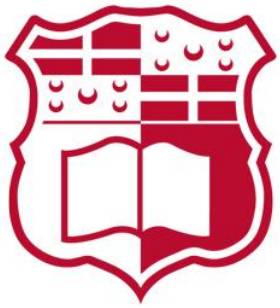

L-Università ta' Malta

Reimagining Crimes Against Humanity: Confronting Impunity for Crimes Against Migrants in Peacetime Under Article 7 of the Rome Statute

Teresa Quadt

Principal Supervisor: Prof. Omar Grech

Co-Supervisor: Prof. Itamar Mann

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Abstract

For over a decade, scholars and civil society actors have argued that violations of migrants' rights at the borders of, and within, several states of the so-called Global North amount to crimes against humanity under Article 7 of the Rome Statute. Yet, impunity persists, and border violence continues. This thesis critically examines how the legal framework of crimes against humanity can and should respond to the widespread, systematic violence targeting migrants in peacetime. It explores why the International Criminal Court (ICC) has failed to sufficiently engage with such cases, and argues that a combination of historical misinterpretations, structural impunity, and doctrinal gaps has hindered criminal accountability. It then proposes a strategy to overcome barriers to prosecution.

A key normative contribution of the thesis is its call to reimagine crimes against humanity. It proposes interpreting Article 7 through the lens of its desired law (*lex desiderata*) rooted in the pre-1945 vision of universal civilian protection unrestrained by the wartime *nexus*. This reinterpretation seeks to restore the broader, morally grounded scope originally envisioned for crimes against humanity and to reassert its relevance in peacetime contexts, particularly its potential application to migration governance.

This thesis introduces a novel interdisciplinary methodology by applying conceptual frameworks from Peace and Conflict Studies (PCS) to reinterpret crimes against humanity under International Criminal Law (ICL). This interdisciplinary inquiry takes a unique perspective on the crimes' structural and state policy dimensions, reassessing the scope of

Article 7. This PCS-informed lens on violence under Article 7 provides tools to understand crimes against humanity as the norm that criminalises structural violence in legal terms and thereby bridges the gap between the disciplines. Integrating PCS into ICL further enables the reconceptualisation of the so-called 'migration-crisis' as a protracted, structural conflict, triggering international legal scrutiny.

Drawing on the combined normative and methodological insights, this thesis develops two practical approaches designed to support prosecutorial action by the Office of the Prosecutor (OTP) at the ICC. These approaches aim to overcome legal and operational barriers to prosecution by clarifying the applicability of Article 7 to peacetime contexts and addressing the role of passive state policies and structural impunity in sustaining such violence.

The concept of crimes against humanity possesses significant potential for protecting civilians from state or organisational abuse of power *at all times*. Realising the concept's full capacity allows it to fulfil its desired scope as a universal legal code ensuring protection during armed conflict and in peacetime, irrespective of the civilians' nationality or any other characteristic. The findings of this study, although derived from the phenomenon of migration, aim to refine the broader understanding of crimes against humanity and contribute to confronting impunity in all peacetime contexts. By applying an original normative perspective and unique interpretative lens grounded in PCS, this study makes a substantive contribution to the doctrinal development of ICL.

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All things living are in search of a better world.

- Karl R. Popper -

To everyone seeking a better future.

List of Abbreviations

AC	Appeals Chamber
ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ACLU	American Civil Liberties Union
AIDA	Asylum Information Database
AP	Additional Protocol
AU	African Union
Berkeley J. Crim. L.	Berkeley Journal of Criminal Law
Case W. Res. J. Int'l L.	Case Western Reserve Journal of International Law
CBP	Customs and Border Patrol
CCL No. 10	Control Council Law No. 10
CEAS	Common European Asylum System
CIL	Customary International Law
CILD	Coalizione Italiana Libertà e Diritti Civili
CILRAP	Centre for International Law Research and Policy
CJEU	Court of Justice of the European Union
CJN	Criminal Justice Network
CLICC	Commentary on the Law of the International Criminal Court
COI	Country of Origin Information
Colum. J. Transnat'l L.	Columbia Journal of Transnational Law
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
CSDM	Centre Suisse pour la Défense des Droits des Migrants
CSR51	1951 Convention Relating to the Status of Refugees
CUP	Cambridge University Press
DAC	Dynamics of Asymmetrical Conflict

DESA	Department of Economic and Social Affairs
DHS	United States Department of Homeland Security
DW	Deutsche Welle
EC	European Commission
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECCHR	European Centre for Constitutional and Human Rights
ECHR	European Convention on Human Rights
ECRE	European Council on Refugees and Exiles
ECtHR	European Court of Human Rights
EJIL	European Journal of International Law
EMN	European Migration Network
ENAR	European Network Against Racism
EoC	Elements of Crimes
EPRS	European Parliamentary Research Service
ESPMI	Emerging Scholars and Practitioners on Migration Issues
EU	European Union
EUCFR	European Union Charter of Fundamental Rights
FCC	French Criminal Code
FIDH	International Federation for Human Rights
FRA	European Union Agency for Fundamental Rights
GA	General Assembly
GC	Geneva Convention
GCCAIL	German Code of Crimes against International Law
HHC	Hungarian Helsinki Committee
HRC	Human Rights Committee
HRL	Human Rights Law
HRW	Human Rights Watch
IAC	International Armed Conflict
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights

ICJ	International Court of Justice
ICL	International Criminal Law
ICLR	International Criminal Law Review
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ILC	International Law Commission
IMT	International Military Tribunal
Int'l L. Rev.	International Law Review
IOM	International Organization for Migration
IRRC	International Review of the Red Cross
ISPI	Italian Institute for International Political Studies
JIL	Journal of International Law
JLASC	University of Pennsylvania Journal of Law and Social Change
JMHS	Journal on Migration and Human Security
LCG	Libyan Coast Guard
LEMO	Lebendiges Museum Online
LFJL	Lawyers for Justice in Libya
Loy. L.A. Int'l & Comp. L. Rev.	Loyola of Los Angeles International and Comparative Law Review
Miami Int'l & Comp. L. Rev.	Miami Journal of International and Comparative Law Review
MPIL	Max Planck Encyclopedias of International Law
MPP	Migrant Protection Protocols
MS	Member State
MSF	Médecins Sans Frontières
NATO	North Atlantic Treaty Organization
NIAC	Non-International Armed Conflict
OLAF	Office Européen de Lutte Anti-Fraude/European Anti-Fraud Office
OTP	Office of the Prosecutor
OUP	Oxford University Press

PC	Preparatory Committee
PCS	Peace and Conflict Studies
PE	Preliminary Examinations
PNG	Papua New Guinea
PPE	Pre-Preliminary Examinations
PPPE	Policy Paper on Preliminary Examinations
PPU	Urgent Preliminary Ruling Procedure
PSC	Protracted Social Conflict
PTC	Pre-Trial Chamber
RPC	Regional Processing Centres
RPE	Rules of Procedure and Evidence
RSD	Refugee Status Determination
SAR	Search and Rescue
SC	Security Council
SCSL	Special Court for Sierra Leone
SGBV	Sexual and Gender Based Violence
SJAC	Syrian Justice and Accountability Centre
TC	Trial Chamber
TFEU	Treaty on the Functioning of the European Union
TOAEP	Torkel Opsahl Academic Epublisher
UCDP	Uppsala Conflict Data Program
UDHR	Universal Declaration of Human Rights
UIDPM	Unidad de Investigación de Delitos para Personas Migrantes
UK	United Kingdom
UN	United Nations
UN GA	United Nations General Assembly
UN SC	United Nations Security Council
UNCAT	United Nations Convention against Torture
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNHCR	United Nations High Commissioner for Refugees
UNWCC	United Nations War Crimes Commission
US	United States

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Chapter I: Introduction

1. General Introduction

The concept of crimes against humanity has extraordinary potential. It may be understood as a norm protecting civilians from grave abuses of state power at all times.[1] However, its full potential is disregarded in law and practice. The current interpretation of the law on crimes against humanity is underdeveloped to respond to crimes that are committed outside of armed conflict, due to the historically grown prevalence of conflict-related adjudication before international criminal tribunals and the attention of scholarship to such contexts.[2] This thesis refines the understanding of the concept of crimes against humanity in *peacetime*.

While peacetime crimes against humanity are not considerably less prevalent, conflict-related crimes tend to attract greater prosecutorial attention.[3] This phenomenon potentially

[1] *Inter alia*, United Nations War Crimes Commission (UNWCC), History of the United Nations War Crimes Commission and the Development of the Laws of War (His Majesty's Stationary Office 1948) 175, 179; Kai Ambos, 'Article 7' in Kai Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary* (4th ed, C.H. Beck 2022) paras 3, 13 [*Rome Statute: 2022 Commentary*]; *Prosecutor v. Dusko Tadić* (Opinion and Judgment) TC I, ICTY IT-94-1-T (7 May 1997) 635; David Luban, 'A Theory of Crimes Against Humanity', 29 Yale Journal of International Law 85 (2004) 86.

[2] Leila Nadya Sadat, 'Crimes Against Humanity in the Modern Age', 107 American Journal of International Law 334 (2013) 334-377; although Sadat labels the International Criminal Court ((ICC) a 'crimes against humanity court', see: Leila Nadya Sadat, '2023 Klatsky Endowed Lecture in Human Rights: The Forgotten Crime: Forging a Convention for Crimes Against Humanity', 56 Case W. Res. J. Int'l L. (2024) 532.

[3] Chapter IV analyses the prosecution practice before the ICC and provides the empirical data for this conclusion.

arises from an incorrect perception that crimes against humanity during armed conflict inherently indicate a higher degree of severity. By drawing only from existing judicial decisions and complementing analytical commentary, these assumptions are perpetuated, as the majority of cases are connected to crimes in armed conflict.[4] Prosecutors considering and investigating crimes against humanity thus find themselves ill-equipped to apply the legal framework to peacetime contexts, which creates an impunity gap for peacetime crimes. One such context that merits consideration is the context of migration.

There is a rich body of persuasive academic opinion and additional commentary arguing *that* large-scale crimes relevant as crimes against humanity under Article 7 of the Rome Statute of the International Criminal Court (ICC) appear to be committed against migrants without consequences.[5] On this basis, this research studies the reasons *why* impunity

[4] Detailed, see Chapter IV at 2.2.

[5] Article 7 of the Rome Statute of the International Criminal Court, Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (17 July 1998) UN Doc A/CONF.183/9 [Rome Statute or ICC Statute]. Research includes *inter alia*: Claire Henderson, 'Australia's Treatment of Asylum Seekers: From Human Rights Violations to Crimes Against Humanity' 12 JICJ 5 (2014) 1161–1181; Ioannis Kalpouzos and Itamar Mann, 'Banal crimes against humanity: The case of asylum seekers in Greece' 16 Melbourne Journal of International Law 1 (2015) 1-28; Vincent Chetail, 'Is There any Blood on my Hands? Deportation as a Crime of International Law' 29 Leiden Journal of International Law 3 (2016) 917-934; Stine von Förster, '*Verbrechen gegen die Menschlichkeit durch Migrationskontrolle?'* (PhD Thesis, University of Hamburg 2019); Ioannis Kalpouzos, 'International Criminal Law and the Violence against Migrants', 21 German Law Journal 3 (2020) 571-597; Cathryn Costello and Itamar Mann, 'Border Justice: Migration and Accountability for Human Rights Violations', 21 German Law Journal Special Issue 3 (2020) 311-334; Natalie Hodgson, 'International criminal law and civil society resistance to offshore detention', 26 Australian Journal of Human Rights 3 (2020) 449-467; Emilio Distretti, 'Enforced Disappearances and Border Deaths Along the Migrant Trail' in Paolo Cuttitta and Tamara Last (eds), *Border Deaths: Causes, Dynamics and Consequences of Migration-related Mortality* (Amsterdam University Press 2020) 117-130; Itamar Mann, 'Border Crimes as Crimes against Humanity', in Cathryn Costello, Michelle Foster, and Jane McAdam (eds),*The Oxford Handbook of International Refugee Law*, Oxford Handbooks (OUP 2021) 1174-1190; Itamar Mann, 'Border Violence as Crime', 42 University of Pennsylvania Journal of International Law (2021) 675-736; Itamar Mann, 'Attack by Design: Australia's Offshore Detention System and the Literature of Atrocity' 32 EJIL 1 (2021) 309–326; Pat Rubio Bertran, 'Aiding and Abetting: Assessing the Responsibility of European Union Officials for Crimes Against Humanity Committed Against Migrants in Libya' in Jasmin Lilian Diab (ed), *Dignity in Movement: Borders, Bodies and Rights* (E-International Relation 2021) 302-316; Valentina Azarova, Amanda Danson Brown and Itamar Mann, 'The Enforced Disappearances of Migrants', Boston University International Law Journal 40 (2022) 133-204; Natalie Hodgson, 'Resisting the State Crimes of the Global North: Exploring the Potential of International Criminal Law', 22 JICJ 1 (2024) 151-168. In addition, Article 15 submissions to the Office of the Prosecutor (OTP) at the ICC provide: Communiqué for the Office of the Prosecutor regarding Mr Andrew Wilkie MP's application relating to crimes against humanity in Australia, Ref: OTP-CR-322/14 (23 January 2015); Stanford International Human Rights and Conflict Resolution Clinic and Global Legal Action Network (GLAN), 'The Situation in Nauru and Manus Island: Liability for crimes against humanity in the detention of refugees and asylum seekers, Communiqué to the Office of the Prosecutor of the International Criminal Court, Under Article 15 of the Rome Statute' (2017); U Ne Oo; Enslavement in Manus Island and Nauru, communication to the Office of the Prosecutor of International Criminal Court under Article 15 of Rome,

prevails for the alleged crimes in the context of migratory flows. It proposes new perspectives on the essence and purpose of the concept of crimes against humanity under Article 7. It can be understood as the crime that criminalises structural violence when it exceeds the severity threshold by character and comparability of the enlisted acts, particularly suitable for peacetime contexts. Structural violence, according to Peace and Conflict Studies (PCS), is described as violence built into the system, presumably invisible and non-criminal.[6]

Despite increasing attention to structural violence, such as institutionalised racism,[7] there is limited research investigating the applicability of crimes against humanity under International Criminal Law (ICL) to this dimension of violence.[8] Therefore, this study explores the concept of crimes against humanity beyond conflict to address large-scale violations of fundamental rights and system criminality involving structural violence. It confronts the impunity for crimes against migrants as crimes that exhibit both parameters: They occur in peacetime *and* represent systemic, structural violence. To achieve this, this research draws from insights generated from investigating the phenomenon of 'migration towards the Global North' in light of the hypothesis that certain state policies and practices

Reference OTP-220/17 (2017); Omer Shatz and Juan Branco, 'EU Migration Policies in the Central Mediterranean and Libya (2014-2019)', Communication to the Office of the Prosecutor of the International Criminal Court, Pursuant to the Article 15 of the Rome Statute (June 2019); Syria Justice and Accountability Centre, 'Communication to the Office of the Prosecutor of the International Criminal Court, The Situation in Greece' (28 January 2021) and Supplementary Submission to the Communiqué to the Office of the Prosecutor of the International Criminal Court (12 November 2021); Adala for All, StraLi and UpRights, 'Article 15 Communication on War Crimes and Crimes Against Humanity Committed Against Migrants and Asylum Seekers in Libya: To the Office of the Prosecutor of the International Criminal Court, The Hague, the Netherlands (Turin, Paris, The Hague 17 January 2022); ECCHR, FIDH, and LFJL, 'Article 15 Communication to the Office of the Prosecutor of the International Criminal Court Re: Situation in Libya – Crimes against Migrants and Refugees in Libya' (November 2021), (public version); ECCHR, 'Article 15 Communication to the Office of the Prosecutor of the International Criminal Court Re: Situation in Libya – Commission of Crimes Against Migrants and Refugees: Interceptions at Sea as Crimes Against Humanity' (29 November 2022), (confidential version on file with the author).

[6] Johan Galtung, 'Violence, Peace, and Peace Research' 6 Journal of Peace Research 3 (1969) 167-191; Johan Galtung, 'Cultural Violence', 27 Journal of Peace Research 3 (1990) 291-305.

[7] Yves Winter, 'Violence and Visibility' in Andrew Dilts *et al.*, 'Revisiting Johan Galtung's Concept of Structural Violence', 34 New Political Science, 2 (2012) 191-227.

[8] Itamar Mann dealt with this question in several works, such as Mann, 'Border Crimes as Crimes against Humanity' (n 5) 1186.

fulfil the requirements of Article 7 of the Rome Statute. It further systematically bridges PCS and ICL, using PCS frameworks to refine the understanding of structural violence in legal terms under Article 7.

Overall, this research critiques the current prosecution practice before the ICC and formulates a more nuanced understanding of the concept of crimes against humanity by reimagining it. In its reimagined concept, it reflects the original value, which depicted the early desired law (*lex desiderata*), of protecting civilians from severe abuses of state power *at all times*. Normatively and practically, this study conduces to initiate change in the context of migration, but ideally also in other peacetime contexts, by confronting the widespread and prevalent impunity, aligning with the objectives of ICL and the ICC's mandate.[9] By offering corrections of misperceptions deeply engrained in thought and practice about the concept's origins and rationale, this thesis contributes to a fuller understanding of the concept of crimes against humanity. In brief, this thesis answers the questions of which underlying causes contribute to the persistent impunity for grave abuses of migrants' rights despite the availability of sufficient information *prima facie* satisfying Article 7's requirements and develops legal and conceptual strategies to overcome the existing barriers to investigating the crimes.

[9] Robert Cryer, Håkan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure* (2nd edn CUP 2010) 24-39; Preamble to the ICC Statute.

2. Background and Context

Human rights and fundamental freedoms were rather like elephants; you did not need a definition of an elephant to recognize one when you met it.

This was particularly the case when gross abuses took place.[10]

The drafters of the Charter of the United Nations (UN), mandating the UN and its member states to promote respect for human rights and fundamental freedoms to maintain peace and security, assumed a shared understanding of what the desired rights and freedoms entailed.[11] Shaken by the atrocities committed during World War II (WWII), the retrospection made detailed explanations about the rights that required protection unnecessary. The new international law should guarantee peace and security, 'reaffirming faith in fundamental human rights, in the dignity and worth of the human person'.[12] The mass atrocities further led to the emergence of ICL, establishing individual criminal responsibility for the most serious crimes. Defining these values as protected goods in penal codes is not self-evident and – despite more than a century of effort – remains in flux to date.[13] However, only a clear definition of these rights and freedoms will allow a

[10] A.W. B. Simpson, 'Human Rights Visionary Hersch Lauterpacht', 46 Law Quadrangle (formerly Law Quad Notes), (2003) 70. Simpson referred to the absence of a fully spelt-out text on these rights and freedoms in the Charter of the United Nations (UN), signed on 26 June 1945, entered into force on 24 October 1945.
[11] Ibid; UN, Charter of the United Nations, UN Doc 1 UNTS XVI (24 October 1945) [UN Charter].
[12] Preamble of the UN Charter.
[13] Hersch Lauterpacht, *An International Bill of the Rights of Man* (Columbia University Press 1945); Hannah Arendt, *The Origins of Totalitarianism* (Meridian Books 1962, first published 1951); Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (The Viking Press, revised and enlarged edition, 1963); Antonio Cassese, *International Criminal Law* (OUP 2003); Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford University Press 1998, originally published 1995); *Tadić* (Judgment) (n 1) para 697; M. Cherif Bassiouni, '"Crimes against Humanity" The Need for a Specialized Convention', Columbia Journal of Transnational Law 31 (1993); Beth Van Schaack, 'The Definition of Crimes Against Humanity: Resolving the Incoherence', 37 Colum. J. Transnat'l L. (1998) 787-850; Luban, 'A Theory of Crimes Against Humanity' (n 1) 85-167; Larry May, *Crimes against Humanity: A Normative Account* (CUP 2004); Charles C. Jalloh, 'What Makes a Crime Against Humanity a Crime Against Humanity?', American University International Law Review 28 no. 2 (2013); Christopher Macleod, 'Towards a Philosophical Account of Crimes Against Humanity', 21 EJIL 2 (2010) 281-302; Philippe Sands, *East West Street: On the Origins of 'Genocide' and 'Crimes Against Humanity'* (Alfred A. Knopf, New York 2016); M. Cherif Bassiouni and William A. Schabas (eds), *The Legislative History of the International Criminal Court* (2nd ed, Vol 2, Brill

consistent criminalisation of gross violations, as criminal law demands the highest degree of certainty about its scope and its protected legal interests to justify criminal sanctions for individual perpetrators.[14]

One legal text addressing mass human rights violations is the Rome Statute, the legal basis for the ICC.[15] Article 7, the norm describing one of four recognised core crimes under international law, criminalises 'crimes against humanity'.[16] Unlike the certainty about defining the conceptual scope of rights and freedoms in the UDHR in 1945, crimes against humanity have time and again sparked controversial debates, fraught with uncertainty and ambiguity about their most adequate interpretation and application – from their first codification as a criminal concept in 1945[17] to their currently applicable law under Article 7 of the Rome Statute, and beyond.[18] Despite considerable controversy and continuous efforts to refine the understanding of the concept of crimes against humanity – or perhaps

2016); Timothy Snider, *Bloodlands*: *Europe Between Hitler and Stalin* (Basic Books 2010); Timothy Snider, *On Tyranny: Twenty Lessons from the Twentieth Century* (Tim Duggan Books 2017); Bernhard Kuschnik, 'Humaneness, Humankind and Crimes Against Humanity', 2 Goettingen Journal of International Law 2 (2010); Rustam B. Atadjanov, *Humanness as a Protected Legal Interest of Crimes Against Humanity: Conceptual and Normative Aspects*, International Criminal Justice Series (Asser Press 2019); Leila Nadya Sadat (ed), *Forging a Convention for Crimes against Humanity* (CUP 2011); Richard Vernon, 'What Is Crime Against Humanity?', Journal of Political Philosophy 10 (2003) 321–349; Norman Geras, *Crimes Against Humanity: Birth of a Concept* (Manchester University Press 2011).

[14] Cryer *et al.*, *An Introduction to International Criminal Law and Procedure* (n 9) 17; Machteld Boot, *Nullum crimen sine lege and the subject matter jurisdiction of the International Criminal Court: genocide, crimes against humanity, war crimes* (Intersentia 2002) 271; Judith N. Shklar, *Legalism: Law, Morals and Political Trials* (HUP 1964); Gillian MacNeil, *Legality Matters; Crimes Against Humanity and the Problems and Promise of the Prohibition on Other Inhumane Acts* (T.M.C. Asser Press, 2021) (International Criminal Justice Series Vol 28) 29-33, Article 22 of the ICC Statute.

[15] Preamble to the ICC Statute; Ambos, 'Article 7' in Ambos, *Rome Statute: 2022 Commentary* (n 1) para 3.

[16] Article 7 ICC Statute.

[17] It was first codified in the London Charter, the legal basis for the prosecution of the war criminal before the International Military Tribunal (IMT) in Nuremberg, Germany, adopted on 8 July 1945: Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Charter of the International Military Tribunal (London 8 August 1945) [IMT Charter, London Charter or Nuremberg Charter]. In detail, Chapter III at 3.2.

[18] Crimes against humanity are codified in several domestic criminal codes, such as Section 7 of the German Code of Crimes against International Law (GCCAIL); Article 212-1, paragraph 1 French Criminal Code (FCC); 4. (1)(b) Canadian Crimes Against Humanity and War Crimes Act (2000, c. 24); on implementation of the International Law Commission (ILC) draft on crimes against humanity in domestic law, see also Elies van Sliedregt, 'Criminalization of Crimes Against Humanity under National Law', 16 JICJ 4 (2018) 729-749. Moreover, its customary international law status (CIL) remains a highly debated matter, see detailed: Yudan Tan, *The Rome Statute as Evidence of Customary International Law* (BRILL 2021); Shklar, *Legalism* (n 14); Larissa van den Herik, 'Using Custom to Reconceptualize Crimes Against Humanity', in Shane Darcy and Joseph Powderly (eds), *Judicial Creativity at the International Criminal Tribunals* (OUP 2010) 80-105.

because of these efforts – it possesses exceptional potential for protecting civilians against severe violations of the most fundamental rights on a large scale.[19]

Crimes against humanity, according to Article 7 of the Rome Statute, are briefly defined as the widespread or systematic commission of multiple unlawful acts such as torture, deportation, imprisonment, persecution, or other inhumane acts directed against any civilian population ('attack'), pursuant to or in furtherance of a state or organisational policy to commit such attack and with knowledge of the attack by the individual perpetrator.[20] Article 7 criminalises the interplay between a macro-criminal dimension, namely the attack against civilians pursuant to a state or organisational policy,[21] and a micro-criminal dimension, namely the multiple commission of unlawful acts.[22] The attack by the state or organisation and the individual acts function in reciprocity.[23] The macro- and micro-criminal contexts enable, encourage, further, support, or promote each other, resulting in an increased danger for the civilian population targeted.[24] Unlike war crimes under Article 8, crimes against humanity under Article 7 do not require the context of armed conflict. Although they often occur in the midst of armed conflict and outbursts of extreme violence, they may likewise occur in peacetime.

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[19] ILC, 'Draft Code of Crimes against Peace and the Security of Mankind' in *Yearbook of the International Law Commission* (Vol II, Part 2) UN Doc A/CN.4/SER.A/1991/Add.l (1991) [1991 Draft Code], Article 21 addressed 'systematic or mass violations of human rights,' later termed crimes against humanity, ILC, 'Draft Code of Crimes against Peace and the Security of Mankind' in *Yearbook of the International Law Commission* (Vol II, Part 2) UN Doc A/CN.4/SER.A/1996/Add.l (1996) [1996 Draft Code]; see also: Kai Ambos and Steffen Wirth, 'The Current Law of Crimes Against Humanity: an analysis of UNTAET Regulation 15/2000', Criminal Law Forum 13 (2002) 9; Sadat, 'The Forgotten Crime' (n 2).

[20] Article 7 ICC Statute; Article 7 Elements of Crimes: UN, 'Report of the Preparatory Commission for the International Criminal Court', Addendum (Part II) Finalized draft text of the Elements of Crimes, UN Doc PCNICC/2000/l/Add.2 (2 November 2000) [Elements of Crimes or EoC].

[21] Ibid; Kuschnik, 'Humaneness, Humankind and Crimes Against Humanity' (n 13) 522.

[22] Ibid ('both levels of criminality are dependent upon each other').

[23] Ibid; Luban, 'A Theory of Crimes Against Humanity' (n 1) 97.

[24] Ambos and Wirth, 'The Current Law of Crimes Against Humanity' (n 19) 14; Kai Ambos, *Treatise on International Criminal Law, Volume I: Foundations and General Part* (OUP 2013) 84-85; Elements of Crimes, Article 7, Introduction, para 3.

It is commonly accepted that not all serious human rights violations constitute crimes against humanity, but only those sufficiently severe, crossing the threshold to be lifted to the international community's concern and warranting interference by the ICC.[25] Severe infringements on life, liberty, and physical and mental integrity qualify, provided that they are criminalised, and that all other elements are met.[26] Article 7 lists prohibited acts that constitute the most serious violations of fundamental rights. These acts must show a pattern of violence and repetition or be spread over a large territorial, temporal, or geographical space.[27] This definition clearly distinguishes crimes against humanity from everyday crimes by their severity and large-scale occurrence. A crime against humanity further requires a state or organisational policy indicating a plan, method, or orchestration that can either be officially adopted or implicitly practised.[28] This form of policy will be referred to as an 'active policy' in this thesis. Under exceptional circumstances, the deliberate failure to take action, consciously aimed at encouraging the crimes committed by individual perpetrators, equally qualifies as a policy under Article 7.[29] This form of policy is referred to as 'passive policy' or 'policy of toleration' and is particularly relevant for this research. Despite some disagreement, the function of the policy element is to

[25] For an analysis of their interconnection, see Juan Pablo Pérez-León Acevedo, 'The Close Relationship Between Serious Human Rights Violations and Crimes Against Humanity: International Criminalization of Serious Abuses', Anuario Mexicano de Derecho Internacional 17 (2017) 145-186; Christopher Roberts, 'On the Definition of Crimes Against Humanity and Other Widespread or Systematic Human Rights Violations', 20 U. Pa. J.L. & Soc. Change 1 (2017) 1-27. Detailed, Chapter II at 2. and 3.

[26] Ibid, 148; Evelyne Schmid, *Taking Economic, Social and Cultural Rights Seriously in International Criminal Law* (CUP 2015) 32; Carola Lingaas, 'The Elephant in the Room: The Uneasy Task of Defining 'Racial' in International Criminal Law', 15 International Criminal Law Review 3 (2015) 498. For the discourse and disagreement on peremptory norms, *ius cogens*, and customary international law, see M. Cherif Bassiouni, *Introduction to International Criminal Law: Second Revised Edition* (Martinus Nijhoff Publishers 2014) 240.

[27] *Inter alia*: *Tadić* (Judgment) (n 1) para 648; *Prosecutor v. Jean-Paul Akayesu* (Judgment) TC I, ICTR-96-4-T (2 September 1998) para 580; *Prosecutor v. Kunarac*, *Kovac and Vukovic* (Appeal Judgment) ICTY, IT-96-23-T and IT-96-23/1-A (12 June 2002) para 94; *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* (Decision on the confirmation of charges pursuant to Article 61 (7) (a) and (b) of the Rome Statute) PTC II, ICC-01/09-01/11 (23 January 2012) para 177.

[28] M. Cherif Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (CUP 2011) 14; *Prosecutor v. Germain Katanga* (Judgment) TC II, ICC-01/04-01/07 (7 March 2014) para 1112-1113. For the doctrinal debate and further (conflicting) case law, see Chapter II at 2. and 4.3.

[29] Article 7 Elements of Crimes, fn. 6; see also ILC, Report to the UN GA, Draft Code of Offences against the Peace and Security of Mankind (with commentary) (1954) in *Yearbook of the International Law Commission* (Vol II) UN Doc A/CN.4/SER.A/1954/Add.l (published 1960), [1954 Draft Code] Commentary to Article 2, para 11 ('at the instigation or with the toleration').

internationalise mass human rights violations through the powerful entity that orchestrates the violence and poses a significant danger to civilians (and international peace).[30]

Article 7 aims to establish individual criminal responsibility for conduct linked to the macro or micro-criminal dimension.[31] As the taxonomy of the article suggests, the so-called *chapeau*, involving the state policy that enables the multiple commission of unlawful acts, provides the context in which crimes against humanity occur.[32] Conduct of individual perpetrators, amounting to an unlawful act criminalised under Article 7 (1)(a) – (k) (*actus reus*) and committed with intent and knowledge (*mens rea*) must be embedded in the overarching attack. The acts must be 'part of' the attack, meaning they must be 'sufficiently related',[33] as isolated and sporadic violence is excluded from the purview of Article 7.[34] Several elements in crimes against humanity aim to exclude 'ordinary' crimes to satisfy the purpose of criminalising only the most serious, large-scale violations of fundamental rights.

The historical evolution of crimes against humanity is crucial to understanding its current interpretation. When first codified after WWII in 1945, the prosecution of crimes against humanity before the International Military Tribunal (IMT) at Nuremberg was limited to war-related crimes due to the so-called war *nexus*.[35] The insertion of this *nexus* in Article 6

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[30] Kai Ambos, *Treatise on International Criminal Law, Volume II: The Crimes and Sentencing* (OUP 2014) 50-51; Bassiouni and Schabas, *The Legislative History* (n 13) 169. See Chapter II at 2. for differing opinions.
[31] Kuschnik, 'Humaneness, Humankind and Crimes Against Humanity' (n 13) 522.
[32] Ambos, 'Article 7' in Ambos, *Rome Statute: 2022 Commentary* (n 1) para 3.
[33] *Tadić* (Judgment) (n 1) para 633; *Kunarac et al.* (Appeal Judgment) (n 27) para 100; *Prosecutor v. Limaj et al.* (Judgment) ICTY, IT-03-66 (30 November 2005) para 189; *Situation in the Republic of Kenya*, (Decision pursuant to Article 15 of the 1998 Rome Statute on the authorization of an investigation into the Situation in the Republic of Kenya) PTC II, ICC-01/09 (31 March 2010) [*Kenya* Decision 2010] paras 117, 155, including Dissenting Opinion of Judge Hans-Peter Kaul, paras 82 and 112; *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé* (Judgment, Majority's analysis of evidence contained in Judge Henderson's reasons (Annex B)) TC, ICC-02/11-01/15 (16 July 2019) para 1390; on imputation: Ambos, *Treatise, Volume I* (n 24) 83.
[34] Among others, controversially discussed in the *Kenya* Decision 2010 and the Dissenting Opinion, at paras 117, 155 and 81-83, 111-112, respectively. See also Cassese, *International Criminal Law* (n 13) 63; Ambos and Wirth, 'The Current Law of Crimes Against Humanity' (n 19) 21, 28.
[35] Article 6 (c) IMT Charter ('in execution of or in connection with any crime within the jurisdiction of the Tribunal').

(c) of the IMT Charter, which served as the legal basis for the prosecution of the major Axis war criminals, sparked a controversy lasting until today. Some commentators argue that the war *nexus* element in the IMT Charter was purely jurisdictional and, therefore, had no implications for other statutes and courts nor the substantial rationale of crimes against humanity.[36] Other commentators contend that it was material and, although it later disappeared in legal texts, including the Rome Statute, informs the rationale of crimes against humanity as crimes committed in relation to armed conflict or comparable extreme physical violence.[37]

This fundamental disagreement remains unsolved to date, although it is more convincing that in 1945, the *nexus* was jurisdictional in nature.[38] And yet, the influential debate distracts from and dilutes the original intended meaning of the concept as it was shaped by several events prior to WWII, such as the abolition of slavery and the atrocities against Armenians. It further fails to acknowledge the desired concept by its drafters in the pre-Nuremberg phase, above all, Hersch Lauterpacht, who became known as the father of crimes against humanity, and several other exiled lawyers.[39] In its original meaning, the concept of crimes against humanity as a core aspect of the arising international (criminal) law was designed as a 'universal moral code'[40] to protect civilians at all times from grave

[36] Margaret McAuliffe deGuzman, 'The Road from Rome: The Developing Law of Crimes against Humanity', 22 Human Rights Quarterly 2 (2000) 355, fn. 87; Sands, *East West Street* (n 13) chapter 144; Elies Van Sliedregt, 'AJIL Symposium: The Humaneness-side of Humanity – CAH's Modern Meaning', Opiniojuris.org (23 July 2013) <https://opiniojuris.org/2013/07/23/ajil-symposium-the-humaneness-side-of-humanity-cahs-modern-meaning/>; for a comprehensive analysis, Yudan Tan 'Prosecuting Crimes against Humanity before International Crimes Tribunal in Bangladesh: A Nexus with an Armed Conflict', 24 Asian Yearbook of International Law 294 (2018) 303-315; however, arguing that it was material in Tan, *The Rome Statute as Evidence of Customary International Law* (n 18) 150-162.

[37] Ibid; most influential: *Kenya* Decision 2010 (n 33) Dissenting Opinion of Judge Hans-Peter Kaul para 6. See for a critique: Sadat, 'Crimes Against Humanity in the Modern Age' (n 2) 334-377; Van Sliedregt, 'The Humaneness-side of Humanity' (n 36).

[38] Chapter III analyses the debate comprehensively.

[39] Hersch Lauterpacht, 'The Grotian Tradition in International Law', 23 British Yearbook of International Law 1 (1946) 1-53; Martti Koskenniemi, 'Hersch Lauterpacht and the Development of International Criminal Law' 2 JICJ 3 (2004) 810-825; Kerstin von Lingen, 'Legal Flows: Contributions of Exiled Lawyers to the Concept of "Crimes Against Humanity" During the Second World War', 12 Modern Intellectual History 2 (2020).

[40] Ibid, 51, following the aspired Grotian tradition of international law; Douglas Irvin-Erickson, 'Hersch Lauterpacht and Early Formulations of Crimes Against Humanity' in Omar Grech (ed), *Crimes against*

abuses of state power, particularly in respect to a state's own population. It was constructed to safeguard minorities irrespective of their nationality, race, religion, gender, or any other characteristic from malevolent states, applicable in times of conflict *and* peace. It thereby challenged state sovereignty, which was thought of as an inviolable concept at the time.[41] The war *nexus* prevented the adoption of this wide protection scope in 1945. However, an analysis of the motives underlying the insertion of the *nexus* reveals that it did not substantively describe the essence of crimes against humanity. Most importantly, limiting the scope alleviated the concerns of the Allies related to other legal principles and questionable circumstances in the host countries of the delegates, *inter alia*, lynching in the United States (US).[42]

The narrow view on the adoption of the IMT Charter, with its limiting *nexus* requirement, and the disregard of the early evolution of the concept and purpose of crimes against humanity, arguably led to errors in its historical interpretation. Jurisprudence and literature on crimes against humanity primarily deal with crimes in armed conflict due to the dominance of related prosecutions.[43] Yet, a review of cases considered, investigated, and prosecuted by the Office of the Prosecutor (OTP) at the ICC exposes that potentially relevant crimes against humanity occur in times of armed conflict as frequently as in peacetime.[44] Despite this, crimes against humanity are less often charged without a connection to conflict and have never resulted in a conviction when charged independently.[45] Moreover, although a clear position cannot yet be identified, the ICC system seems to associate crimes in armed conflict with a higher degree of severity, which

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humanity: towards a more comprehensive approach? (Centre for the Study and Practice of Conflict Resolution, University of Malta, Msida 2021) 5.

[41] Ana Filipa Vrdoljak, 'Human Rights and Genocide: The Work of Lauterpacht and Lemkin in Modern International Law', 20 EJIL 4 (2010) 1194.

[42] See Chapter III at 3.2.2.

[43] Sadat, 'Crimes Against Humanity in the Modern Age' (n 2); Sadat, 'The Forgotten Crime' (n 2).

[44] Ibid; a systematic case analysis is conducted in Chapter IV.

[45] In detail, Chapter IV at 2.2.

has no legal basis in the Rome Statute as such. Examining and relying uncritically on existing case law and research thus bears the risk of perpetuating conceptual inaccuracies. Given the few exceptions of investigations by the OTP into genuine peacetime crimes against humanity,[46] judicial decisions and complementing analytical commentary present a normative problem for peacetime crimes against humanity in general. The concept's overall relevance and practical application beyond armed conflict remains insufficiently explored. Due to the resulting impunity, a more comprehensive understanding of peacetime crimes against humanity is necessary.

Against this background, the increase in violations of fundamental rights of migrants at the external borders of several states of the so-called Global North merits consideration and scrutiny as an exemplary context for applying crimes against humanity outside of armed conflict.[47] Whether violations of migrants' rights qualify as crimes against humanity remains a contested issue and poses a challenge to the traditional interpretation of the crimes' elements under ICL. This is specifically relevant as novel forms of atrocities emerge and new methods and state policies are enacted, it appears that modern-day prosecutors struggle with accepting contemporary atrocities under the existing legal framework, arguably as peacetime atrocities, resulting in impunity for crimes committed in these settings.

[46] In particular, the Situation in the Republic of the Philippines, Decision on the Prosecutor's request for authorisation of an investigation pursuant to Article 15(3) of the Statute, PTC I-ICC-01/21 (12 September 2021) [Authorisation Decision Philippines]. The OTP, the Office, and The Prosecutor are used interchangeably.

[47] Providing data on several circumstances such as Greece-Turkey or Poland: Violeta Moreno-Lax, 'The "Crisification" of Migration Law: Insights from the EU External Border', Queen Mary Law Research Paper No. 403/2023 (15 September 2023), Forthcoming, Stella Burch Elias, Kevin Cope and Jill Goldenziel (eds), *The Oxford Handbook of Comparative Immigration Law* (OUP 2023) 1-30; European Union Agency for Fundamental Rights (FRA), 'Guidance on investigating alleged ill-treatment at borders', Report (20 July 2024) 3/47, 25/47; UN GA, 'Human rights violations at international borders: trends, prevention and accountability: Report of the Special Rapporteur on the Human Rights of Migrants, Felipe González Morales', HRC, UN Doc A/HRC/50/31 (26 April 2022) paras 23-32.

In recent years, a significant body of academic literature has established persuasive legal opinion that the recorded systematic violations of fundamental rights of migrants at the borders of several states belonging to the so-called Global North amount to crimes against humanity according to Article 7 of the Rome Statute.[48] Several compelling works conclude that the violations of migrants' rights *prima facie* qualify, urging the Prosecutor to take action and carry out full investigations. While the available information and supporting material have been utilised to demonstrate that the crimes are committed on a large scale and of sufficient severity, qualifying as the 'most serious crimes',[49] the OTP has not opened thorough investigations to date.[50] The absence of adequate and comprehensive investigations at the international level corresponds to the lack of domestic accountability. Hence, impunity prevails for crimes against migrants.

Impunity is referred to as the absence of criminal sanctions for harm done.[51] It is often a result of destruction following armed fighting and the disintegration of a state's institutional and legal system or of authoritarian governance.[52] However, in peacetime, in functioning democratic states, impunity may have a distinct quality. As its occurrence is widespread and as part of the institutional practice, this research identifies a 'structural impunity' for peacetime crimes against migrants. Structural impunity can be defined as the

[48] See the listed works, *supra* (n 5).
[49] Preamble of the ICC Statute; Article 1 ICC Statute; Article 5 ICC Statute.
[50] The OTP investigated the Situation in Libya related to the conflict. However, the crimes against migrants, as alleged in the submissions, remain outside its scope, see Chapter II at 4.4. Moreover, the OTP rejected further engagement in the case of Australia, Phakiso Mochochoko; Letter from the Director of the Jurisdiction, Complementarity and Cooperation Division to Andrew Wilkie, Ref. OTP-CR-322/14/001, OTP of the ICC (12 February 2020) ('no basis to proceed'), published in ICC-OTP, Report on Preliminary Examinations (2020) paras 44-55.
[51] Mark A. Drumbl, 'Impunities' in Kevin Jon Heller *et al.* (eds), *The Oxford Handbook of International Criminal Law* (OUP 2020) 238-260; Rocío Lorca, 'Impunity thick and thin: The International Criminal Court in the search for equality', 35 Leiden Journal of International Law 2 (2022) 422.
[52] Preparatory Document Drafted by the International Committee of the Red Cross for the First Periodical Meeting on International Humanitarian Law, Geneva (19-23 January 1998), original document in French, available on the website of the International Committee of the Red Cross (ICRC); see for post-conflict and post-authoritarian societies: Guillermo Trejo, Juan Albarracín and Lucía Tiscornia, 'Breaking state impunity in post-authoritarian regimes: Why transitional justice processes deter criminal violence in new democracies', Journal of Peace Research (2018) 1-20; Omar Grech, *The International Law of Peacebuilding* (Taylor & Francis 2024) 13.

systematic and intentional use of impunity on the domestic level embedded into the state's policies employed to maintain the violations.[53] The deliberate use of impunity in the domestic system represents a powerful and political tool to maintain or encourage a system of violations and deprivation of fundamental rights.[54] This impunity is consolidated by the systemic lack of accountability for peacetime crimes on the international level. The concept of structural impunity exposes the weakness of ICL in responding to structurally induced crimes and traditionally non-criminal structural violence overall.[55] However, as this research shows, a better understanding of the policy of toleration can remedy this shortcoming and complement the limited research on the pertinence of crimes against humanity within contexts of structural violence.[56] A 'policy of toleration' refers to a deliberate state practice of passively permitting systematic violations – distinct from active planning but sufficient to meet the Article 7 threshold, as foreseen in the ICC's Elements of Crimes, provided that it is consciously aimed at encouraging the attack.[57]

The present research addresses this deficiency through a process of reimagination. It suggests that interpreting crimes against humanity in light of the underlying spirit of its *lex desiderata* pre-1945 could bring its full potential for peacetime crimes to fruition. In this refined understanding, it is directly applicable to the critiqued cases. Slightly modified, it follows traditional sequences of international law developments.[58] International law traditionally evolves from an aspiration. Thinkers, lawmakers, and activists desire a certain

[53] Luis Daniel Vázquez Valencia, *Impunidad y Derechos Humanos: ¿Por dónde comenzar la estrategia anti-impunidad?* (Instituto de Investigaciones Jurídicas México 2021); Maunica Sthanki, 'Deconstructing Detention: Structural Impunity and the Need for an Intervention', 65 Rutgers Law Review 447 (2013); Joyce de Coninck and Guilia Raimondo, 'Understanding European Border Management: A Tale of Transformation and Orchestrated Impunity', VerfBlog (27 February 2024) <https://verfassungsblog.de/understanding-european-border-management/>.
[54] Ibid.
[55] Galtung, 'Violence, Peace, and Peace Research' (n 6) 167–191; Galtung, 'Cultural Violence' (n 6) 291-305.
[56] Exceptionally, Mann, 'Border Crimes as Crimes against Humanity' (n 5) 1186.
[57] Article 7, Introduction, para 3, fn. 6, Elements of Crimes.
[58] Mark A. Drumbl, *Reimagining Child Soldiers in International Law and Policy* (OUP 2012) 102.

change or adoption, which forms the desired law (*lex desiderata*).[59] If pursued, embraced, and further shaped, it progresses into a future law (*lex ferenda*), displaying the crystallised law as it should be.[60] With sufficient support from international actors, concretising the future law, new laws emerge, modelling the law until adoption, which is then settled (*lex lata*).[61] This thesis suggests that in order to realise the full potential of crimes against humanity, it is necessary to interpret it in light of the version at the time when it appeared as a *lex desiderata*. This legal notion would represent the concept's capacity as a comprehensive moral and universal code that protects civilians of any nationality or other characteristic during armed conflict *and* in peacetime.[62] Rather than an idealistic exercise, reimagining crimes against humanity in this way is a legal imperative to respond to contemporary atrocities otherwise beyond the reach of the law.

3. Research Aim, Objectives, and Questions

This research relies on the established body of scholarship that sufficiently supports the hypothesis that crimes against humanity according to Article 7 of the ICC Statute are *prima facie* committed in the context of migration. Since the start of this research, the literature and additional material on crimes against humanity and migration have significantly increased; in quantity and quality. This resulted in a change from researching the question of *whether* crimes against humanity are being committed to hypothesising that

[59] Ibid, 102.
[60] Ibid; see also Alejandro Chehtman, 'A Theory of International Crimes' in Heller *et al.*, *The Oxford Handbook of International Criminal Law* (n 51) 319.
[61] Ibid, 102. For the interplay between *lex ferenda* and *lex lata*, see Noora Arajärvi, 'Between Lex Lata and Lex Ferenda? Customary International (Criminal) Law and the Principle of Legality', 15 Tilburg Law Review: Journal of International and European Law 2 (2011) 163-183.
[62] Lauterpacht, 'The Grotian Tradition in International Law' (n 39) 51; on the 'purity'/universality of international law and the necessity to eliminate sovereignty, Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts: Beitrag zu einer reinen Rechtslehre* (2 Auflage, J.C.B Mohr Siebeck 1928) 319-320.

they *are,* based on abundant academic opinion and supporting commentary. However, despite this, the OTP has not engaged in thorough investigative efforts.

Several scholars have subsequently proposed additional explanations for why the OTP remains inactive, such as the inherent bias and hegemonic nature of ICL as a whole, impeding the prosecution of crimes committed against migrants due to inequality matters and power dynamics.[63] Moreover, researchers have suggested additional theoretical frameworks on crimes against humanity relevant to migrant abuses, such as their inherent political nature and potential for addressing the instrumentalisation of human beings.[64] These theoretical and doctrinal contributions inform the present thesis, but also highlight a gap in research. The peacetime context has thus far not been adequately addressed. However, it significantly influences the understanding of crimes against migrants as crimes against humanity. The historical development continues to critically shape the concept's understanding and the current prosecution practice. Existing scholarship has not yet systematically examined the profound connection to conflict as a major factor contributing to the impunity gap for migrants. In that regard, the theoretical underpinnings of PCS as a discipline dealing extensively with causes, nature, and dynamics of conflicts have not been sufficiently integrated.[65] PCS, however, provide additional tools to understand conceptual elements in crimes against humanity, such as the policy of toleration, highlighting systemic abuses. This interdisciplinary approach offers a novel lens on interpreting crimes against humanity to support the OTP's prosecutorial strategy.

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[63] Kalpouzos, 'Violence against Migrants' (n 5) 595; Hodgson, 'Resisting the State Crimes' (n 5) 152.
[64] Sadat, 'The Forgotten Crime' (n 2) 530; Mann, 'Border Crimes as Crimes against Humanity' (n 5) 1179-1189.
[65] Inter alia: John W. Burton, *Conflict & communication: the use of controlled communication in international relations* (Macmillan 1969); John W. Burton, World Society (CUP 1972); Galtung, 'Cultural Violence' (n 6) 294-295; Edward E. Azar, *The Management of Protracted Social Conflict: Theory and Cases* (Dartmouth 1990); Richard E. Rubenstein, *Resolving Structural Conflicts: How Violent Systems Can Be Transformed* (Routledge 2017); Christopher R. Mitchell, *The Structure of International Conflict* (Macmillan 1981).

This research continues investigating the root causes for *why* the OTP does not prosecute the alleged crimes with a focus on the peacetime context in which they occur. Hence, this thesis poses one primary and two corollary research questions addressing the current research gap pertaining to the conceptual nature of crimes against humanity:

1) Given that there is sufficient information supporting a reasonable basis to believe that the constitutive requirements of Article 7 are *prima facie* fulfilled in the context of migration towards the Global North, *why* are they not investigated before the ICC, i.e. what are the underlying causes contributing to impunity beyond the explored reasons in scholarship?

2) What legal and conceptual strategies can be developed to overcome the doctrinal and practical barriers to investigating and prosecuting crimes against humanity in peacetime migration contexts?

3) In what ways can the migration context serve as a model for reimagining crimes against humanity to better address systemic rights violations in non-conflict settings?

Addressing these research questions now is essential for three reasons. First, several researchers have shown that unaddressed violations risk normalising and institutionalising ongoing violations[66] or may even descend into conflict.[67] The present research thus aims to confront the violations at a crossroads to their manifestation and a potential escalation. Second, with its previous engagement, scholarship has created a momentum for the attention of the OTP on migrant abuses. However, this trajectory may be lost if no

[66] Foundational, Agamben, *Homo Sacer* (n 13) and Giorgio Agamben, *State of Exception* (The University of Chicago Press 2005); Galtung, 'Cultural Violence' (n 6) 302; in the migration context, see Moreno-Lax, 'The "Crisification" of Migration Law' (n 47) 11; see also the anthropological study of border violence, Maurizio Albahari, *Crimes of Peace: Mediterranean Migrations at the World's Deadliest Border* (PENN 2015).
[67] Sadat, 'The Forgotten Crime' (n 2) 530.

additional theoretical and doctrinal contributions are offered to advance the legal framework, risking a deepening of the structural impunity. Third, state-led violence occurs beyond the studied phenomenon. ICL must evolve in line with systems of oppression, deprivation, and exclusion to respond adequately to contemporary atrocities, especially when committed in peacetime.

By reimagining the concept of crimes against humanity, this thesis advances the legal framework on peacetime crimes under ICL, addressing the gap in the literature on crimes against humanity outside of armed conflict. To achieve this, it investigates the phenomenon of 'migration towards the Global North' based on the hypothesis that several state policies satisfy the requirements of Article 7 of the Rome Statute and draws normative conclusions from the findings. Additionally, this thesis engages with the underlying reasons why no formal investigation has been undertaken by the OTP specifically addressing migrant abuses. The analysis reveals that the reasons contributing to impunity are characterised by deeply engrained perceptions about the rationale of crimes against humanity based on the historical *nexus* to war, leading to the OTP's unbalanced focus on situations involving crimes against humanity connected to armed conflict scenarios. Moreover, the historical legacy indirectly results in the attribution of a higher degree of severity to war-related crimes. To expose the misconception about the original meaning of crimes against humanity, this study assesses the historical development of crimes against humanity to challenge current misperceptions about the concept and offer corrections to disconnect crimes against humanity from the conflict *nexus* coherently in thought and practice by providing supporting arguments to scholars, lawyers, and civil society active in the field as well as the OTP.

The hypothesis that the OTP associates crimes related to conflict with a higher degree of severity finds support in its prosecution practice, in particular in the investigation into the Situation in the Republic of the Philippines and the 'war on drugs' narrative,[68] which serves as a guiding case study to critically examine the OTP's reasoning in peacetime settings. The approach developed to overcome this assumption is formulated with additional qualifiers to counteract concerns about overly broadening the application of crimes against humanity.[69] The approach proposes a rigorous disconnection from the link to war and suggests focusing on the policy requirement instead when the crimes are committed in peacetime. It offers an interpretation of the policy of toleration adhering to its exceptionality by introducing restrictive criteria that prevent overstretching the concept. As a state's failure to take action does not suffice to satisfy the threshold to criminality, a state's previous endangering behaviour should be accounted for and establish the legal admissibility of such situations.

Subsequently, this research engages with the perceived severity necessary to engage in further prosecutorial action. The second approach provides an interpretation of the so-called 'migration crisis' in light of parameters defining a conflict under international law (International Humanitarian Law (IHL) and ICL) and according to PCS. PCS offer a more comprehensive view of conflicts and violence therein, namely as dynamic processes, moving beyond the binary peace/conflict model under IHL.[70] This effort serves the purpose of arguing that *even if* the Prosecutor opines that crimes against humanity are either genuinely conflict-related or more readily meet the threshold of severity when committed in conflict settings, the political and legal responses by several states to the so-

[68] Authorisation Decision Philippines (n 46).
[69] Cryer *et al.*, *An Introduction to International Criminal Law and Procedure* (n 9) 16-21; see Chapter V at 2.1.
[70] Galtung, 'Cultural Violence' (n 6) 294-295.

called ‘migration crisis’ can be reframed as creating such conflict-like circumstances at and within their borders, and may trigger international attention. Although the strict requirements for defining a conflict under IHL/ICL are not satisfied, states are deliberately using a war and conflict narrative, referring to migration *per se* as a security threat.[71] The security paradigm is used to justify restrictive and militarised measures against migrants.[72] Reframing the ‘migration crisis’ as a conflict-like setting may thus serve the Prosecutor to consider systematic acts of border violence as crimes relevant under international law.[73] This approach can impact the ICC’s severity assessment and correct the presumed perception that crimes committed in relation to armed conflict are the more serious crimes.

While – normatively – there is no hierarchy between the crimes or the acts within the articles of the Rome Statute, the perceived severity of crimes linked to conflict, as well as the disregard for structurally induced crimes, materialises in the OTP’s case prioritisation and the Chamber’s authorisation decisions.[74] Letting go of this perception and focusing on a broader range of crimes also committed in peacetime would be one way for the ICC to advance a more balanced prosecution practice. Taking this approach offers a new perspective on dimensions of conflict relevant under international law and may be used as a practical tool by the Prosecutor to confront the prevalent impunity for peacetime crimes against humanity. Normatively and practically, this research establishes a strategy that has not yet been devised in scholarship. While it draws significantly from the work and ideas of leading researchers, it moves beyond the boundaries of ICL. By integrating the expertise from PCS, it employs a novel and enriched hermeneutic method to ICL. PCS scholars such

[71] *Inter alia*: Moreno-Lax, ‘The “Crisification” of Migration Law’ (n 47) 23.
[72] Ibid; Dereck Lutterbeck, ‘Policing Migration in the Mediterranean’, 11 Mediterranean Politics 1 (2006) 59–82; Müge Kinacioglu, ‘Militarized governance of migration in the Mediterranean’, 99 International Affairs 6 (2023) 2423–2441.
[73] For other reasons impeding prosecution, such as the inherent hegemonic nature of ICL, see Chapter II at 4.5.
[74] See Chapter IV at 2.2.

as Omar Grech have suggested a greater integration of the theoretical and practical knowledge derived from PCS to maximise the potential for peacebuilding, which also requires advancing its normative frameworks.[75] Using ICL and PCS theory thus generates a new understanding of the concept of crimes against humanity and its potential for addressing systems involving structural violence, systemic oppression, and the severe deprivation of fundamental rights in contemporary settings of multilayered criminality.

4. Methodology and Scope

The overall research strategy follows the traditional doctrinal approach, the so-called 'black-letter' methodology, which 'aims to systematise, rectify, and clarify the law on any particular topic'.[76] It analyses the law itself, relying predominantly on statutes and jurisprudence.[77] The primary source is the ICC Statute and its established case law, as this thesis deals exclusively with Article 7 of the Statute. This includes the work of the International Law Commission (ILC),[78] the preparatory works (*travaux préparatoires*),[79] as well as the Elements of Crimes (EoC) and the Rules of Procedure and Evidence (RPE).[80] As the predominant sources of international law, other treaties and customary law are further accounted for,[81] including statutes and case law by the International Criminal

[75] Grech, *The International Law of Peacebuilding* (n 52) 50.
[76] Mike McConville and Wing Hong Chui, *Research Methods for Law* (2edn, EUP 2017) 4.
[77] Ibid.
[78] UN GA Resolution 174 (II), Establishment of the International Law Commission (ILC), 123rd plenary meeting (21 November 1947).
[79] UN GA, 'Report of the Preparatory Committee on the Establishment of an International Criminal Court' UN GAOR, 51st Session (Supp No 22 Vol I) UN Doc A/51/22 (13 September 1996) [1996 PrepCom report].
[80] Article 21 (1)(a) ICC Statute; EoC; ICC, Rules of Procedure and Evidence, ICC-PIDS-LT-02-002/13_Eng (2013) reproduced from the Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002 (ICC-ASP/1/3 and Corr.1), part II.A. [RPE].
[81] Article 21 (1)(b) ICC Statute; Cassese, *International Criminal Law* (n 13) 16.

Tribunal for the former Yugoslavia (ICTY),[82] the International Criminal Tribunal for Rwanda (ICTR),[83] and other international or hybrid criminal tribunals.[84] The character of ICL further allows and necessitates relying on human rights law and national criminal law,[85] and respective jurisprudence, including regional courts such as the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR). These authoritative texts and sources inform the analysis throughout the thesis.

Additionally, the established literature on ICL, IHL, and International Human Rights Law (IHRL), specifically including migration and asylum law,[86] and most critically, ICL and migration, complement the primary sources as fundamental tools for examining ICL.[87] Publicly available and *prima facie* credible information and supporting insights are further derived from UN and European Union (EU) reporting, relevant media publications, and civil society reports. Of particular interest are the Article 15 submissions to the OTP related to crimes against migrants, providing extensive information and interpretative assistance for exploring the current state of knowledge and advancing the theoretical framework.

The unique contribution of this study is its interdisciplinary methodology. Literature from the field of PCS distinctively guides the practical approaches developed in this research, as

[82] UN Security Council Resolution 827, UN Doc S/RES/827 (25 May 1993), establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY), operating on the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Former Yugoslavia Since 1991, UN SCOR, Annex, UN Doc S/25704 (1993) [ICTY Statute].
[83] UN Security Council Resolution 955, UN Doc S/RES/955 (8 November 1994), establishment of the International Criminal Tribunal for Rwanda (ICTR), operating on the Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January 1994 and 31 December 1994, UN SCOR, 49th Session [ICTR Statute].
[84] Including but not limited to the IMT, the Special Court for Sierra Leone (SCSL) and the Extraordinary Chambers in the Courts of Cambodia (ECCC). Although the International Court of Justice (ICJ) does not deal with criminal law but with inter-state disputes, relevant cases also inform the analysis.
[85] Cassese, *International Criminal Law* (n 13) 18.
[86] Vincent Chetail, 'Moving towards an Integrated Approach of Refugee Law and Human Rights Law', in Costello *et al.*, *Oxford Handbook for International Refugee Law* (n 5) 202-220.
[87] Article 21 (3) ICC Statute.

this academic discipline analyses causes, nature, and avenues to peacefully resolve conflicts through highly nuanced theoretical and practical frameworks. Bringing the expertise developed in PCS to the traditional interpretation of the concept of crimes against humanity provides a novel interdisciplinary approach to studying ICL.

Moreover, legal realism and critical legal approaches, as well as aspects of socio-legal, criminological, sociological, and political sciences, essentially advance thinking beyond the established boundaries of ICL.[88] Although ICL inherently involves legal, political, and philosophical thought,[89] an interdisciplinary investigation of the research hypotheses allows 'decipher[ing] the workings of legal, social, and cultural processes',[90] adding a critical and original perspective on the research questions. This approach is necessary to counteract a possible stasis in the field of ICL in the context of migration, whilst acknowledging the risk of politicising legal, or generally (over)stretching, concepts[91] by setting boundaries on how the findings should be interpreted and applied.

Due to ethical considerations and concerns for individual harm and infringements on privacy rights,[92] no interviews were conducted with victims or other affected individuals. This decision was made by carefully weighing any added value to this thesis against jeopardising the well-being of potential interviewees, namely, to prevent re-traumatisation

[88] McConville and Chui, *Research Methods for Law* (n 76) 5-6; on the complex relationship between international lawyers and PCS practitioners, see Grech, *The International Law of Peacebuilding* (n 52) 37.
[89] Bassiouni, *Introduction to International Criminal Law* (n 26) 44.
[90] McConville and Chui, *Research Methods for Law* (n 76) 6.
[91] Rogier Bartels, 'The Classification of Armed Conflicts by International Criminal Courts and Tribunals', 20 International Criminal Law Review 4 (2020) 618; Giovanni Sartori, 'Concept Misformation in Comparative Politics', 64 American Political Science Review 4 (1970) 1035; based on Santori's arguments, see also Jonathan Kent, Kelsey P Norman, and Katherine H Tennis, 'Changing Motivations or Capabilities? Migration Deterrence in the Global Context', 22 International Studies Review 4 (2020) 853–878.
[92] Denisa Kostovicova and Eleanor Knott, 'Harm, change and unpredictability: the ethics of interviews in conflict research', 22 Qualitative Research 1 (2022) 56-73. On the complexity of empirical research in ICL in conflict, see the awarded paper by Sarah M.H. Nouwen, ''As You Set out for Ithaka': Practical, Epistemological, Ethical, and Existential Questions about Socio-Legal Empirical Research in Conflict', 27 Leiden Journal of International Law 1 (2014) 227-260.

through possibly repeated interviewing.[93] Interviewing affected individuals as victims and/or witnesses is the core duty of a competent investigative team, which is also in a position to provide psycho-social support.[94] However, informal conversations with scholars and practitioners in the field have guided the critical reflection on the explored topics. These conversations provided valuable insights into the specificities of certain regions, such as Malta, Greece, or the United States, and the author is grateful for the constructive feedback that finds its way into the conclusions offered in this thesis in an indirect manner.

The phenomenon of 'migration to the Global North' is selected as a specific context occurring in *peacetime*, although other relevant peacetime contexts require testing the key findings. The phenomenon studied is chosen over others for two reasons. Due to previous and ongoing academic and professional engagement in migration and refugee law, the author's personal expertise lies in this field. Moreover, to the author's knowledge, no other context is explored to the extent required to pose the primary research question, rendering it a unique context that is accessible within the scope of this thesis. It is acknowledged that several other concrete realities exist and are yet to be explored under the proposed framework. They are not dealt with in-depth but are briefly referenced in the concluding chapter.

This research examined the broad dimension of 'migrants,' i.e. people on the move (towards the Global North), as asylum-seekers and refugees are also migrants. This renders the category of migrants more suitable to include any individuals affected by ill-treatment.

[93] Ibid, 62. See also the guidelines published by the OTP and Eurojust on documentation by CSO, 'Documenting international crimes and human rights violations for accountability purposes', ICC-OTP and Eurojust, QP-07-22-681-EN-C (2022).
[94] Article 68 ICC Statute; Article 43 (6) ICC Statute. The Victims and Witness Unit within the Registry assists in protection measures.

The United Nations Department of Economic and Social Affairs recognises that 'there is no formal legal definition of an international migrant',[95] but defines a migrant as 'someone who changes his or her country of usual residence, irrespective of the reason for migration or legal status'.[96] This category includes asylum-seekers and refugees who fulfil the narrower definition of their legal status.[97] Moreover, the understanding of the phenomenon of migration has evolved significantly. Migration studies have come to understand migration as a 'complex social process'[98] and refer to migration as 'human mobility', marking the 'mobility turn'.[99] This includes several categories, from economic migrants to asylum-seekers and refugees.[100] Especially since the recorded violations are not merely refugee law violations but predominantly violations of the most fundamental human rights every person is entitled to enjoy,[101] such as the right to life, physical and mental integrity, and the freedom from inhuman and degrading treatment.[102] Scholarship increasingly refers to the category of 'migrants' and includes any human being faced with ill-treatment at borders (including sea crossings), detention centres, and other immigration facilities, irrespective of their legal status.[103] Premature judgments about the legal status of persons who arrive at the borders of the relevant states should thus not result in narrowing the

[95] United Nations Department of Economic and Social Affairs, 'Definitions: Refugees and Migrants' <https://refugeesmigrants.un.org/definitions>.
[96] Ibid.
[97] According to the UNHCR, refugees are persons 'who are outside their country of origin for reasons of feared persecution, conflict, generalized violence, or other circumstances that have seriously disturbed public order and, as a result, require international protection', as defined in the 1951 Refugee Convention. It is also recognised that asylum-seekers are included in the protection scope of the convention; the status of a refugee is declaratory. See James C. Hathaway *et al.*, 'The Michigan Guidelines on Refugee Freedom of Movement', University of Michigan: Eighth Colloquium on Challenges in International Refugee Law (2017) General Principles No 1.
[98] Anna Triandafyllidou in Anna Triandafyllidou *et al.*, 'Rethinking Migration Studies for 2050', 22 Journal of Immigrant & Refugee Studies 1 (2024) 2.
[99] Peter Scholten in ibid, 7.
[100] Anna Triandafyllidou in ibid, 3.
[101] In detail, Chapter II at 4.2. See also Omar Grech, 'Migrants' and refugees' rights: a brief international law perspective' in Omar Grech and Monika Wohlfeld (eds.), *Migration in the Mediterranean: human rights, security and development perspectives* (Mediterranean Academy of Diplomatic Studies 2014) 40.
[102] See the Special Issue: 'Border Justice: Migration and Accountability for Human Rights Violations', 21 German Law Journal Special Issue 3 (2020) 311-619.
[103] Ibid; Kalpouzos, 'Violence against Migrants' (n 5); Valentina Azarova *et al.*, 'The Enforced Disappearances of Migrants' (n 5) 133-204.

protection scope examined in this thesis and reflect the labels used in more recent scholarship. However, Chapter II addresses certain sub-categories, such as 'asylum-seekers' or 'irregular migrants' against the legal interpretation of specific unlawful acts, including the crime of deportation and persecution.[104] This is critical since the applicability of these crimes is contingent on an interpretation involving clearly defined groups of victims for which the category of migrants may not be suitable.

Furthermore, this study does not identify individual perpetrators, nor does it assess potential modes of liability, including defences. Although some sections allude to the concept of liability, for instance, the concept of commission by omission,[105] it remains with the OTP or relevant actors as the responsible institutions and more resourceful bodies to identify perpetrators and their degree of individual guilt. Additionally, as this thesis explores substantive legal challenges, procedural law aspects are not engaged with in depth. The OTP's prosecution practice and the evidentiary standard for opening (Pre) Preliminary Examinations (PPE) and moving forward to the investigation stage are addressed to support a proffered hypothesis.[106] However, the findings are utilised to reinforce substantial law arguments. A more extensive procedural analysis would have exceeded the resources available for this project and would not have significantly improved the quality of the outcome, as it deals primarily with the concept of crimes against humanity and the interpretation of its constitutive elements.

In parallel, this thesis deals extensively with impunity, i.e., the absence of *criminal* punishment.[107] While the lack of such sanctions depicts an important dimension of impunity, several authors have put forward a more nuanced understanding of the concept

[104] See Chapter II at 4.2.1. and 4.2.2.
[105] See Chapter V at 2.1.2.
[106] See Chapter IV at 2.1.
[107] Drumbl, 'Impunities' (n 51) 238-260; Lorca, 'Impunity thick and thin' (n 51) 422.

of impunity. Mark A. Drumbl, for instance, recognises that impunity implies the dominance of criminal punishment and incarceration but advocates for the recognition of 'impunities'.[108] The meaning of punishment, he proposes, signals a process of rethinking to include 'recrimination, shame, consequence, and sanction'[109] to remedy the selectivity of justice. Drumbl primarily refers to actions outside the scope of criminal law.[110] Whilst recognising the value of advancing the understanding of impunity, as Drumbl suggests, this research does not explore alternative means of justice or punishment.[111] And yet, as one of its objectives is to provide arguments why the OTP should open Preliminary Examinations (PE), these examinations could, similar to provisional measures imposed by the International Court of Justice (ICJ),[112] have a beneficial effect falling short of punishment. Shifting attention to the crimes allegedly committed against migrants and by actors of the Global North under ICL may publicly recriminate and shame the inhumane practices and demand their termination.[113] This is all the more salient in situations of ongoing violence because an examination could represent a minimally invasive form of intervention. Criminal sanctions continue to be the last resort (*ultima ratio*),[114] and many may reject the idea of imprisonment of several border guards and policymakers for crimes against humanity. Preliminary Examinations into *situations* by the OTP, the broadest and most

[108] Ibid. See also Mann, 'Border Violence as Crime' (n 5) proposing a 'new anti-impunity movement' in the context of migration and defending the turn to criminal law against four critiques and concludes: 'But as long as we have prisons, let them be filled with those who have committed the worst of crimes, instead of with migrants and refugees.', at 723.
[109] Ibid, 255.
[110] Ibid, 260.
[111] Foundationally, Michel Foucault, *Discipline and Punish – The Birth of the Prison* (Vintage Books 1975); Ben Gifford, 'Prison Crime and the Economics of Incarceration', Stanford Law Review 71 (January 2019); see also Rocío Lorca, 'Could We Live Together Without Punishment? On the Exceptional Status of the Criminal Law', 17 Criminal Law and Philosophy (2023) 29-38.
[112] Bernhard Kempen and Zan He, 'The Practice of the International Court of Justice on Provisional Measures: The Recent Development', ZaöRV 69 (2009) 929. The authors consider provisional measures as one of the most important instruments of the ICJ 'to prevent irreparable prejudice to human life', although their effect may be less impactful than expected.
[113] Admittedly, there is a high risk of a backlash against the Court, as recent state reactions demonstrate. See also Henry Lovat, 'International Criminal Tribunal Backlash' in Heller *et al.*, *The Oxford Handbook of International Criminal Law* (n 51) 601-625, see also the work of scholars in the field, advocating for the expressive use of ICL and as a tool of resistance, presented in Chapter II at 4.5.
[114] Ambos, *Treatise, Volume I* (n 24) 64.

depersonalised category to investigate before identifying cases and individuals,[115] may already serve as a powerful and minor intrusive instrument to address alleged systemic violations of fundamental rights and other direct forms of violence. Nonetheless, this thesis seeks to promote full investigations and criminal proceedings provided that there is a reasonable basis to proceed.[116]

It is important to note what this thesis does *not* seek to promote. Especially in the context of the EU, it does not aim to exert undue pressure on first-entry Member States that bear a disproportionate obligation in managing migration flows.[117] It recognises that structural inequities arise from the EU asylum system, such as the Dublin system, and upholds the principles of solidarity and burden-sharing that are indispensable in circumstances of great challenges,[118] despite the longstanding deficiencies.[119] However, this research draws a clear distinction between political and criminal accountability. While political responsibility for lawful and humane migration management must be shared across the EU (and globally), the individual nation states remain bound by the fundamental human rights obligations,[120] irrespective of the broader geopolitical context or systemic deficits. This

[115] Article 13 (a) and (b) ICC Statute. A situation is a broad category from which cases are built. See for the contours of situations and cases: William A. Schabas, 'Selection of Situations and Cases' in Carsten Stahn (ed.) *The Law and Practice of the International Criminal Court* (OUP 2015) 367; Situation in the Democratic Republic of the Congo (Decision on the Application for the Participation in the Proceedings) PTC I, ICC-01/04 (17 January 2006) para 65.

[116] Article 53 (1) ICC Statute.

[117] Anja Radjenovic, 'Reforming asylum and migration management', European Parliamentary Research Service (EPRS), Briefing, Doc No PE 659.316 (October 2020) 2. See also the study on the 2024 adopted Common European Asylum System (CEAS) reform, Evangelia Lilian Tsourdi, 'The new screening and border procedures: Towards a seamless migration process?', Policy Study, Foundation for European Progressive Studies, Friedrich-Ebert-Stiftung and European Policy Centre (2024); Patricia Vella de Fremeaux and Felicity Attard, 'Navigating the Human Rights Trajectory of the EU Migration and Asylum Pact in Search and Rescue Operations: Part One', Opiniojuris.org (16 September 2024) <http://opiniojuris.org/2024/09/16/navigating-the-human-rights-trajectory-of-the-eu-migration-and-asylum-pact-in-search-and-rescue-operations-part-one/>; and *ibid* Part Two, Opiniojuris.org (17 September 2024) <http://opiniojuris.org/2024/09/17/navigating-the-human-rights-trajectory-of-the-eu-migration-and-asylum-pact-in-search-and-rescue-operations-part-two/>.

[118] Ibid; European Union, Official Journal of the European Union, Volume 2, Consolidated version of the Treaty on the Functioning of the European Union (TFEU), C 202/78 (7 June 2016) Article 80 TFEU; Philippe van Parijs, 'European Values: Solidarity', 34 Ratio Juris 2 (2021) 95-105.

[119] Evangelia Lilian Tsourdi, 'Solidarity at work? The prevalence of emergency-driven solidarity in the administrative governance of the Common European Asylum System', 24 Maastricht Journal of European and Comparative Law 5 (2017) 667-686.

[120] Vella de Fremeaux and Attard, 'Navigating the Human Rights Trajectory: Part Two' (n 117).

research, therefore, acknowledges the reality that states at the external borders of the EU are the most exposed to migratory pressure due to their geographical situatedness. Yet, it does not diminish their duty to comply with pertinent legal standards nor the applicability of individual criminal responsibility. This research further presents the system criminality in multiple layers. While individual perpetrators on the micro-level are located in the nation states, the policymakers, adopting policies and laws that enable the violence, are located in the states as well as at the EU decision-making level and represent the macro-criminality. The individual responsibility for these actors must be ascertained by a competent court.

Moreover, many policymakers and border officials perform their duties with integrity and fully uphold the legal norms.[121] The findings in this thesis should not be understood as casting generalised blame on all agents belonging to the described groups of actors. Its objective is to provide the basis for investigating specific instances where the legal threshold for crimes against humanity has been met, and individual criminal responsibility may arise as a result of satisfying the elements under the legal framework of Article 7 of the Rome Statute.

5. Chapter Outline

This thesis consists of seven chapters. The five core chapters follow the method of reimagining a legal concept, namely tracing the traditional sequences of its development, evolving from a desired law (*lex desiderata*), to a future law (*lex ferenda*), to a settled law (*lex lata*). This process is slightly modified in this thesis, as it adds a *desired application* of

[121] See also von Förster, '*Verbrechen gegen die Menschlichkeit*' (n 5) 5.

the law as a sequential dimension. Following this method, the concept of crimes against humanity is reimagined to offer a more comprehensive understanding. The chapters of this thesis provide the necessary background and arguments on how to interpret crimes against humanity in reflection of this early, albeit unfulfilled, version of crimes against humanity and why this is warranted.

Chapter II shows that sufficient academic opinion and supporting material exists to argue that crimes against humanity are being committed in the context of migration towards the Global North, whilst identifying specific research gaps that necessitate further analysis, namely the crime of persecution and the state policy of toleration. Pointing out *that* large-scale crimes appear to be committed without consequences, the chapter lays the groundwork for asking and studying additional underlying reasons for *why* impunity prevails for the alleged crimes against migrants.

Chapter III examines possible underlying reasons contributing to this impunity. To better comprehend when and why misconceptions about the concept of crimes against humanity emerged, it investigates the historical evolution of the norm, pinpointing a gap for peacetime crimes along two hypotheses: First, the war *nexus* has contributed to the incorrect understanding that crimes against humanity are inherently connected to conflict including that conflict-related crimes are more severe. Second, the policy requirement *de facto* evolved from the *nexus* to become the internationalising element,[122] yet the passive version of the policy remains under-recognised. The chapter thus offers insights into the root causes of misinterpretations that influence the current lack of accountability.

Chapter IV interrogates the prosecution practice by the ICC against the hypotheses raised by analysing the standard for opening PE and case considerations, revealing essential lines

[122] Ambos, *Treatise, Volume II* (n 30) 50-51; Bassiouni and Schabas, *The Legislative History* (n 13) 169.

of reasoning that largely result in impunity for peacetime crimes against humanity. The findings of this chapter serve as the basis to articulate an understanding of crimes against humanity as the norm designed to criminalise structural violence that exceeds the threshold to criminality and punish systems of systemic oppression and severe deprivation of fundamental rights.

Chapter V develops two practical approaches aiming to initiate a change in the attention of the Prosecutor on peacetime crimes against humanity, confronting the impunity for these crimes. Abandoning the war *nexus* in thought and practice and refocusing on the function of the policy is the first step in refining the understanding of their occurrence in contemporary settings. Moreover, the chapter suggests avenues to overcome the barrier to prosecution by introducing theories from PCS and reframing the 'migration crisis' as a dimension of conflict, aiming to sensitise the Prosecutor to the similarities between conflict settings and the context of migration. The chapter synthesises the two approaches into one unified dual strategy, and argues that, if applied complementarily, they could directly impact the OTP's prosecutorial decision-making. The chapter overall demonstrates the *desired application* of the current law when misinterpretations are corrected.

Chapter VI crystallises the findings of the previous chapters and engages in reimagining crimes against humanity. Thereby, it contributes to a fuller understanding of the concept in peacetime and for the protection of civilians, particularly minorities of any characteristic. The chapter completes the process of reimagining crimes against humanity by suggesting to 'return' to the (unfulfilled) *lex desiderata* in practice. Given the potency to protect minorities from discrimination based on the crime of persecution, the chapter concludes by contemplating future research on this crime. It recommends refining the understanding of

the crime's essence and purpose and its promising nature for preventing crimes against humanity in peacetime.

Chapter VII reflects on and synthesises the chapters, highlighting the key findings of this research overall. It further elaborates on the significance of these findings to the discipline and suggests areas in which the findings could have a beneficial impact. It concludes by deliberating on the general implications of the research results on broader questions of inequalities of concern to society at large and how society assumes a key role in legitimising the ongoing violence.

Chapter II: Crimes Against Migrants as Crimes Against Humanity

1. Introduction

Article 15 ICC Statute communications are submissions to the OTP containing information about allegedly committed crimes that may fall within the jurisdiction of the ICC.[123] They can be provided by states, UN organs, civil society organisations, and other reliable sources and aim to urge the OTP to investigate based on its *proprio motu* powers.[124] Civil society actors have informed the OTP about crimes allegedly committed in the context of migration since 2014.

The first submissions concerned the offshore processing and detention centres in Papua New Guinea (PNG) and the Nauru Republic, where intercepted migrants were transferred by Australian authorities.[125] Moreover, a total of four Article 15 communications to the OTP were filed related to migrant interceptions, deaths at sea, and mistreatment in

[123] Article 15 (1) ICC Statute; ICC-OTP, 'Policy Paper on Preliminary Examinations' [PPPE] (November 2013) paras 30-33.
[124] Article 15 (2) ICC Statute.
[125] The first communications in the Australian case were submitted in 2014 and 2015, see Tracy Aylmer, 'Breaches of the Rome Convention by the Current Australian Government' (2014); Wilkie, 'Communication: Australia' (n 5), four more were filed until 2017, see *infra* 4.2.1.

Libya.[126] The submissions claim that in several incidents,[127] migrants rescued from distress in the Mediterranean Sea were pulled back to Libya contrary to European and international law,[128] and could be identified in detention centres, where they faced severe mistreatment.[129] However, they further allege the involvement of EU member states' officials, such as Maltese, Italian, German, and EU actors, as well as officers of the border agency Frontex.[130] The dire conditions in Greek reception and identification centres further resulted in a communication to the OTP, maintaining that the treatment of refugees therein may amount to crimes against humanity.[131]

The senders of these submissions argue that ill-treatment of migrants does not appear as isolated incidents, but part of a systematic pattern of severe violations of civilians' lives in the Mediterranean and Australian context, amounting to crimes against humanity under Article 7 of the Rome Statute.[132] With the communications, the senders contend that the

[126] Shatz and Branco, 'Communication: Central Med' (n 5); Adala for All *et al.*, 'Communication: Libya' (n 5); ECCHR, 'Communication: Libya' (n 5); ECCHR, 'Communication: Interceptions' (n 5).
[127] For instance, Forensic Oceanography, 'Mare Clausum: Italy and the EU's undeclared operation to stem migration across the Mediterranean, A report by Forensic Oceanography (Charles Heller and Lorenzo Pezzani), affiliated to the Forensic Architecture agency (Goldsmiths, University of London) (May 2018) 7-8; for the communicated case and 3D Modelling of the incident, see Forensic Architecture, 'Sea Watch vs the Libyan Coastguard' (publication date 4 May 2018) available at <https://forensic-architecture.org/investigation/seawatch-vs-the-libyan-coastguard>, communicated to the ECtHR: *S.S. and Others v. Italy* (Communicated Case) ECtHR Application No 21660/18 (26 June 2019), the case is pending as of March 2025.
[128] Adala for All *et al.*, 'Communication: Libya' (n 5) para 110, in violation of the principle of *non-refoulement* and the European Convention on Human Rights (ECHR), see the landmark ruling of *Hirsi Jamaa and Others v. Italy* (Judgment) GC, ECtHR Application no 27765/09 (23 February 2012) para 36; see for issues of jurisdiction, Daniel Ghezelbash *et al.*, 'Securitization of search and rescue at sea: the response to boat migration in the Mediterranean and offshore Australia', International and Comparative Law Quarterly (2018); Itamar Mann, *Humanity at Sea: Maritime Migration and the Foundations of International Law* (CUP 2016) introducing the notion of 'rights of encounter'; Violeta Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, S.S. and Others v. Italy, and the 'Operational Model', 21 German Law Journal 3 (2020); Patricia Vella de Fremeaux and Felicity G. Attard, 'Rescue at Sea and the Establishment of Jurisdiction: New Direction from the Human Rights Committee? Part I', Opiniojuris.org (3 March 2021) <https://opiniojuris.org/2021/03/03/rescue-at-sea-and-the-establishment-of-jurisdiction-new-direction-from-the-human-rights-committee-part-i/>, showing that a distress call suffices to establish extraterritorial jurisdiction.
[129] Ibid, para 473; ECCHR, 'Communication: Libya' (n 5) para 73.
[130] Adala for All *et al.*, 'Communication: Libya' (n 5) para 415; ECCHR, 'Communication: Libya' (n 5) para 18; Shatz and Branco, 'Communication: Central Med' (n 5) paras 518-573, 622-631.
[131] SJAC, 'Communication: Greece' (n 5), involving Frontex as well.
[132] Adala for All *et al.*, 'Communication: Libya' (n 5) para 415; ECCHR, 'Communication: Libya' (n 5) para 18; Shatz and Branco, 'Communication: Central Med' (n 5) paras 518-573, 622-631; SJAC, 'Communication: Greece' (n 5) 2; Stanford, 'Communication: Nauru and Manus Island' (n 5) 63.

recorded incidents exceed 'mere' human rights violations and instead qualify as international crimes. Since international crimes are considered to be the most heinous crimes,[133] the accusation weighs heavily and, if substantiated, involves individual criminal responsibility for the alleged perpetrators.[134]

Simultaneously, scholars have published widely on the consequences of migration control and management policies as criminal conduct relevant under Article 7.[135] Both civil society and scholarship conclude that the violations of migrants' rights at the borders of these states *prima facie* qualify as crimes against humanity in the respective circumstances and, due to similar exclusion practices and systematic mistreatment of migrants at the US-Mexican border,[136] attest a 'global trend'.[137]

Despite the abundant material available, the OTP has thus far not initiated thorough investigations to ascertain whether these allegations persist. Although it carried out investigative efforts in Libya and engaged with the Australian case,[138] they have not resulted in full investigations or prosecutions. This chapter reviews the developments and reflects on the current research body related to the alleged crimes in academia and civil society, and examines the OTP's investigative status into the alleged crimes.

This chapter identifies two phases in scholarship. In the first phase, researchers provided legal arguments as to why the migration-related crimes fall within the ambit of Article 7. In the second phase, scholars took a meta-perspective on previous scholarship and civil

[133] Preamble of the ICC Statute; Article 1 ICC Statute; Article 5 ICC Statute.
[134] Article 25 ICC Statute.
[135] The first publication relates to the alleged crimes in Australia, Henderson, 'Australia's Treatment of Asylum Seekers' (n 5) 1161–1181; in the context of the EU, the first scholarly contribution was published in 2015, see Kalpouzos and Mann, 'Banal crimes against humanity' (n 5) 1-28.
[136] Mann, 'Border Violence as Crime' (n 5) 705-714; Astghik Hairapetian, 'A Culture of Impunity: Why the Remain in Mexico Policy is Insulated from International Criminal Accountability', 25 Berkeley J. Crim. L. 1 (2020) 1-24; see also Kalpouzos, 'Violence against Migrants' (n 5) 573; generally, Hodgson, 'Resisting the State Crimes' (n 5).
[137] Ibid, 715.
[138] Australia and Libya will be ICC-OTP, Report on Preliminary Examinations (n 50) paras 44-55; ICC, 'Situation in Libya', ICC-01/11, referred to the ICC by the United Nations Security Council (February 2011).

society action and exposed structural patterns pertaining to theories underlying the concept of crimes against humanity and ICL as a whole.[139] In this phase, scholars engaged in broader issues that may explain the lack of accountability in the migration context, such as power politics, global inequality, and the structural dimension of the violence against migrants, which this thesis builds upon.

The chapter proceeds in six main steps. First, it provides a brief definition of crimes against humanity under Article 7 as interpreted in ICL jurisprudence as a basis for examining migrant abuses. Second, it outlines the factual context and patterns of conduct that form the evidentiary basis for considering these alleged crimes, drawing on case examples and publicly available reports. Third, it examines the underlying acts listed in Article 7 (1), focusing on those most relevant to the migration context: deportation or forcible transfer, imprisonment or severe deprivation of liberty, and other inhumane acts. Fourth, the chapter includes a dedicated section on persecution due to its unique legal structure and heightened evidentiary threshold, especially the requirement to demonstrate discriminatory intent. Given that exclusionary migration policies often target individuals based on national, ethnic, or social origin, persecution warrants separate treatment to assess its underexplored potential in this context.

Fifth, it turns to the *chapeau* elements of crimes against humanity, requiring an attack against a civilian population, which is widespread or systematic in nature, and a state policy, and evaluates their applicability in the migration context, with special emphasis on the contested policy requirement. Sixth, the chapter examines the second phase in scholarship, critically reflecting on the ICC practice and arguments impeding the

[139] Mann, 'Border Crimes as Crimes against Humanity' (n 5) 1179-1189; Kalpouzos, 'Violence against Migrants' (n 5) 576; Hodgson, 'ICL and civil society resistance' (n 5) 452; Hodgson, 'Resisting the State Crimes' (n 5).

prosecution of migrant-related abuses. This thesis interrogates and builds upon these theories, especially the research dealing with structural violence, as systemic, presumably invisible, and non-criminal violence.[140] This chapter considers the relevance of judicial and prosecutorial interpretations, drawing from ICC jurisprudence and prosecutorial decisions to assess how legal standards have been applied in practice.

The chapter concludes by synthesising these findings and positing that, under a plausible and legally grounded interpretation of the Rome Statute, migration-related abuses could qualify as crimes against humanity. This provides the normative foundation for Chapter III, which turns to the question of why such crimes remain unprosecuted before the ICC.

2. A Brief Definition of Crimes Against Humanity Under Article 7 ICC Statute

In essence, crimes against humanity aim to criminalise massive human rights violations.[141] However, not all breaches of human rights on a large scale automatically constitute crimes against humanity.[142] Only severe infringements on life, liberty, and physical and mental integrity are criminalised, protecting a combination of 'humankind' and 'humanness'.[143] Crimes against humanity are characterised by their widespread nature or systematicity,

[140] Ibid, 1190; Galtung, 'Violence, Peace, and Peace Research' (n 6) 170-171.
[141] In a previous draft of the ILC, crimes against humanity were termed 'systematic or mass violations of human rights,' see 1991 Draft Code (n 19) Article 21. In 1996, it was replaced with 'crimes against humanity', see 1996 Draft Code (n 19).
[142] *Prosecutor v. Kunarac, Kovac and Vukovic* (Judgment) TC, ICTY IT-96-23-T and IT-96-23/1-T (22 February 2001) para 428. The ICC confirmed in *Prosecutor v. Jean-Pierre Bemba Gombo* (Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the charges) PTC II, ICC-01/05-01/08 (15 June 2009) (*Bemba* Decision) paras 117-124 and *Prosecutor v. Jean-Pierre Bemba Gombo* (Judgment pursuant to Article 74 of the Statute) TC III, ICC-01/05-01/08 (21 March 2016) (*Bemba* Judgment) paras 688-689.
[143] Ambos, 'Article 7' in Ambos, *Rome Statute: 2022 Commentary* (n 1) para 3; Ambos, *Treatise, Volume II* (n 30) 56; see the crime of persecution in Robert Dubler SC and Matthew Kalyk, *Crimes against Humanity in the 21st Century: law, practice, and threats to international peace and security* (Brill Nijhoff 2018) 893 ('the fundamental affront to human dignity'); advocating for recognising other rights, Schmid, *Taking ESC Rights Seriously* (n 26); for the protected legal interest, see Chapter I at (n 13), for instance, Atadjanov, *Humanness as a Protected Legal Interest* (n 13).

repetition, and patterns of severe violations such as murder, torture, or imprisonment that are sufficiently connected and form an attack against a civilian population.[144] The crucial aspect is the interplay between severe human rights violations committed by individual perpetrators (micro-criminality), who act with intent and knowledge of the broader context of the attack,[145] and an overarching policy, plan, or method by a state or organisation (macro-criminality), posing a danger to international peace.[146] Despite differing opinions, the policy element is understood as the internationalising element and is required to lift ordinary human rights violations to the international judicial fora.[147] Although it is explicitly mentioned in Article 7 (2)(a) in the Rome Statute, conflicting views on the policy's legal nature and interpretation, its customary status and general necessity exist.[148]

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[144] *Inter alia*: *Tadić* (Judgment) (n 1) paras 573, 632-633, 648; *Akayesu* (Judgment) (n 26) para 580; *Kunarac et al.* (Appeal Judgment) (n 27) para 94-100; *Limaj et al.* (Judgment) (n 33) para 189; *Katanga* (Judgment) (n 28) para 1123; *Prosecutor v. Bosco Ntaganda* (Judgment) TC VI, ICC-01/04-02/06 (8 July 2019) para 692; *Gbagbo* (Judgment) (n 33) para 1390; ILC, 'Report of the International Law Commission, Seventy-first Session, draft articles on the prevention and punishment of crimes against humanity' (29 April to 7 June and 8 July to 9 August 2019) UN Doc A/74/10 [2019 ILC Draft Articles] Commentary to Article 2, para 15.

[145] Article 30 (1) ICC Statute; Article 25 (3)(d) ICC Statute; deGuzman, 'The Road from Rome' (n 36) 380. See also *Kunarac et al.* (Appeal Judgment) (n 27) para 81 ('in full awareness that [his or her] actions would contribute to the attack'); *Prosecutor v. Dominic Ongwen* (Judgment) TC IX, ICC-02/04-01/15-1762-Red (4 February 2021) para 2693 ('awareness requirements'); see also Article 7, Introduction, para 2, Elements of Crimes. Personal motives are irrelevant, *Tadić* (Judgment) (n 1) para 633; *Gbagbo* (Judgment) (n 33) para 1389. Although irrelevant to the *means rea*, they can indicate the relationship between an act and an attack.

[146] Reflected in Article 7 (1): 'as part of' and 7 (2): '*pursuant to* or *in furtherance of* a State or organisational policy' (emphasis added); Kuschnik, 'Humaneness, Humankind and Crimes Against Humanity' (n 13) 522; the interplay translated to liability: Elies van Sliedregt, 'The Curious Case of International Criminal Liability', 10 JICJ 5 (2012) 1174.

[147] Ambos, *Treatise, Volume II* (n 30) 57, referring to it as 'international element' and 'internationalization'. See also Bassiouni and Schabas, *The Legislative History* (n 13) 169, referring to it as a jurisdictional 'threshold element'; see also the controversial *Kenya* Decision 2010 (n 33) and Dissenting Opinion of Judge Hans-Peter Kaul at para 6.

[148] See for instance, several contributions to a symposium with a focus on the policy, Larissa Van Den Herik and Elies Van Sliedregt, 'Removing or Reincarnating the Policy Requirement of Crimes against Humanity: Introductory Note', 23 Leiden Journal of International Law 4 (2010) 825–826; Matt Halling, 'Push the Envelope—Watch It Bend: Removing the Policy Element and Extending Crimes Against Humanity', 23 Leiden Journal of International Law 4 (2010) 827-845; Schabas' response to Halling: William A. Schabas, 'Prosecuting Dr Strangelove, Goldfinger, and the Joker at the International Criminal Court: Closing the Loopholes', 23 Leiden Journal of International Law 4 (2010) 847–853; Claus Kress, 'On the Outer Limits of Crimes against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC Kenya Decision', 23 Leiden Journal of International Law 4 (2010) 855–873; see also, Van Sliedregt, 'The Humaneness-side of Humanity' (n 36); Leila Nadya Sadat, 'AJIL Symposium: Sadat response to Robinson and van Sliedregt', Opiniojuris.org (23 July 2013) <http://opiniojuris.org/2013/07/23/ajil-symposium-sadat-response-to-robinson-and-van-sliedregt/>; see also Jalloh, 'What Makes a Crime Against Humanity' (n 13); Guénaël Mettraux, 'Crimes Against Humanity and the Question of a "Policy" Element' in Sadat, *Forging a Convention* (n 13) 142-176, arguing that if it is necessary, it must be defined more accurately, see at 176; Darryl Robinson, 'Crimes Against Humanity: A Better Policy on 'Policy'' in Stahn (ed), *The Law and Practice of the International Criminal Court* (n 115); Marjolein Cupido, 'The Policy Underlying Crimes Against Humanity: Practical Reflections on a Theoretical Debate', 22 Criminal

According to its current interpretation, the element requires that an overarching plan or policy is present that explicitly or implicitly orders, enables, promotes, or encourages the commission of multiple criminal acts.[149] Tribunals and courts have dealt with the element, however, its interpretation has not always been consistent.[150] Since the rise of the capabilities of non-state actors, it is recognised that entities such as groups, militias, and organisations holding state-like authority can be authors of such policies.[151] Hence, any state or powerful state-like entity attacking civilians on a large scale can invoke the concern of the international community.[152]

These elements form the context in which crimes against humanity occur, carried out through multiple enlisted unlawful acts and lift severe human rights violations to the status of crimes 'under international law'.[153] They 'exist as crimes whether or not the conduct has been criminalized under national law'.[154] Most importantly, under Article 7 of the ICC Statute, crimes against humanity can be committed during armed conflict and in peacetime.[155] The attack element does not require a military nature.[156]

Law Forum 3 (2011). For the element's historical development, see Chapter III at 3.2.3.4. For its application in the migration context, see *infra* at 4.3.

[149] Ambos, 'Article 7' in Ambos, *Rome Statute: 2022 Commentary* (n 1) para 4, 205; Article 7, Introduction, para 3, Elements of Crimes ('actively promote or encourage').

[150] For instance, a low threshold on the policy is required in *Prosecutor v. Tihomir Blaškić* (Judgment) ICTY, IT-95-14-T (3 March 2000) para 205; *Prosecutor v. Kupreškić et al.* (Judgment) TC, ICTY IT-95-16-T (14 January 2000) para 555 ('explicit or implicit approval' when states tolerate crimes); not be officially adopted, formalised, or promulgated in advance: *Katanga* (Judgment) (n 28) para 1108-1109 as opposed to the previous decision by the PTC I in *Prosecutor v. Germain Katanga* (Decision on the Confirmation of Charges) PTC I, ICC-01/04-01/07-717 (14 October 2008) para 396. A high threshold required in *Prosecutor v. Laurent Gbagbo* (Decision on the Confirmation of Charges) PTC I, ICC-02/11-01/11-656-Red (12 June 2014) para 215 ('formally adopted').

[151] Gerhard Werle and Boris Burghardt, 'Do Crimes Against Humanity Require the Participation of a State or a 'State-Like' Organization?', JICJ 10 (2012) 1151-1170.

[152] Ibid.

[153] 2019 ILC Draft Articles (n 144) Commentary to the Preamble, para 5. The conceptual boundaries of international crimes are, however, blurred, see Alexander K.A. Greenwalt, 'What is an International Crime?' in Kevin Jon Heller *et al.* (eds), *The Oxford Handbook of International Criminal Law* (n 51) 316 and Alejandro Chehtman, 'A Theory of International Crimes: Conceptual and Normative Issues' in ibid, 330.

[154] ILC, 'Report of the International Law Commission, Sixty-ninth Session' (1 May to 2 June and 3 July to 4 August 2017), UN Doc A/72/10, advanced version (11 August 2017) [2017 ILC Report] para 4.

[155] Ambos, 'Article 7' in Ambos, *Rome Statute: 2022 Commentary* (n 1) para 2; Bassiouni, *Crimes Against humanity* (2011) (n 28) 726. Detailed, Chapter III.

[156] Article 7, Introduction, para 3, Elements of Crimes.

3. Taxonomy of Article 7: The Contextual Elements and the Enlisted Acts

The first paragraph of Article 7 introduces the contextual elements. The *chapeau* requires that the acts must be committed as part of a 1) systematic or widespread 2) attack 3) against any civilian population, and 4) with knowledge of the attack.[157] The contextual framework of Article 7 therefore consists of four components codified in the opening clause.[158] The Statute defines 'attack' in paragraph 2 as a 'course of conduct involving the multiple commission of acts (…), pursuant to or in furtherance of a State or organizational policy to commit such attack',[159] concretising the broad element of attack. The taxonomy of Article 7 suggests that the *chapeau* represents the orchestrated, methodical, and large-scale dimension of the crime without mentioning the actual criminal acts or the degree of severity they must meet. The magnitude implied by the elements in the *chapeau*, however, lifts the crimes to the international community's concern and reflects the increased danger underlying a setting where multiple actors commit multiple unlawful acts.[160] The circumstances in which an attack occurs lower the natural inhibition of other potential perpetrators since they may feel encouraged.[161] This specific setting furthers the commission of crimes by other actors, in particular since perpetrators do not face prosecution or punishment.[162]

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[157] Article 7 (1) ICC Statute.
[158] Margaret McAuliffe deGuzman argues that the *chapeau* is comprised of only two components, namely 'the existence of a widespread or systematic attack' and 'against a civilian population', deGuzman, 'The Road from Rome' (n 36) 355. Mettraux argues that there are five general requirements; see Guénaël Mettraux, *International Crimes and the Ad Hoc Tribunals* (OUP 2006) 155.
[159] Article 7 (2)(a) ICC Statute.
[160] Ambos, *Treatise, Volume I* (n 24) 56.
[161] Ibid.
[162] Ibid.

Article 7 (1)(a) – (k) enumerates the acts introduced in the *chapeau* ('any of the following acts'). The list is non-exhaustive, as Article 7 (1)(k) stipulates by referring to other inhumane acts of similar character causing great harm or suffering.[163] However, in (a) – (j), only the most severe acts are listed, and other relevant acts under (k) must be of 'comparable character'[164] in 'nature and gravity',[165] determined by their consequence.[166] This comparability suggests that the Statute does not foresee a hierarchy among the acts; they are equally recognised as the most severe acts.[167] The list of acts is traditionally divided into two categories of underlying offences, namely murder-type and persecution-type crimes.[168] Murder-type crimes are criminal acts such as murder, enslavement, or torture. These acts are usually criminal under any legal system.[169] On the contrary, a persecution-type crime 'is not a crime *per se* in most of the world's legal systems'.[170] The crime is classified by the severe deprivation of fundamental rights contrary to international law and 'the intent to discriminate on prohibited grounds in conjunction with other acts'.[171]

[163] Article 7 (1)(k) ICC Statute; Article 7 (1)(k), paras 2-3, Elements of Crimes.
[164] *Bemba* Decision (n 142) para 193.
[165] Article 7 (1)(k), para 2, fn. 30, Elements of Crimes.
[166] For the interplay with the act of torture, see *Prosecutor v Zejnil Delalić et al.* (Judgment) TC, ICTY IT-96-21-T (16 November 1998) (*Čelebići* Case) para 463: 'The *Northern Ireland Case* best illustrates the inherent difficulties in determining a threshold level of severity beyond which inhuman treatment becomes torture'. For an analysis of the Northern Ireland Case (*Ireland* v. *United Kingdom* before the ECtHR), see Omar Grech, *Human Rights and the Northern Ireland Conflict: Law, Politics and Conflict, 1921-2014* (Routledge 2017) 133 ff. For other inhumane acts, Bassiouni, *Crimes Against humanity* (2011) (n 28) 434, listing bush cases, enslavement, and sexual slavery, clarifying that sexual slavery is not the same as enforced marriage due to nonsexual elements. The ICC recognised forced marriage in *Ongwen* (Judgment) (n 145) paras 2741-2753; but applied a narrow approach in *Katanga* (Confirmation Decision) (n 150) para 455. See also *Prosecutor v. KAING Guek Eav alias Duch* (Judgment) TC, ECCC 001/18-07-2007/ECCC/TC (26 July 2010) para 372 (denial of 'adequate food, hygiene and medical care'); Bernhard Kuschnik, 'Legal Findings of Crimes against Humanity in the *Al-Dujail* Judgments', Chinese JIL (2008) 504. For the interplay between the residual clause and the notion of humanity, see Kuschnik, 'Humaneness, Humankind and Crimes Against Humanity' (n 13) 501-530. For an extensive analysis of the residual clause and a radically new approach to its interpretation (arguing for legitimate retroactivity), see MacNeil, *Legality Matters* (n 14).
[167] For the hierarchy in terms of gravity/admissibility, see Chapter IV at 3.; suggesting that the intent requirement influences the nature and gravity of the crimes, see Micaela Frulli, 'Are Crimes against Humanity More Serious than War Crimes?', 12 EJIL 2 (2001) 329-350, at 337.
[168] UNWCC, History of the UNWCC (n 1) 178 (at (iii)(a)).
[169] Bassiouni, *Crimes Against Humanity* (2011) (n 28) 373, 377.
[170] Ibid, 405.
[171] Ibid.

The connection requirement postulates that some persecutory acts are not sufficiently severe to amount to crimes against humanity but 'through the cumulative effect together with other acts, may reach the necessary gravity'.[172] When mistreatment of civilians is based on prohibited grounds like ethnicity, race, or religion, the practice may amount to the crime of persecution.[173] The structure thus implies that the severity is inherent in murder-type but not in persecution-type acts, which is remedied by the additional criteria (connection with another act of Article 7 or crime within the Statute and discriminatory intent) necessary only for the crime of persecution.[174] For both categories, as for all crimes, the presence of the unlawful conduct (*actus reus*) and the mental element (*mens rea*) must be proven. Persecution-type crimes require specific intent, i.e. the intent to discriminate.[175] The level of mental engagement may thus vary among the unlawful acts.[176]

In the context of migration, it has been argued that the violations of migrants' fundamental rights amount to several enumerated acts, such as imprisonment, torture, deportation, persecution, and other inhumane acts. Researchers have argued that these acts are committed as part of a systematic and widespread attack,[177] justifying the turn to international criminal law as a response to severe human rights violations. The established body of literature is thus reviewed hereunder and evaluated against the brief definition and the structure of Article 7 ICC Statute.

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[172] Ambos and Wirth, 'The Current Law of Crimes Against Humanity' (n 19) 82.
[173] *Tadić* (Judgment) (n 1) para 697 ('the discrimination itself makes the act inhumane').
[174] Dealing with the question of what qualifies as inhumane, MacNeil, *Legality Matters* (n 14) 165; see also *Tadić* (Judgment) (n 1) para 697; *Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman* ("Ali Kushayb") (Document Containing the Charges, public redacted version) PTC II, ICC-02/05-01/20-325-Conf-Anx1-Corr2 (22 April 2021) (Situation in Darfur) para 57.
[175] Specific intent crimes are denoted by the purpose the perpetrator aims to achieve with their unlawful conduct and must cover not only the conduct but also the desired consequence, see Johan D. Van der Vyver, 'The International Criminal Court and the Concept of Mens Rea in International Criminal Law', 12 U. Miami Int'l & Comp. L. Rev. 57 (2004) 100-102.
[176] For instance, extermination requires intent 'to bring about the destruction of part of a population', see Article 7 (1)(b), para 1, Elements of Crimes; apartheid required the intent to maintain a regime of racial oppression and domination, see Article 7 (1)(j) paras 4-5, Elements of Crimes.
[177] See *infra* 4.3.

4. Migration Towards the Global North: Key Literature and Foundational Works

This review narrows the available material to the literature most suitable for studying the phenomenon of 'migration towards the Global North', where migrants are met with violence and exclusion, allegedly amounting to crimes against humanity. It focuses on two identified phases in the literature.

In the first phase, several scholars examined the human rights violations as shown by migration and human rights scholars under the framework of Article 7 in individual settings, such as in Greece and Australia.[178] They examined specific unlawful acts, arguing that the violations meet the threshold for crimes under international law. This phase is complemented by several Article 15 submissions to the OTP, which provide extensive information for concrete alleged crimes, highlighting certain practices, such as the 'Offshore Detention' by Australia,[179] the 'Failure to Rescue'[180] and 'Interception at Sea'[181] in the Central Mediterranean, 'Violence at Borders and in Reception and Identification Centres'[182] in the Eastern Mediterranean, and – under domestic and international (human rights) law – the 'Family Separation Policy' in the US.[183]

[178] Henderson, 'Australia's Treatment of Asylum Seekers' (n 5) 1161–1181; Kalpouzos and Mann, 'Banal crimes against humanity' (n 5) 1-28.
[179] Wilkie, 'Communication: Australia' (n 5); Stanford, 'Communication: Nauru and Manus Island' (n 5).
[180] Shatz and Branco, 'Communication: Central Med' (n 5).
[181] ECCHR, 'Communication: Interceptions' (n 5).
[182] SJAC, 'Communication: Greece' (n 5).
[183] Jenny-Brooke Condon, 'When Cruelty Is the Point: Family Separation as Unconstitutional Torture', 56 Harvard Civil Rights-Civil Liberties Law Review 27 (2021) 37-76; Beth Van Schaack, 'The Torture of Forcibly Separating Children from their Parents', Just Security (18 October 2018) <https://www.justsecurity.org/61138/torture-forcibly-separating-children-parents/>; Beth Van Schaack, 'Father-Son Separation at US Border Illustrates Lasting Harm That Demands Redress', Just Security (6 January 2021) <https://www.justsecurity.org/74079/father-son-separation-at-us-border-illustrates-lasting-harm-that-demands-redress/>.

While civil society and NGO reports are essential in the human rights and ICL realm, caution is necessary regarding their evidential weight. In several cases before the ICC, the reliability and probative value of NGO reports have been questioned or rejected entirely.[184] The reports and Article 15 submissions have therefore limited evidential weight in the criminal procedure; however, they serve as an important tool to bring alleged crimes to the attention of the Prosecutor. It is the Prosecutor's obligation to assess their reliability and corroborate the information with additional evidence.[185] In the present research, these sources are considered supporting material for academic opinion that provides legal interpretations of the information submitted under Article 7. Moreover, the reports serve as indicators of the existence of legal elements, such as the systematicity of conduct, but require thorough investigations by the OTP as the competent body. This reinforces the claim made in this thesis that the OTP should commence investigations into the alleged crimes to ascertain whether the allegations persist.

Following elaboration on the conceptual boundaries of this research, this section reviews the available sources providing the legal opinion on migrant-related abuses. It further underscores that a more detailed assessment of the crime of persecution and the policy of toleration[186] is necessary in academia. Both aspects are particularly relevant in the context of migration and have not been explored sufficiently. The section concludes with the

[184] *Prosecutor v. Jean-Pierre Bemba* (Decision on the Admissibility and Abuse of Process Challenges) TC III, ICC-01/05-01/08-802 (24 June 2010) para 255; *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 35; *Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona* (Public Redacted Version of 'Defence Response to "Prosecution's Fifteenth submission of miscellaneous items of evidence via the "bar table" (ICC-01/14-01/18-2058), 7 September 2023') TC V, ICC-01/14-01/18 (4 October 2023) paras 7-10. See also Geert-Jan Alexander Knoops, 'The Evidentiary Value of NGO and IO Reports at the ICC' in ibid, *International Criminal Evidence at the International Criminal Court* (Brill | Nijhoff 2024) 243-259.

[185] *Gbagbo* (Adjournment Decision) (n 184) paras 36-37.

[186] As defined in Chapter I at 2.

investigative status into the alleged crimes before the ICC, highlighting the enduring impunity, both domestically and internationally.

In the second phase, although partly overlapping with the first, several scholars took a holistic approach and studied the broader category of the Global North/western democracies, possible underlying theories of the concept of crimes against humanity, and the continuing expressive value of ICL in the face of impunity.[187] The section concludes by emphasising the persuasive and abundant academic opinion, which this thesis builds upon. Although scholarship has engaged with concrete substantive law questions and broader issues of ICL in the context of migration, this thesis identifies a gap in the current research. Despite growing academic interest in the intersection of ICL and migration, it transpires that a core issue remains largely unexamined, namely, why crimes against migrants as crimes committed in *peacetime* escape investigation and prosecution. This thesis directly addresses that gap, interrogating the structural and conceptual foundations of this enduring impunity.

4.1. Conceptual and Phenomenological Boundaries

This section defines the parameters for the literature relevant to this thesis. First, it presents the phenomenological boundaries pertaining to 'migration' and the 'Global North.' It briefly outlines the actors and a potential complementarity issue in the context of democratic states. It then discusses the different terminology used for migrants and sub-categories such as refugees and irregular migrants. It shows that migrants as such are referred to as a security threat and describes the relevant state policies. Moreover, it

[187] Among others, Kalpouzos, 'Violence against Migrants' (n 5).

clarifies that migrants qualify as a civilian population under Article 7 and reflects on sub-categories as potentially required under the framework of the crime of persecution.

4.1.1. State Policies of the Global North

As the present research examines peacetime crimes against humanity and the phenomenon of 'migration towards the Global North,' relevant literature and CSO action were chosen based on diverse parameters. Leading scholars in the field of border violence and crimes have focused their attention on the US, Australia, and the external border states of the EU and produced a rich body of research on these regions.[188] These states are considered wealthy, liberal democracies belonging to the so-called Global North.[189] Researchers have highlighted that the violations occur on a global scale,[190] as states imitate or copy one another's models of migration management, collaborate on these matters, and outsource their responsibilities.[191] The current state of legal opinion suggests that these states have been involved in crimes against migrants amounting to crimes against humanity according to Article 7 ICC Statute.

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[188] Ibid; Mann, 'Border Violence as Crime' (n 5) 689; Hodgson, 'Resisting the State Crimes' (n 5); von Förster, '*Verbrechen gegen die Menschlichkeit'* (n 5).

[189] Ibid; see also the works in human rights and migration studies: Kent *et al.*, 'Changing Motivations or Capabilities?' (n 91) ('Western liberal democracies'); Daniel Ghezelbash, 'Hyper-Legalism and Obfuscation: How States Evade Their International Obligations Towards Refugees', 68 The American Journal of Comparative Law 3 (2020) 479–516 ('wealthy liberal democracies); David Scott FitzGerald, *Refuge Beyond Reach: How Rich Democracies Repel Asylum Seekers* (OUP 2019); Hodgson, 'Resisting the State Crimes' (n 5); see also, challenging the dichotomy of 'western'/'non-western' and 'liberal'/'non-liberal'; Katharina Natter, 'Rethinking immigration policy theory beyond 'Western liberal democracies'', 6 Comparative Migration Studies 4 (2018) 1-21; Penny Green and Mike Grewcock, 'The War against Illegal Immigration: State Crime and the Construction of a European Identity', 14 Current Issues in Criminal Justice 1 (2022) 87-101, referring to 'zones of exclusion' at 88.

[190] Mann, 'Border Violence as Crime' (n 5) 715, referring to it as a 'global plot' at 708; some authors argue that powerful states installed a 'Global Apartheid' system, for instance, Catherine Besteman, *Militarized Global Apartheid* (Duke UP 2020) 3; Ainhoa Ruiz Benedicto *et al.*, 'A Walled World Towards a Global Apartheid' (Centre Delàs d'Estudis per la Pau 2020).

[191] Ghezelbash, 'Hyper-Legalism' (n 189) 10, 21; FitzGerald, *Refuge Beyond Reach* (n 189) 12; Bill Frelick *et al.*, 'The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants' 4 JMHS 4 (2016) 190-220; on extraterritoriality and ICL, Kalpouzos, 'Violence against Migrants' (n 5).

The present research places the most emphasis on state policies within the meaning of Article 7, as opposed to state-like entities and organisational policies. However, some authors have argued that the EU as a whole and Frontex could qualify as organisations within the meaning of Article 7.[192] Moreover, the primary focus lies on state actors, such as policymakers and law enforcement personnel, in particular, border guards, whose conduct is commonly attributable to the state;[193] notwithstanding involved militias in Libya and a controversial debate about the liability of Frontex personnel and reports of 'masked men',[194] who have allegedly been implicated in the crimes.

Furthermore, the US, Australia, and the EU are at peace, providing the framework for studying crimes against humanity beyond armed conflict. They also follow the rule of law and are bound by a minimum set of human and refugee/asylum rights.[195] Except for the US, all states are also State Parties to the ICC.[196] As the body of literature in the field suggests, in these parts of the world, violations of these rights and freedoms of migrants possibly trigger the ICC's jurisdiction.[197] Given that all states hold that they follow the rule of law, it may be objected that the ICC does not take action based on complementarity, as states have the primary prosecutorial obligation.[198] When unable or unwilling, the ICC may

[192] For instance, von Förster, '*Verbrechen gegen die Menschlichkeit*' (n 5) 124-125.
[193] Cryer *et al.*, *An Introduction to International Criminal Law and Procedure* (n 9) 584. See for attribution and imputation of conduct, Ambos, *Treatise, Volume I* (n 24) 83-84.
[194] Kalpouzos and Mann argue that Frontex may be held liable by co-perpetration or by aiding and abetting the crimes committed by the Greek agents, see Kalpouzos and Mann, 'Banal crimes against humanity' (n 5) 21-23; similarly, holding that the EU and Frontex are complicit, SJAC, 'Communication: Greece' (n 5) paras 7, 69; on masked men, see HRW, '"Their Faces Were Covered": Greece's Use of Migrants as Police Auxiliaries in Pushbacks' (7 April 2022).
[195] See the list of signatories (as of September 2019): United Nations High Commissioner for Refugees (UNHCR), 'States parties, including reservations and declarations, to the 1951 Refugee Convention' <https://www.unhcr.org/5d9ed32b4> and 'to the 1967 Protocol Relating to the Status of Refugees' <https://www.unhcr.org/5d9ed66a4>. Ratification of the 18 International Human Rights Treaties: Status (last updated 2 August 2020) <https://indicators.ohchr.org/>. The US is bound by the smallest number of treaties (5), Australia (14), and EU MS (between 13 and 17), they are also bound by the ECHR and the EU Charter of Fundamental Rights (EU CFR).
[196] ICC, State Parties – Chronological list, Assembly of State Parties to the Rome Statute <https://asp.icc-cpi.int/states-parties/states-parties-chronological-list>.
[197] See *infra* 4.2.1. for comments on jurisdiction over crimes by US agents.
[198] Article 17 (1)(a) ICC Statute.

intervene.[199] In particular, since the ICC issued arrest warrants against democratically elected leaders of Israel,[200] the discussion about exceptions for states that follow the rule of law and maintain functioning judicial systems resurfaced.[201] The general debate is not appraised since jurisdictional matters are not the focus of this research; however, the lack of engagement on the domestic level is important for different reasons in the context in which this thesis is framed.

The democratic nature of the states does not prematurely preclude the ICC's jurisdiction based on complementarity. The states under review may not be *unable* to prosecute themselves, having the institutional and financial means, but the persistent impunity indicates that the states are *unwilling* to prosecute genuinely. More importantly, the specific role and quality of this *unwillingness*, i.e. the impunity in functioning states outside the destructive circumstances of armed conflict, is key to the proposed understanding of impunity in peacetime.[202] *Deliberately* using impunity as a political choice is scrutinised in light of the exceptional policy of toleration and appears as a substantive legal element in this context.[203] Moreover, as shown in Chapter IV, the lack of accountability embedded in the domestic system, which is used to maintain and encourage the systemic violations, indicates a structural dimension of impunity. Due to a lack of ICC action, this impunity is consolidated internationally.

In sum, the research focuses on state actors and migration-related state policies enacted by rather wealthy states, following the rule of law. These states, primarily, the EU and its

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[199] Ibid, ICC-OTP, 'Policy on Complementarity and Cooperation' (April 2024).
[200] ICC, 'Situation in the State of Palestine: ICC Pre-Trial Chamber I rejects the State of Israel's challenges to jurisdiction and issues warrants of arrest for Benjamin Netanyahu and Yoav Gallant', Press Release (21 November 2024).
[201] See a compelling blog post on the issue by Malcolm Jorgensen, 'A "Democratic Exception" to ICC Jurisdiction: The Law and Politics of Double Standards', VerfBlog (6 December 2024) <https://verfassungsblog.de/exception-to-icc-jurisdiction/>.
[202] See *infra* 4.3.2.
[203] Vázquez Valencia, *Impunidad y Derechos Humanos* (n 53) 261; Article 7, Introduction, para 3, fn. 6, Elements of Crimes.

Member States, Australia, and the US, belong to the so-called Global North/Western sphere and are at peace.

4.1.2. Migrants as a Perceived Threat and Group of Victims

The body of literature does not show a unified position on the group of victims. This research encompasses the broad dimension of 'migrants,' i.e. people on the move (towards the Global North), not restricting it to a sub-category, as defined in Chapter I.[204] However, some authors, such as Kalpouzos and Mann, have assessed the alleged crimes against refugees and asylum-seekers.[205] Others, such as Stine von Förster, refer to so-called 'illegal,' 'irregular,' or 'unauthorised' migrants.[206] Several other sources involve similar language.[207] Concurrently, in the political discourse, the terminology of 'illegal migration' faced wide criticism since its language bears the risk of illegalising human beings.[208] To prevent such language, the public discourse has evolved from referring to a wrongdoing, to describing the entry or stay, involving terminology such as 'irregular,' 'unauthorised,' and 'undocumented.' These terms were intended to humanise migrants who enter without permission.[209] However, political debate and public opinion often associate irregular

[204] Chapter I at 4.
[205] Kalpouzos and Mann, 'Banal crimes against humanity' (n 5).
[206] von Förster, '*Verbrechen gegen die Menschlichkeit*' (n 5), limiting the analysis to 'irregular migration'.
[207] For instance, UNHCR, Executive Committee of the High Commissioner's Programme, 'Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach', 18th Meeting of the Standing Committee (EC/50/SC/CPR.17) (9 June 2000); critically: Rebecca Hamlin, ''Migrants'? 'Refugees'? Terminology Is Contested, Powerful, and Evolving', Migration Policy Institute (24 March 2022).
[208] François Crépeau and Maja Vezmar, 'Words Matter: 'Illegal', 'Irregular', 'Unauthorized', 'Undocumented'', Policy Brief, World Bank Group (2021); Jennifer Merolla *et al.*, ''Illegal,' 'Undocumented,' or 'Unauthorized': Equivalency Frames, Issue Frames, and Public Opinion on Immigration', 11 Perspectives on Politics 3 (2013) 789-807.
[209] On the controversial 'No One IS Illegal' movement, see Tiina Seppälä, ''No One Is Illegal' As a Reverse Discourse Against Deportability', 36 Global Society 3 (2022) 391-408.

migration with ‘mass’ and ‘uncontrolled’ migration, inverting the intended effect, which results in further dehumanisation of migrants.[210]

As shown in Chapter I, states have increasingly engaged in labelling migration *per se* as a security risk. Several authors demonstrate that migration is being framed as a threat to national security and criminalised, without consistently differentiating among categories.[211] Most states commonly refer to migration control and management, yet researchers show that the states’ measures aim to *prevent* migration, particularly through deterrence and defence policies.[212] Adequately labelling these policies is crucial to examine the viability of the state action based on the security rationale.[213] This thesis refers to ‘deterrence and defence’ following Kent *et al.*’s suggested differentiation between measures aimed at impacting the motivation (deter) or the capabilities (defend).[214] ‘Defence’ measures for the purpose of this thesis are measures securitising and/or militarising the state against migrants as the perceived threat. As crimes against humanity essentially involve the

[210] Tendayi Achiume, ‘Beyond Prejudice: Structural Xenophobic Discrimination Against Refugees’, 45 Georgetown Journal of International Law 3 (2014) 343; Stephen M. Utych, ‘How Dehumanization Influences Attitudes toward Immigrants’, 71 Political Research Quarterly 2 (2017) 440-452; Amanda Warnock, ‘The dehumanization of immigrants and refugees: A comparison of dehumanizing rhetoric by all candidates in three U.S. presidential elections’, Journal of Purdue Undergraduate Research 9 (2019) 49-59; Cathryn Costello and Michelle Foster, ‘(Some) refugees welcome: When is differentiating between refugees unlawful discrimination?’, 22 International Journal of Discrimination and the Law 22 (2022) 244-280.

[211] Green and Grewcock, ‘The War against Illegal Immigration’ (n 189); Alexandria J. Innes, ‘Human Mobility and Security’ in Edwin Daniel Jacobs (ed), *Rethinking Security in the Twenty-First Century* (Palgrave Macmillan 2017) 174; Nick Vaughan-Williams, ‘Populist and ‘Post-Truth’ Border Politics: The Securitization of Public Opinion on Migration’ in *Vernacular Border Security: Citizens' Narratives of Europe's 'Migration Crisis'* (OUP 2021) 60-95; Graham C. Ousey and Charis E. Kubrin, ‘Immigration and Crime: Assessing a Contentious Issue’, Annual Review of Criminology 1 (2018) 63-84; Violeta Moreno-Lax *et al.*, ‘Between Life, Security and Rights: Framing the Interdiction of ‘Boat Migrants’ in the Central Mediterranean and Australia’, 32 Leiden Journal of International Law 715 (2019); Monika Wohlfeld, ‘Is migration a security issue?’ in Grech and Wohlfeld, *Migration in the Mediterranean* (n 101) 61-77.

[212] *Inter alia:* Thomas Gammeltoft-Hansen and Nikolas F. Tan, ‘The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy’, 5 JMHS 1 (2017) 29; Thomas Gammeltoft-Hansen and Nikolas Feith Tan, 'Extraterritorial Migration Control and Deterrence', in in Costello *et al.*, *Oxford Handbook for International Refugee Law* (n 5) 502; David Scott FitzGerald, ‘Remote control of migration: theorising territoriality, shared coercion, and deterrence’, 46 Journal of Ethnic and Migration Studies 1 (2020) 4-22; UN GA, ‘Report on means to address the human rights impact of pushbacks of migrants on land and at sea: Report of the Special Rapporteur on the Human Rights of Migrants, Felipe González Morales’, HRC, UN Doc A/HRC/47/30 (12 May 2021) para 102 (pushbacks as deterrence); Kent *et al.*, ‘Changing Motivations or Capabilities?’ (n 91) 859; Mann, ‘Border Violence as Crime’ (n 5) 721.

[213] See groundwork on the security narrative, Snider, *Bloodlands* (n 13); Snider, *On Tyranny* (n 13).

[214] Kent *et al.*, ‘Changing Motivations or Capabilities?’ (n 91) 859.

constitutive element of a state policy, researchers explored these measures against their compliance with international law standards and challenged the security paradigm as a justification.[215]

In addition, the so-called 'refugee crisis,' which peaked in 2015, is increasingly referred to as a 'migration crisis'.[216] This thesis thus utilises the states' framing of migration/migrants as the embodiment of crisis and threat, taking the alleged perpetrators' perspective. Violeta Moreno-Lax highlights that the crisis narrative results in dehumanisation and instrumentalisation of migrants, which states misuse to legitimise and enable further violations.[217] Moreno-Lax and other scholars note that the crisis and emergency narratives are abused to justify restrictive measures, including militarised responses such as the deployment of NATO forces.[218] According to them, the security threat argument has evolved into a state paradigm, created, deliberately upheld, and used as a tactic.[219] This discussion from human rights, migration, and political scholarship has informed several contributions in ICL and sets the groundwork for formulating the practical approach of reframing the 'migration crisis' as a dimension of conflict relevant to the OTP's legal reasoning in Chapter V.[220]

In brief, the present research studies migrants/migration as a perceived threat by states, which respond with deterrence and defence policies to prevent migration.

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[215] See for the EU and Australia: Moreno-Lax *et al.*, 'Between Life, Security and Rights' (n 211); for the US: Pia Orrenius and Madeline Zavodny, 'Do Immigrants Threaten U.S. Public Safety?', ZBW Working Paper 1905 (SSRN 2019); Daniel Silander and John Janzekovic, 'State versus Human Security: The Great Debate' in *Responsibility to Protect and Prevent: Principles, Promises and Practicalities* (Anthem Press 2013); Center for Security Studies, 'Human Security: Genesis, Debates, Trends', CSS Analysis in Security Policy No 90, ETH Zurich (March 2011); Grech and Wohlfeld, *Migration in the Mediterranean* (n 101) 61-77.
[216] Moreno-Lax, 'The "Crisification" of Migration Law' (n 47) 2.
[217] Ibid, 11.
[218] Ibid, 22-24; Albahari, *Crimes of Peace* (n 66) 203; Lutterbeck, 'Policing Migration in the Mediterranean' (n 72) 59-82. For groundwork on the state of exception, see Agamben, *Homo Sacer* (n 13) introducing the concept of the state of exception used to exclude and dehumanise; and specifically, Giorgio Agamben, *State of Exception* (The University of Chicago Press 2005).
[219] Ibid, 11; Vaughan-Williams, 'Populist and 'Post-Truth' Border Politics' (n 211) 60.
[220] See Chapter V at 2.2.

4.1.3. Migrants as a Civilian Population under Article 7 (1) ICC Statute

Crimes against humanity involve *any* civilian population as a particularly wide category, not requiring a specific characteristic,[221] which includes foreign nationals.[222] Addressing migration as such reflects the wide protection scope of crimes against humanity more accurately, which only differentiates between civilians and non-civilians (combatants and non-combatants),[223] delineating crimes against humanity from war crimes.[224]

The migrant population must be civilian and become the direct target of the attack, carried out by unlawful acts enlisted in Article 7 (1)(a)-(k).[225] Even a not entirely homogenous population qualifies under Article 7, as a few combatants do not render the population non-civilian.[226] It protects those who do not actively engage in fighting, lay down their

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[221] The ICC identified the *perceived* 'political affiliation' as sufficiently describing the targeted population in *Prosecutor v. Uhuru Muigai Kenyatta (*Situation in the Republic of Kenya, 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 (29 January 2010) para 110.

[222] *Tadić* (Judgment) (n 1) paras 635 and 644 ('membership of a targeted civilian population'); on the history of crimes against a state's own nationals, UNWCC, History of the UNWCC (n 1) 179. Detailed, Chapter III.

[223] In times of conflict: *Tadić* (Judgment) (n 1) para 640; *Prosecutor v. Vlastimir Dordevic* (Appeal Judgment) ICTY, IT-05-87/1-A (27 January 2014) para 522; *Blaškić* (Judgment) (n 150) para 214; *Prosecutor v. Dragomir Milošević* (Judgment) ICTY, IT-98-29/1 (12 December 2007) para 947; *Prosecutor v. Dragomir Milošević* (Appeal Judgment) ICTY, IT-98-29/1 (12 November 2009) paras 58-60; *Akayesu* (Judgment) (n 26) para 582; for an interpretation of civilian outside of armed conflict: *Prosecutor v. Clement Kayishema and Obed Ruzindana* (Judgment) TC, ITCR-95-01 (21 May 1999) para 127, anyone who does not 'have a duty to maintain public order and have the legitimate means to exercise force.' For a critique of this judgment, see van den Herik, 'Using Custom to Reconceptualize Crimes Against Humanity' (n 18) 94.

[224] Leila Nadya Sadat, 'A Comprehensive History of the Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity' in Sadat, *Forging a Convention* (n 13) 464, para 31; Luban, 'A Theory of Crimes Against Humanity' (n 1) 119. However, in armed conflict, often both norms are breached which leads to the question of cumulative charging, see Mettraux, 'Crimes against Humanity' (n 148) 301.

[225] *Kunarac et al.* (Judgment) (n 142) para 421 ('the primary object of the attack'); confirmed in *Kunarac et al.* (Appeal Judgment) (n 27) paras 92, 103; reiterated in *Prosecutor v. Jovica Stanišić and Franko Simatović* (Judgment) ICTY, IT-03-69-T (30 May 2013) para 964; refining that the 'intention of the agent' determines this element, *Blaškić* (Judgment) (n 150) para 208, footnote 401; *Prosecutor v. Radovan Karadžić* (Judgment) ICTY, IT-95-5/18-T, Public Redacted Version of Judgment Issued on 24 March 2016 – Volume I of IV (24 March 2016) para 475; *Prosecutor v. Jadranko Prlić* (Judgment) ICTY, IT-04-74-T (29 May 2013) para 36; *Bemba* Decision (n 142) para para 95; *Kenya* Decision 2010 (n 33) para 82; *Prosecutor v. Charles Ghankay Taylor* (Judgment) SCSL-03-01-T (18 May 2012) (*Taylor* Judgment) para 548; confirmed in *Prosecutor v. Charles Ghankay Taylor* (Appeal Judgment) SCSL-2003-01-PT (26 September 2013) para 258, fn. 603.

[226] *Tadić (*Judgment) (n 1) para 639; confirmed in *Prosecutor v. Tihomir Blaškić* (Appeal Judgment) AC, ICTY IT-95-14-A (29 July 2004) para 104; holding that the determination for war crimes depends on IHL: *Kenya* Decision 2010 (n 33) para 82, fn. 74.

weapons, or are otherwise *hors de combat*.[227] The civilian population element aims to reflect a 'collective nature'[228] and safeguard vulnerable persons vis-à-vis a controlling and equipped state (or entity).[229] According to one controversially viewed ruling by the ICTR for peacetime contexts, it applies to individuals who do not exercise legitimate or *de facto* force.[230] A more adequate definition for peacetime contexts remains pending.

According to the current interpretation, migrants *prima facie* fall within the ambit of the protective framework of the civilian population element of Article 7, as also shown by researchers.[231] In Chapter V, it is demonstrated that the boundaries may nonetheless become blurred in the context of migration. Instances of escalations of border violence have occurred, which are evaluated to compare and contrast elements of armed conflict under IHL/ICL and dimensions of conflict under PCS.

4.1.4. Identifying and Targeting Migrants According to the Crime of Persecution

Referring to migrants in certain sub-categories, however, is useful and necessary to examine whether they are persecuted under Article 7 (1)(h), requiring an identifier and a prohibited discriminatory ground.[232] Targeting civilians as persecution can take place solely based on the attribution of a characteristic to the victims, such as 'illegal migrant,'

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[227] Ibid.
[228] *Tadić (*Judgment) (n 1) para 635.
[229] Ambos, *Treatise, Volume II* (n 30) 56; Sadat, 'A Comprehensive History' (n 224) 464, para 31; UN GA, 'Guiding Principles on Business and Human Rights' as annexed to Human Rights Council 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie', UN Doc A/HRC/17/31 (21 March 2011) Principle 1 (the duty to protect its civilians generally).
[230] *Kayishema and Ruzindana* (Judgment) (n 223) para 127; von Förster, *Verbrechen gegen die Menschlichkeit durch Migrationskontrolle?'* (n 5) 103-104.
[231] Kalpouzos and Mann, 'Banal crimes against humanity' (n 5) 12; Henderson, 'Australia's Treatment of Asylum Seekers' (n 5) 1167; von Förster, '*Verbrechen gegen die Menschlichkeit'* (n 5) 102-106.
[232] Article 7 (1)(h) and 7 (2)(g) ICC Statute ('identifiable group or collectivity' and 'grounds that are universally recognized as impermissible under international law').

the perspective of the perpetrator is determining.[233] Although disagreement on the applicable discriminatory grounds exists, scholars and CSO have highlighted that labels such as 'asylum-seekers,' 'refugees,' 'irregular,' 'illegal,' or 'unauthorised' become relevant as prohibited discriminatory grounds under Article 7 (1)(h), arguing that the legal status or the means of entry meet the provision's requirements of a prohibited ground.[234]

This crime plays a critical role in the context of migration and peacetime more broadly. However, due to the limited scope, this thesis primarily reviews the arguments provided in the relevant literature and offers a brief additional perspective prompted by the invasion of Ukraine and the differential treatment of migrants. In the section below, the crime's centrality is discussed, and the need for further research on the unique crime is formulated.[235] The thesis identifies a research gap on the crime of persecution overall. The potential of Article 7 to address structural violence, which is examined in Chapter IV, sheds new light on the crime of persecution. In light of the findings, Chapter VI offers deliberations and suggests an in-depth analysis for a future project.

In conclusion, parameters concerning the phenomenological boundaries of migration towards the Global North and legal specifics required under Article 7 resulted in a rich body of literature and additional commentary predominantly from the period of 2014 to 2024, which is reviewed in two parts. First, the works that provided the main arguments that the constitutive elements of Article 7 are satisfied are presented. Second, the contributions that take a meta-perspective on international criminal law and migration as a distinct synthesis of two fields of study are critically examined. The present study is

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[233] Powderly and Hayes, 'Article 7' in Ambos, *Rome Statute: 2022 Commentary* (n 1) para 146; in detail reading racial grounds, see Lingaas, 'The Elephant in the Room' (n 26) 516; Carola Lingaas, *The Concept of Race in International Criminal Law* (Routledge 2019).

[234] Henderson, 'Australia's Treatment of Asylum Seekers' (n 5) 1180 (mode of arrival); von Förster, '*Verbrechen gegen die Menschlichkeit*' (n 5) 254 (mode of arrival), 257 (political grounds), likewise Kalpouzos and Mann, 'Banal crimes against humanity' (n 5) 17-18.

[235] See *infra* 4.2.2.

situated between these two research segments, one dealing with substantive legal issues such as interpreting the crime of deportation in the context of migratory movements and the other with underlying normative and political questions related to crimes against humanity and ICL as a whole.

4.2. Crimes Against Migrants under Article 7: Presenting Substantive Legal Elements

The early segment in literature dealing with crimes against migrants under the ICL framework built upon a rich body of research from human rights and migration law studies, which have examined the systematic nature of the violations, the character and purposes of the migration policies underlying the violations, jurisdictional issues, and the prevailing lack of accountability.[236] This section presents the established legal opinion related to selected constitutive elements required under Article 7.

The research on crimes against migrants under Article 7 offers three main arguments, justifying the turn to international criminal law requiring attention by the ICC. It provides that 1) the degree of severity of the crimes is met because the violations infringe on life, liberty, and physical and mental integrity, 2) the violations occur with systematicity and on a large scale, and 3) the individual acts of perpetrators are interconnected with an overarching plan, namely the implementation of harsh deterrence and defence policies to prevent migration. Not all elements are controversial, such as migrants as a civilian population, as explored above. Thus, this section focuses on selected enlisted acts and the policy requirement, where clarifications concerning specific interpretations of these components are directly relevant to this thesis.

[236] Among others, the Special Issue, 'Border Justice', German Law Journal (n 102).

4.2.1. Violations of the Right to Life, Liberty, and Physical and Mental Integrity

The research on migrant abuses as crimes against humanity began in 2014, with the examination of the Australian offshore practices under the framework of Article 7. Claire Henderson, the first academic contributor in the field, argued that Australian actors are committing the crime of imprisonment and persecution (Article 7 (1)(e) and (h)) by transferring migrants into arbitrary, prolonged detention under inhumane conditions in PNG and Nauru.[237] Her assessment followed the first Article 15 communications to the OTP, submitted by Tracie Aylmer and Andrew Wilkie, a Member of the Australian Parliament.[238]

Following Aylmer's submission, which did not provide a detailed analysis of the crimes' interpretation under ICL,[239] Wilkie argued that imprisonment, other inhumane acts (Article 7 (1)(k)) and deportation/forcible transfer (Article 7 (1)(d)) apply to the Australian practices.[240] Henderson previously rejected the crime of deportation, accepting that asylum-seekers are not 'lawfully present' in the territory as required under Article 7 (1)(d), as migrants enter illegally and remain not legally present.[241] The interceptions and pushbacks by Australian agents would not qualify under this interpretation.

In response to the disagreement on the crime of deportation, Vincent Chetail proposed that asylum-seekers are legally present in the host state's territory during their pending asylum procedure and cannot be lawfully removed under coercion.[242] He supports the claim by

[237] Henderson, 'Australia's Treatment of Asylum Seekers' (n 5) 1178.
[238] Tracy Aylmer, 'Breaches of the Rome Convention by the Current Australian Government' (2014); Wilkie, 'Communication: Australia' (n 5).
[239] Ibid, 42.
[240] Wilkie, 'Communication: Australia' (n 5) 6-10.
[241] Henderson, 'Australia's Treatment of Asylum Seekers' (n 5) 1177-1178.
[242] Chetail, 'Is There any Blood on my Hands?' (n 5) 926.

referring to the prohibition to penalise illegal entry according to Article 31 (I) of the 1951 Refugee Convention,[243] concluding that it 'presumes that asylum-seekers are lawfully present under international law'.[244] Explicitly, however, the Convention only safeguards refugees from penalisation as the illegality has a 'good cause'.[245] Chetail interprets the Convention according to its purpose, claiming that it pertains to 'exempting asylum-seekers from the entry requirements generally imposed on immigrants'.[246] Chetail thereby moves beyond the traditional interpretation of the crime of deportation in the Statute.[247] In particular, he rejects the interpretation closely connected to forced transfers within conflict settings, which imposes a narrow notion on the element of 'lawful presence' and protects the home of the civilian population.[248]

This observation is significant since it highlights that interpretations of the crimes under ICL are highly influenced by case law and research connected to situations of armed conflict. There are limited sources that provide insights into the specifics of crimes against humanity in peacetime, particularly forced transfer, as this appears to be an inherent conflict-related act, as the movement of populations is often required for military reasons. In such circumstances, it becomes a war crime when the military action is not justified.[249] Proposals such as Chetail's on the crime of deportation invoke both positive and negative reactions. It may be read as overstretching the concept or to 'set in motion a novel legal interpretation', as Itamar Mann notes.[250] It may indeed be perceived as novel. More adequately, it fills a gap left by the lack of precedents of genuine peacetime adjudication.

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[243] Ibid, 926; UN GA, Convention Relating to the Status of Refugees (28 July 1951) United Nations, Treaty Series (vol. 189) 137, UN Res 429 (V) [Refugee Convention].
[244] Ibid, 926.
[245] Guy S. Goodwin-Gill, 'Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection', UNHCR (October 2001) paras 24-25, 34.
[246] Chetail, 'Is There any Blood on my Hands?' (n 5) 926.
[247] Mann, 'Border Violence as Crime' (n 5) 692-693.
[248] Chetail, 'Is There any Blood on my Hands?' (n 5) 923.
[249] Ibid, 922-923.
[250] Mann, 'Border Violence as Crime' (n 5) 692-693.

Such proposals may be read as new and creative, but in essence, they provide crucial interpretations for crimes committed outside the ambit of armed conflict. In addition, they underscore the rule of law and human rights frameworks underlying the obligations of states, such as the Refugee Convention, as interpretative tools in ICL. A different set of regulations applies during armed conflict and occupation, safeguarding civilians from deportation.[251] This does not apply to peacetime contexts. Such interpretations therefore significantly contribute to advancing the concept of crimes against humanity in peacetime and can assist in clarifying the specificities that underlie the crimes' rationale according to the respective setting.

Chetail's interpretation influenced a third Article 15 submission drafted by several lawyers and filed in 2017.[252] The senders provided extensive evidence for believing that (besides deportation as interpreted by Chetail) unlawful imprisonment, torture, persecution, and other inhumane acts are being committed (Article 7 (1)(e), (f), (h), (k)).[253] This communication and a fourth one submitted by activist U Ne Oo in 2018, claiming that the crime of enslavement applies (Article 7 (1)(c)),[254] further addressed the involvement of private actors in the outsourcing efforts by Australia for the first time.[255]

In 2020, the OTP replied to these submissions. It found that there is sufficient evidence to believe that the extent, duration, and conditions in the offshore detention centres amount to the crimes of imprisonment or other severe deprivation of physical liberty under Article 7 (1)(e).[256] However, the OTP rejected all other acts, particularly the interpretation of 'lawful

[251] Chetail, 'Is There any Blood on my Hands?' (n 5) 940-941.
[252] Stanford, 'Communication: Nauru and Manus Island' (n 5) paras 88-90. See also submissions by Refugee Action Collective, 'Communiqué for the Office of the Prosecutor regarding the application to the International Criminal Court' (28 March 2016); Courtenay Barklem *et al.*, 'In the Matter of a Prosecution of the Australian Government in Relation to Indefinite Detention and Forcible Removal of Asylum Seekers: Communiqué for the Prosecutor at the International Criminal Court' (2016).
[253] Ibid, paras 63-95.
[254] U Ne Oo, 'Communication to the OTP: Enslavement in Manus Island and Nauru' (n 5) para 3.
[255] Ibid, para 4; Stanford, 'Communication: Nauru and Manus Island' (n 5) paras 96-97.
[256] ICC-OTP, Report on Preliminary Examinations (n 50) paras 47-48.

presence' as proposed by Chetail, and the involvement of private actors.[257] The OTP nonetheless found that migrants and asylum-seekers 'were detained on average for upwards of one year in unhygienic, overcrowded tents or other primitive structures while suffering from heatstroke resulting from a lack of shelter from the sun and stifling heat'.[258] It recognised the resulting health problems, lack of adequate medical care, and mental suffering, but considered other mistreatment as 'sporadic acts of physical and sexual violence'.[259] Sporadic and opportunistic violence is not covered by Article 7.[260] The other alleged acts were rejected with very limited detail. Despite recognising one enlisted crime, the Office declined to engage in PE due to a lack of a connection to a ('deliberate, or purposefully designed') policy.[261]

This caused wide criticism among scholars and civil society, who characterised the OTP's reasoning as erroneous and a misinterpretation of the law.[262] This thesis shares the critique, and Chapter V engages more profoundly with the reactions and (mis)interpretation relating to this case. It is one of the most relevant sources for this thesis for two reasons. First, it is the only migration-related case that received a response, which gives insights into the legal reasoning of the OTP. Second, as noted by Mann and Heller, the OTP applied a threshold that is not foreseen in the Statute.[263] Instead, although the OTP does not explicitly refer to the policy of toleration, the language used (deliberate, purposeful) indicates that the Office may have based its reasoning on this form of policy. This exceptional form of passively

[257] Ibid, paras 49-52.
[258] Ibid, para 46.
[259] Ibid, para 46.
[260] *Kenya* Decision 2010 (n 33) paras 117, 155 and Dissenting Opinion of Judge Hans-Peter Kaul, paras 82 and 112; *Ongwen* (Judgment) (n 145) para 2678.
[261] ICC-OTP, Report on Preliminary Examinations (n 50) paras 54-55.
[262] Mann, 'Attack by Design' (n 5); Kevin Jon Heller, 'The OTP Lets Australia off the Hook', Opiniojuris.org (17 February 2020) <https://opiniojuris.org/2020/02/17/the-otp-lets-australia-off-the-hook/>; Mathias Holvoet, 'Australia's Offshore Immigration Detention Policy: The Prototype of Passively Encouraged Crimes Against Humanity', Opiniojuris.org (6 May 2020) <https://opiniojuris.org/2020/05/06/australias-offshore-immigration-detention-policy-the-prototype-of-passively-encouraged-crimes-against-humanity/>.
[263] Ibid.

encouraging crimes was recognised by Holvoet, who describes the Australian policy as a textbook example of this version of a state policy.[264] In the section below, the policy of toleration is examined as to its relevance in the realm of migration. Moreover, the OTP's response and its required 'deliberate' design are the foundation for the suggested interpretation of the policy of toleration in Chapter V since the OTP may have misinterpreted the element's standard.

A similar issue arose concerning alleged crimes in the European region, where several Article 15 submissions were filed. In 2019, the lawyers Shatz and Branco submitted that the EU Mediterranean policies amounted to murder by omission by way of failure to rescue and implicated EU agents for complicity in crimes of deportation, murder, imprisonment, enslavement, torture, rape, persecution, and other inhumane acts in Libyan detention camps.[265] Public attention led to institutional inquiry in the EU, which rejected the accusation that these violations followed an EU policy.[266] Like in the Australian case, the EU case's prospect to be considered by the OTP may be contingent on the state policy as a critical element under Article 7.

In 2021, the European Centre for Constitutional and Human Rights (ECCHR), in collaboration with two NGOs, submitted that migrants and refugees are mistreated in an exploitative and abusive system in the Libyan detention camps, amounting to war crimes and crimes against humanity.[267] They hold that the violations met the constitutive elements of imprisonment, enslavement, murder, torture, rape, sexual slavery, enforced prostitution, sexual violence, persecution, and other inhumane acts.[268] Similarly, in 2022, Adala for All

[264] Holvoet, 'The Prototype of Passively Encouraged Crimes' (n 262).
[265] Shatz and Branco, 'Communication: Central Med' (n 5) para 2.
[266] *front*-Lex, 'Prosecuting EU Officials for Crimes Against Humanity in the Central Mediterranean: International Criminal Court, 2019' <https://www.front-lex.eu/icc-case>; Maya Thomas-Davis and Omer Shatz, 'EU & Libya: Interview with Omer Shatz', Socialist Lawyer (2020).
[267] ECCHR, 'Communication: Libya' (n 5) paras 3-8.
[268] Ibid, paras 388, 436-658.

et al., a coalition of NGOs submitted a communication to the OTP, claiming that war crimes and crimes against humanity are being committed against migrants and asylum-seekers in Libya.[269] The coalition highlights that despite the focus on Libyan detention centres, the Italian and Maltese authorities are involved in the crimes and should be held responsible for contributing to crimes against humanity under Article 25 (3)(d) ICC Statute.[270] In its second communication, filed in 2022 and accompanied by the report 'No Way Out',[271] the ECCHR focused on interceptions at sea and returns to Libyan detention centres.[272] It argues that these actions trapped migrants in Libya and, therefore, amount to severe deprivation of physical liberty in violation of fundamental rules of international law under Article 7 (1)(e) ICC Statute.[273] According to the ECCHR, these practices violate 'the principle of non-refoulement, the right to be free from arbitrary detention, and the right to a fair trial'.[274]

The Central Mediterranean communications also mark a turn in the identification of the targeted group as they address asylum-seekers/refugees *and* migrants. Previously, asylum-seekers and refugees were the primary subjects of the assessments, in particular in the Australian context. Shatz and Branco note:

> The category of 'migrants' has been created in order to be categorically attacked. Indeed, discursive reification often precedes the commission of mass crimes. It is common, in the context of widespread violence, that political authorities create a "de facto" enemy in order to facilitate the violence committed against it.[275]

[269] Adala for All *et al.*, 'Communication: Libya' (n 5).
[270] Ibid, paras 432-512. See also Pat Rubio Bertran, 'Assessing the Responsibility of EU Officials for Crimes Against Migrants in Libya' in Jasmin Lilian Diab (ed), *Dignity in Movement: Borders, Bodies and Rights* (e-international relations publishing 2021) 302-315.
[271] ECCHR, FIDH, and LFJL, 'No way out: Migrants and refugees trapped in Libya face crimes against humanity', report (2021).
[272] ECCHR, 'Communication: Interceptions' (n 5) paras 8-11.
[273] Ibid, para 12.
[274] Ibid.
[275] Shatz and Branco, 'Communication: Central Med' (n 5) para 409.

Although provocative, this consideration aligns with the shift in the states' migration narrative, which started stigmatising migration *per se*, considering it as a threat to national security.[276] However, it sparks legal questions, such as the relevance of the crime of deportation based on the unique interpretation of 'lawful presence,' as it was only established for asylum-seekers and refugees to whom the Refugee Convention applies.[277] Shatz and Branco also conclude that this crime applies to asylum-seekers.[278] Pushbacks, as one of the most widely and systematically practised violations of migrants' rights by EU actors, would therefore not include all migrants, and no piece in scholarship has thus far shown that the prohibition of forced transfers protects all migrants (moving towards the Global North primarily by land or sea).

The OTP is considering the 'plight of refugees forced to flee the violence'[279] in Libya connected to its investigation into the armed conflict following the United Nations Security Council (UN SC) referral in 2011.[280] However, as shown below, the OTP's engagement with the extent of the crimes (unlawful acts) and the alleged perpetrators (smugglers and militias instead of Libyan and EU state actors) is limited, and the OTP plans to complete its investigation at the end of 2025.[281] Moreover, the problematic aspect of this body of material is that it reinforces the connection between crimes against humanity and conflict, which is not required under Article 7. Although the investigation into the situation in Libya was already ongoing, it appears that the OTP is more likely to consider crimes against migrants when they occur in relation to an armed conflict, as no other situation has thus far been investigated. Even in the Libyan case, EU actors, i.e. perpetrators acting in peacetime,

[276] See *supra* (n 211).
[277] Chetail, 'Is There any Blood on my Hands?' (n 5) 926; *supra* (n 244).
[278] Shatz and Branco, 'Communication: Central Med' (n 5) para 772.
[279] Situation in Libya (n 138).
[280] Ibid.
[281] See *infra* (n 488).

are not mentioned in the OTP's reports.[282] The selective focus on smugglers and militias as the main actors of abuses of migrants prompted strong criticism among scholars, in particular, since several EU Member States were involved in the NATO campaign leading to the destabilisation of Libya.[283]

Whether the hypothesis that a conflict-connection exists is viable is tested in the following chapters. Since the migration-related cases available are insufficient to provide adequate informative value, the hypothesis must be tested involving a larger number of cases. Chapter IV systematically examines the OTP's prosecution practice, focusing on peacetime crimes.

Nevertheless, the Eastern Mediterranean example, also a case unrelated to conflict, supports this assumption. Following Kalpouzos and Mann's seminal analysis of the inhuman and degrading treatment of asylum seekers in Greek detention centres as 'banal crimes against humanity',[284] Stine von Förster examined the Greek, Spanish, Italian, and Bulgarian mistreatment of 'irregular migrants' in her PhD thesis.[285] Widely unnoticed, likely because it is published in German only, she convincingly argues that these states committed several acts of murder, imprisonment, torture, persecution, and other inhumane acts, although she rejects deportation based on the traditional interpretation of the required lawful presence.[286] In 2021, the Syria Justice and Accountability Centre (SJAC) submitted further evidence that refugees faced systematic mistreatment at the Turkish-Greek border

[282] ICC-OTP, 'Twenty-Seventh Report of The Prosecutor of The International Criminal Court to The United Nations Security Council Pursuant to Resolution 1970 (2011)' (14 May 2024) [27th Report to the UNSC: Libya] para 57.
[283] For instance, Itamar Mann, Violeta Moreno-Lax, and Omer Shatz, 'Time to Investigate European Agents for Crimes against Migrants in Libya', EJIL: Talk! (29 March 2018) <https://www.ejiltalk.org/time-to-investigate-european-agents-for-crimes-against-migrants-in-libya/>; Chantal Meloni and Xuchen Zhang, 'Complementarity Is No Excuse: Why the ICC Investigation in Libya Must Include Crimes Against Migrants and Refugees', OpinioJuris (1 December 2021) <https://opiniojuris.org/2021/12/01/complementarity-is-no-excuse-why-the-icc-investigation-in-libya-must-include-crimes-against-migrants-and-refugees/>.
[284] Kalpouzos and Mann, 'Banal crimes against humanity' (n 5).
[285] von Förster, '*Verbrechen gegen die Menschlichkeit*' (n 5) 324-327, not all states commit all acts.
[286] Ibid, 280.

and in Greek reception and identification centres.[287] SJAC submitted that deportation, persecution, other inhumane acts, sexual violence, and torture were being committed, in particular through pushbacks and the deprivation of humanitarian assistance on the Aegean islands.[288] SJAC reiterated that the systematic violation of the principle of *non-refoulement*, protecting refugees from arbitrary and collective expulsion, may amount to the crime of deportation.[289]

The EU contributions further allege the involvement of Frontex personnel as perpetrators of the crimes.[290] The submissions related to the Eastern European corridor await a response from the OTP, and it is unclear whether the OTP will engage in thorough investigations. Similar to the Australian case, as a genuine peacetime setting, it is an important example for this thesis. However, without engagement by the OTP, its position on the alleged crimes cannot be evaluated.

The violence at the US-Mexican border has further been studied within this body of literature. The unique aspect is that the US is not a State Party to the ICC. The treatment of migrants nevertheless requires attention, above all, the 'Family Separation Policy' that prompted international condemnation.[291] According to law professor Jenny-Brooke Condon, the policy led to the systematic violation of the right to family integrity, freedom from torture and other inhuman and degrading treatment.[292] Beth Van Schaack further highlights that the separation of children from their parents amounts to torture and inhuman treatment under US domestic and international law.[293] Several other scholars have

[287] SJAC, 'Communication: Greece' (n 5).
[288] Ibid, paras 39-58.
[289] Ibid, para 39-40.
[290] Ibid, para 7; ECCHR, 'Communication: Interceptions' (n 5) paras 152-192; Shatz and Branco, 'Communication: Central Med' (n 5) para 1002; Kalpouzos and Mann, 'Banal crimes against humanity' (n 5) 21-24; von Förster, '*Verbrechen gegen die Menschlichkeit*' (n 5) 286-288.
[291] Mann, 'Border Violence as Crime' (n 5) 705-715.
[292] Condon, 'When Cruelty Is the Point' (n 183) 37-76.
[293] Van Schaack, 'The Torture of Forcibly Separating Children' (n 183); Van Schaack, 'Father-Son Separation at US Border' (n 183).

put forward that the consequences caused by this policy may amount to enforced disappearances under IHRL due to the prolonged removal from the protection of the law and the withholding or incapacity to give information on the whereabouts of family members.[294]

According to the interpretation of deportation proposed by Chetail, the systematic pushbacks and forced returns from the US to Mexico (also from Mexico to Guatemala),[295] could further be considered under Article 7.[296] Although it is currently unrealistic that action against the US would be taken,[297] the crime, with its cross-border effect, could create a jurisdictional link for the ICC, in line with the Pre-Trial Chamber's reasoning in the Myanmar/Bangladesh situation.[298] Mexico has been a State Party since 2004.[299] The Myanmar case is based on a wide interpretation of 'conduct' under Article 12 (2)(a) for the purpose of jurisdiction,[300] stretching it to non-State Parties (Myanmar) since one element of the crime is fulfilled on a State Party's territory (Bangladesh).[301] In addition to this rather novel interpretation, the novel interpretation of deportation, as explained above, would be required. Although unlikely in the US case, the ICC has proven that surpassing the traditional notions so far recognised may be possible when new circumstances arise,

[294] Alonso Gurmendi, 'On Calling Things What They Are: Family Separation and Enforced Disappearance of Children' OpinioJuris.org (24 June 2019) <http://opiniojuris.org/2019/06/24/on-calling-things-what-they-are-family-separation-and-enforced-disappearance-of-children/>; Azarova *et al.*, 'The Enforced Disappearances of Migrants' (n 5) 133-204, why the practice does not amount to crimes at 150 -152; see also for the missing in the Mediterranean Sea, Pat Rubio Bertran, 'Europe's Border Crimes: Bridging the Impunity Gap for the Enforced Disappearance of Migrants in the Mediterranean Graveyard', Border Criminologies (27 April 2022) <https://blogs.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2022/04/europes-border>.

[295] Morales, 'Report: Pushbacks of Migrants' (n 212) para 60, 69-70.

[296] Ibid, 53-54.

[297] Hairapetian, 'A Culture of Impunity' (n 136) 20-23, arguing that 'neo-colonial or imperial relationships' impede the prosecution.

[298] Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar) PTC III, ICC-01/19-27 (14 November 2019) paras 62, 97-99.

[299] ICC, Assembly of State Parties to the Rome Statute: Mexico. Mexico ratified the Rome Statute on 28 October 2005. The Statute entered into force in Mexico on 1 January 2006.

[300] Myanmar/Bangladesh Authorisation Decision (n 298) paras 46-62.

[301] Ibid.

such as in the situation involving Myanmar. Whether pursuing such an approach – especially concerning the US – is desirable, is a different question to address.

In sum, academic legal opinion and supporting civil society material give rise to concern that several enlisted acts are committed in the context of migration as described above. These violations infringe on life, liberty, and mental and physical integrity of migrants and may amount to severe acts under Article 7. Although the crime of deportation remains controversial, other acts have been alleged that suffice to justify calls for a thorough investigation.

It is accepted that not all violations migrants face fall *prima facie* within the definition of Article 7, such as denying the right to asylum, which may lack the necessary degree of severity. The crimes examined all pertain to explicitly enlisted acts describing severe violations of rights. The exclusion of other fundamental rights from the examination exposes a gap within legal scholarship, namely a more thorough analysis of the crime of persecution. Although this crime is alleged in all contributions (and rejected by the OTP in the response to the Australian case),[302] the crime's interpretation could benefit from a more detailed normative analysis of its specific occurrence in the context of migration. Two events prompt such additional analysis, namely the treatment of women and girls in Afghanistan, amounting to gender-based persecution since the Taliban took power in 2021 and the differential treatment of migrants following the invasion of Ukraine in 2022. The next section is dedicated to the implications of these two events in the context of migration, as it sheds new light on the crime's legal and practical application.

[302] ICC-OTP, Report on Preliminary Examinations (n 50) para 51.

4.2.2. A Unique Crime: Persecution According to Article 7 (1)(h) ICC Statute

The crime of persecution has a unique legal structure, demanding the connection to another crime or act and a high evidentiary threshold for the underlying mental element (*mens rea*), namely the discriminatory intent. This section discusses the crime's significance for migration-related abuses. It underscores the cumulative effect of rights deprivations, which are not sufficiently serious in isolation, and proposes to consider the 'country of origin' of migrants as a prohibited ground. It concludes that the theoretical and doctrinal underpinnings of the crime require further inquiry. This section serves as a basis for further assessment of systems of deprivation and exclusion in the subsequent chapters.

The crime of persecution is not a stand-alone crime in the ICC Statute; it must be connected to another act enlisted in Article 7 or a crime within the Statute. Persecution is distinct from other unlawful acts because it criminalises not the act itself but the discrimination on prohibited grounds underlying it and thereby renders it inhumane.[303] It is considered an umbrella crime,[304] covering various forms of acts,[305] giving crimes against humanity a specific structure.[306] Persecution is defined as the severe deprivation of fundamental rights contrary to international law based on discriminatory grounds.[307]

The fundamental questions that arise from the crime's definition are whether rights deprivations, *not* infringing on life, liberty, or physical integrity, can be considered and which impermissible and discriminatory grounds are recognised. In its assessment related to migrants' rights, the OTP should consider the recent developments that offer new perspectives on the crime's relevance. The Office recognises that the exclusion of Afghan

[303] *Tadić* (Judgment) (n 1) para 697.
[304] *Prosecutor v. Predrag Banović* (Sentencing Judgment) TC, ICTY IT-02-65/1-S (28 October 2003) para 38.
[305] Ibid.
[306] Kalpouzos and Mann, 'Banal crimes against humanity' (n 5) 17.
[307] Article 7 (2)(g) ICC Statute.

women and girls from all aspects of life by the Taliban, which includes several – individually insufficiently severe – measures, can amount to the crime of persecution via its cumulative effect.[308] Moreover, the preferential treatment of Ukrainian migrants by receiving states after Russia's invasion indicates a discrimination against other groups.[309]

4.2.2.1 The Cumulative Effect Underlying Acts of Persecution

The ICTY and the ICTR applied a wide scope of persecution, including physical and mental harm, deprivation of freedom, and even certain property rights.[310] Due to the connection requirement, the ICC Statute does not allow for a wide application like the *ad-hoc* tribunals.[311] Legal scholarship and civil society criticised[312] and challenged[313] the exclusive approach as a backward development.[314] While it represents *de lege lata*,[315] in *Ongwen*, the ICC ruled against this limitation and included property rights.[316] However, in this case, which was connected to an armed conflict, the Chamber found that property destruction as a war crime was committed.[317] Although the Court did not explicitly spell

[308] Situation in the Islamic Republic of Afghanistan, 'Prosecution's application under article 58 for a warrant of arrest against Abdul Hakim HAQQANI', ICC-02/17-225-Red (23 January 2025) para 31; Situation in the Islamic Republic of Afghanistan, 'Prosecution's application under article 58 for a warrant of arrest against Haibatullah AKHUNDZADA', ICC-02/17-224-Red (23 January 2025) para 31.
[309] Costello and Foster, '(Some) refugees welcome' (n 210) 244–280.
[310] Fausto Pocar, 'Persecution as a Crime Under International Criminal Law', 2 Journal of National Security Law & Policy 2 (2008) 358-360.
[311] Article 7 (1)(h) ICC Statute: 'in connection with'.
[312] von Förster, '*Verbrechen gegen die Menschlichkeit'* (n 5) 259.
[313] Schmid, *Taking ESC Rights Seriously* (n 26).
[314] Melissa Hendrickse, 'Closing a Legal Gap on Crimes Against Humanity', Opiniojuris.org (16 April 2023) <http://opiniojuris.org/2023/04/16/closing-a-legal-gap-on-crimes-against-humanity/>.
[315] Dubler and Kalyk, *Crimes against humanity in the 21st century* (n 143) 915; von Förster, '*Verbrechen gegen die Menschlichkeit'* (n 5) 259.
[316] *Ongwen* (Judgment) (n 145) para 2733, referring to *Ntaganda* (Judgment) (n 144) para 991.
[317] Ibid; property destruction: Article 8 (2)(a)(iv) ICC Statute; Article 8 (2)(b)(xiii) ICC Statute (international armed conflict); Article 8 (2)(e)(xii) ICC Statute (non-international armed conflict); pillaging: Article 8 (2)(b)(xvi) ICC Statute; Article 8 (2)(e)(v) ICC Statute.

out the connection between persecution and property destruction, the ruling indicates that it established the necessary link *via* the war crime.[318]

Independently, crimes against humanity do not cover property rights as such due to a lack of severity. Yet, the *ad-hoc* tribunals, as well as the ICC, recognised the cumulative effect of depriving victims of several categories of rights.[319] Fausto Pocar contends that the 'real import of the measures and their intended outcome, as well as incidental effects on the victims'[320] must be recognised. Although a different statutory standard, the ICTR's ruling against *Nahimana et al.* serves as guidance. The Appeals Chamber held:

> (…) it is not necessary that every individual act underlying the crime of persecution should be of a gravity corresponding to other crimes against humanity: underlying acts of persecution can be considered together. It is the cumulative effect of all the underlying acts of the crime of persecution which must reach a level of gravity equivalent to that for other crimes against humanity.[321]

In the case against *Al Hassan*, the ICC further held that the 'act of persecution (…) need not be physical'.[322] It recognised several 'discriminatory orders, policies, decisions or other regulations'.[323] The Chamber acknowledged that severity may be reached when a series of acts cumulatively infringe on the basic rights of the victims.[324]

The investigation into the situation in Afghanistan supports this turn. In the application for arrest warrants against Haibatullah Akhundzada and Abdul Hakim Haqqani,[325] the Prosecutor cites the *Al Hassan* case and recognises that women and girls are deprived of a

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[318] Ibid.
[319] *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barryagwiza, Hassan Ngez* (Appeal Judgment) AC, ICTR-99-52-A (28 November 2007) para 987; *Ntaganda* (Judgment) (n 144) para 992. See also Ambos and Wirth, 'The Current Law of Crimes Against Humanity' (n 19) 82.
[320] Pocar, 'Persecution as a Crime' (n 310) 355.
[321] *Nahimana et al.* (Appeal Judgment) (n 319) para 987.
[322] *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* (Judgment) TC X, ICC-01/12-01/18 (26 June 2024) paras 1202-1204.
[323] Ibid.
[324] Ibid, para 1205.
[325] Arrest Warrant Application *Akhundzada* (n 308); Arrest Warrant Application *Haqqani* (n 308). The applications are identical in terms of the general requirements.

series of rights, concluding that they are persecuted based on their gender.[326] The Office includes 'rights to education, freedom of movement and assembly, private and family life, freedom of expression, physical integrity and autonomy, freedom from arbitrary and unfair punishment, and freedom of conscience and religion'.[327] The Prosecutor further argues that discriminatory rules and prohibitions were imposed on women and girls, 'which, as such, unlawfully restricted the exercise of fundamental rights, and thus *per se* constituted a severe deprivation of rights'.[328] While it is to be seen whether the Chambers will confirm this interpretation, this statement has significant value for the context of migration. Holding that unlawful restrictive measures preventing the exercise of fundamental rights are *per se* sufficiently severe in Afghanistan could similarly be applied in the context of migration. In Afghanistan, the OTP may come to this conclusion due to the unlawfulness of the measures. By contrast, the unlawfulness of certain migration measures and policies remains contested. However, this may be a crucial criterion for the OTP when considering the crime of persecution. While some migration measures already violate international law, as will be shown below, Chapter V revisits the question of lawful or controversial state policies related to the policy of toleration. It will propose an interpretation when partly unlawful or controversial state policies, imposing fundamental rights restrictions resulting in violations, nonetheless become relevant under Article 7.

Moreover, the purpose of the crime of persecution shows that it can adequately respond to the human rights implications. Kalpouzos, advocating for the crime's recognition related to migration policies, summarises its essence. He notes that

[326] Arrest Warrant Application *Akhundzada* (n 308) paras 31-32.
[327] Ibid, para 32.
[328] Ibid, para 33.

(…) the crime of persecution refers to the fundamental failure, and intentional betrayal, of the obligations of governance towards a population under one's jurisdiction, reflected in the entire body of human rights law.[329]

This failure, and the resulting deprivation of fundamental rights, can take different forms and designs. It may be embedded directly in legislation and policies, but also unfolds in practices aimed at exclusion.[330] The IHRL framework provides a broad protection scheme that covers a range of rights and freedoms which are not ousted or replaced when a person becomes a migrant or refugee. Cathryn Costello and Michelle Foster argue for integrating the rationale of the 1951 Refugee Convention into IHRL.[331] They contend that the Refugee Convention should guide the interpretation of IHRL, particularly in relation to non-discrimination.[332]

The failure to provide protection or access to a determination procedure, a state's obligation under international and regional frameworks, underlies the current asylum system.[333] Several scholars emphasise that the system entails not only the failure to govern but the intentional and active prevention of persons from being governed, often extraterritorially, aimed at preventing the exercise of fundamental rights.[334] This is a critical aspect that indicates the necessary level of mental engagement in migration governance. The intention behind the practices and the deliberate (in)actions suggest that the threshold to criminality may be crossed. Chapters V and VI turn to the details of this discussion and examine under which circumstances the state actors may be held liable.

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[329] Kalpouzos, 'Violence against Migrants' (n 5) 582.
[330] *Banović* (Sentencing Judgment) para 38.
[331] Costello and Foster, '(Some) refugees welcome' (n 210) 264.
[332] Ibid.
[333] UN GA, 'Report of the Secretary-General: Report on the human rights of migrants', UN Doc A/HRC/54/81 (3 August 2023); Morales, 'Report: Pushbacks of Migrants' (n 212); Maarten den Heijer, Jorrit Rijpma, and Thomas Spijkerboer, 'Coercion, prohibition, and great expectations: The continuing failure of the Common European Asylum System', 53 Common Market Law Review 3 (2016) 607-642; Evangelia (Lilian) Tsourdi and Cathryn Costello, ''Systemic Violations' in EU Asylum Law: Cover or Catalyst?', German Law Journal 24 (2023) 982-994.
[334] *Supra* (n 212, 329).

Overall, these considerations should inform the OTP's examination of whether the treatment of migrants, including rights' deprivation that falls short of enlisted acts, exceeds the threshold by cumulation under 7 (1)(h) ICC Statute. At all stages of the journey, migrants are at risk of facing infringements upon their life, physical integrity, or dignity. However, one should also think about the purpose of taking away and destroying migrant's smartphones, impeding the right to an effective remedy for violations that could otherwise be recorded.[335] Similarly, pushbacks aim to reduce the possibility of accessing the asylum procedure. Even if it was argued that pushbacks alone do not exceed the threshold or do not amount to the crime of deportation, they cannot be viewed in isolation. Concurrently, as argued by the OTP, restrictions on freedom of movement must be considered. In the context of migration, such restrictions are common.[336] Depending on the duration and conditions, they may be lawful immigration measures. However, a thorough examination of these measures must be conducted based on their cumulative effect.

The purpose and development of these immigration measures should further be monitored. The OTP acknowledged that prohibitions imposed following the Taliban's religious ideology were adopted *incrementally* with 'severe and punitive effect'.[337] In the migration context, the measures are also becoming increasingly restrictive.[338] It also highlights that the deprivation of these rights may precede more severe acts. For instance, Australian practices started with offshore processing and culminated in offshore detention, eventually amounting to the crime of severe deprivation of liberty under inhumane conditions (as

[335] Lena Karamanidou and Bernd Kasparek, 'From Exception to Extra-Legal Normality: Pushbacks and Racist State Violence against People Crossing the Greek–Turkish Land Border', 11 State Crime Journal 1 (2022) 12-32, at 23; Hanaa Hakiki and Delphine Rodrik, 'M.H. v. Croatia: Shedding Light on the Pushback Blind Spot', VerfBlog (29 November 2021) <https://verfassungsblog.de/m-h-v-croatia-shedding-light-on-the-pushback-blind-spot/>; Forensic Architecture, 'Pushbacks Across the Evros/Meriç: The Case of Parvin' <https://parvin.forensic-architecture.org/>.
[336] See *infra* 4.3.1.
[337] Arrest Warrant Application *Akhundzada* (n 308) paras 37-38.
[338] Moreno-Lax, 'The "Crisification" of Migration Law' (n 47) 22.

accepted by the OTP)[339] to intimidate and deter with all force.[340] Although there is no linearity, these extreme measures followed when previous deterring measures failed. The deprivation of fundamental rights falling short of crimes may be an indicator of more severe measures that enable physical and mental violence.[341] Similar to the recognition of a broad range of rights of women and girls in Afghanistan, enabling full Taliban control, the OTP should reconsider the deprivation of migrants from access to protection and participation, enabling full migration control.

In summary, the cumulative effect of discriminatory measures is recognised in case law and the practice of the OTP. The unique character of this crime permits addressing restrictions on fundamental rights that are otherwise not sufficiently severe. The diversity of migration policies includes several practices that – if intentionally practised – may be relevant as acts of persecution under Article 7 (1)(h). Decisively, the deprivation must be based on a prohibited ground, which the section below assesses.

4.2.2.2 Discrimination Based on a Prohibited Ground: Identifying v. Targeting

The crime of persecution further requires a discriminatory ground. As explored above, several grounds have been highlighted in scholarship pertaining to 'refugees' or 'irregular migrants,' and other grounds were raised. While the core elements of the crime of persecution are the denial of fundamental rights and the discriminatory ground underlying the denial, it further postulates that the denial must be directed against an *identifiable* group or collectivity. Before assessing the applicable grounds, clarification on the

[339] ICC-OTP, Report on Preliminary Examinations (n 50) paras 47-48.
[340] Henderson, 'Australia's Treatment of Asylum Seekers' (n 5) 1163-1165.
[341] Powderly and Hayes, 'Article 7' (n 233) para 168, the Taliban first intimidated and installed fear amongst the female population.

difference between *identifying* and *targeting* is necessary. This section thus contrasts the two elements and examines prohibited grounds subsequently. It focuses on the ground of 'country of origin' as a unique category within the migration context and suggests an interpretation.

According to Powderly and Hayes, case law on the crime of persecution must be viewed with caution, as some judgments contain mistakes.[342] They note that the elements *identifiable* and the *prohibited ground* are often conflated and must be assessed independently, although they are often identical.[343] They explain that whether a group is identifiable essentially depends on the *nature* of the group.[344] This aspect accounts for the *actus reus* of the crime. It may be established positively, meaning a person is identifiable *because* they belong to a certain group. It can further be described negatively by the exclusion of the perpetrator.[345] As held in *Jelisić,* persons can be identifiable because they do *not* belong to the perpetrator group.[346] A group may be 'stigmatised in this manner'.[347] As mentioned above, it suffices when the perpetrator *perceives*, i.e. subjectively attributes, a characteristic or affiliation of the victim.[348] In turn, the prohibited discriminatory ground concerns the reason for *targeting* the individual (who belongs to the identified group) and constitutes part of the *mens rea* of the crime.[349] The *nature* of the group of migrants must be established either by objective or subjectively perceived criteria. The grounds for *targeting* the group members must be assessed in terms of their discriminatory nature and

[342] Ibid, para 148.
[343] Ibid.
[344] Ibid.
[345] Ibid, para 146.
[346] Ibid.
[347] *Prosecutor v. Goran Jelisić* (Judgment) TC, ICTY, IT-95-10-T (14 December 1999) para 71.
[348] Powderly and Hayes, 'Article 7' (n 233) para 150.
[349] Ibid, para 148.

effect (discrimination in fact). The latter is considered an indicator of the perpetrator's discriminatory intent.

In relation to migration, some explicitly codified grounds have been examined, such as racial, political, national, and gender.[350] The crime of persecution further prohibits discrimination of 'other grounds;' these grounds must be comparable to those listed and considered 'universally accepted as impermissible.' Most importantly, the grounds protect a characteristic that must show a level of attachment to the identity of the victims.[351] This may lead to so-called 'Othering', a discriminating, dehumanising process of identifying an in-group versus an out-group, an 'us' versus 'them' based on distinct identities.[352] Henderson, for instance, contends that the mode of arrival satisfies the 'other grounds' category of Article 7 (1)(h) ICC Statute, namely the universally recognised prohibition to penalise illegal entry according to Article 31 of the Refugee Convention.[353] Von Förster supports Henderson's conclusion[354] and argues that Article 33 of the Refugee Convention also applies.[355] Article 33 prohibits the *refoulement* and constitutes an internationally recognised and central protection norm for asylum-seekers and refugees.[356] Von Förster further argues that pushback practices, which are such violations of the *non-refoulement* principle (Article 33 Refugee Convention), must be based on additional discriminatory motives.[357]

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[350] For instance, ECCHR, 'Communication: Libya' (n 5) para 604; Kalpouzos and Mann, 'Banal crimes against humanity' (n 5) 16-18.
[351] Powderly and Hayes, 'Article 7' (n 233) para 144, however not identical with the standard in genocide, para 148.
[352] Carola Lingaas, 'The Concept of Race in International Criminal Law', Völkerrechtsblog (12 February 2018) <https://voelkerrechtsblog.org/de/the-concept-of-race-in-international-criminal-law/>. Othering is commonly used in the context of genocide but also in the theoretical discourse on discrimination, racism, and exclusion; see also Anthonie Holslag, 'The Process of Othering from the "Social Imaginaire" to Physical Acts: An Anthropological Approach', 9 Genocide Studies and Prevention: An International Journal 1 (2015) 96-113.
[353] Henderson, 'Australia's Treatment of Asylum Seekers' (n 5) 1180.
[354] von Förster, '*Verbrechen gegen die Menschlichkeit*' (n 5) 272.
[355] Ibid, 252-257.
[356] Ibid, 255.
[357] Ibid, 256.

Having the principle of strict construction and comparability in mind, migrants are indeed *identifiable* by their mode of arrival (illegal entry, Article 31 Refugee Convention). Establishing that they are *targeted* based on it may lack a connection to the identity, even if the *perceived* identity suffices. It may create a conflict with the principle of legality since it is not comparable with the other grounds listed.[358] The other grounds describe characteristics that are part of human nature and to be protected as valuable aspects in a diverse society, such as different religions, nationalities, or political opinions. 'Illegal entry,' although a necessity for refugees, when legal entry is made impossible, is not comparable as a value in the human family requiring protection under ICL. Against this view, it may be argued that the narrative of illegal migration has become an identity question. As explored above, the illegalisation of human beings – from the perpetrator's perspective – may have entered the identity sphere. However, as will be shown below, the Ukrainian example highlights that they were welcomed irrespective of the legality of the entry, while third-state nationals who resided in Ukraine legally faced obstacles in receiving states. The illegal/irregular entry at land and sea borders thus better describes how migrants are *identified*.

Moreover, it is recognised that the principle of *non-refoulement* (Article 33 of the Refugee Convention), which is a state obligation, is universally accepted.[359] It is widely considered the cornerstone of refugee protection and a rule of customary law.[360] However, this character further lacks informative value for the group's identity and the perpetrator's reasons for discrimination. It rather constitutes the violation itself. Von Förster recognises

[358] Generally, MacNeil, *Legality Matters* (n 14).
[359] UN GA, 'Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions, Agnes Callamard: Unlawful death of refugees and migrants', UN Doc A/72/335 (15 August 2017) paras 19-20.
[360] UNHCR, 'Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol' (Geneva 2007) paras 5 and 15.

this when demanding another 'discriminatory motive' that must be attached to the pushbacks.[361] It is difficult to distinguish clearly between the violation, the identification of the group, and the discriminatory grounds. While they certainly overlap, the unlawful *refoulement* rather constitutes a violation that can inherently only occur *after* the identification (or at least simultaneously). Imagining the crime of persecution on a timeline, it could be seen as (1) identifying the victim (on *any* ground), (2) targeting the victim (on a *prohibited* ground), (3) resulting in the severe deprivation of a fundamental right (discrimination in fact).[362] The violation of Article 33 Refugee Convention could be considered as satisfying the third step, i.e. (3). It may not convince the Prosecutor as a ground to identify (1) or target (2) the victims.

Article 33 of the Refugee Convention, as a prohibited ground, may not adequately describe the reason for discrimination; it better reflects the violation itself. This violation must be committed with discriminatory intent to amount to the crime of persecution. The Refugee Convention contains another provision that may suitably describe a prohibited ground on which the violation (*refoulement*) is based, namely Article 3, the non-discrimination clause. The following section examines the clause and the prohibited grounds therein.

4.2.2.3 Discrimination Based on the Country of Origin

After Russia invaded Ukraine, the differential treatment of displaced persons became apparent. The EU and other states proved capable and welcoming to Ukrainians and demonstrated best practices. At the same time, it exposed a discriminatory element that

[361] von Förster, '*Verbrechen gegen die Menschlichkeit*' (n 5) 256.
[362] Lingaas, 'The Concept of Race' (n 352), ('The vital communication aspect by which 'the others' are first identified, portrayed as a ubiquitous threat and then targeted as victims of genocide').

accompanies the treatment of migrants from other countries of origin. The country of origin category is a unique criterion used in migration governance and a listed prohibited ground in Article 3 Refugee Convention. This section examines the country of origin as a prohibited ground under Article 7 (1)(h) since it has not yet been assessed in ICL research.

The dominant view in scholarship is that the 'national' ground in persecution does not apply in the migratory context. The main argument is that not all non-Europeans or non-Australians are subjected to mistreatment and that international law permits differential treatment based on nationality.[363] Consequently, it is argued that distinct treatment based on nationality would not be impermissible within the meaning of Article 7 (1)(h), as immigration inherently relies on and permits disparate regulations for certain countries.[364] However, Powderly and Hayes refer to 'national' grounds as including relevant acts in the context of 'targeting of immigrants on nationality *based on descent*'.[365] Nationality thus includes aspects of national origin, as opposed to simply holding the passport of a state. It is not entirely clear how the national ground must be interpreted under ICL, yet including the national origin better reflects the identity criterion.

Following the Russian invasion, a seminal article by Cathryn Costello and Michelle Foster gave new impetus. They indicate that the country of origin as a reference has been disregarded in the human rights and non-discrimination realm.[366] The country of origin is a prohibited ground in the non-discrimination clause in Article 3 Refugee Convention:

> The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.[367]

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[363] Henderson, 'Australia's Treatment of Asylum Seekers' (n 5) 1179; von Förster, *'Verbrechen gegen die Menschlichkeit'* (n 5) 252-253.
[364] Ibid.
[365] Powderly and Hayes, 'Article 7' (n 233) para 161 (emphasis added).
[366] Costello and Foster, '(Some) refugees welcome' (n 210) 267, see also at 248 their critique of *Qatar v. United Arab Emirates* (Judgment) ICJ Application No 2021/2 (4 February 2021) paras 78-88.
[367] Article 3 of the Refugee Convention.

The Article thus exhaustively lists three grounds that may all be considered in ICL. Race and religion are expressly prohibited according to Article 7 (1)(h) ICC Statute. Discrimination based on 'country of origin' may thus be comparable with the enumerated grounds in the ICC Statute. The Refugee Convention is directly applicable as an international human rights treaty according to Article 21 (1)(a) and (3) of the ICC Statute. Costello and Foster note that the debating history of Article 3 Refugee Convention reveals its particularly far-reaching scope.[368] They conclude that Article 3 Refugee Convention had a 'clear and non-negotiable meaning'[369] with three important elements:

> First, and perhaps most relevantly in a contemporary setting, Article 3 applies without any territorial or jurisdictional limitation; second, it is not conditioned or limited in circumstances such as mass influx, national security or public order; and third, it was intended to ensure universal protection for refugees.[370]

This extensive acceptance of the anti-discrimination clause is further solidified by Article 42 Refugee Convention, which prohibits reservations to Article 3.[371] It also lists Article 33 Refugee Convention, the prohibition of *refoulement*, which is considered *ius cogens* and non-derogable.[372] Since Article 42 only prohibits limitations to very few articles, it is reasonable to imply a comparable importance, in this case, between the (universally recognised) *non-refoulement* principle and the non-discrimination clause.[373] The UNHCR currently lists 149 State Parties to the Refugee Convention and/or its Protocol.[374] Due to its

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[368] Costello and Foster, '(Some) refugees welcome' (n 210) 258.
[369] Ibid.
[370] Ibid, 258-259. Acknowledging that the scope of 1951 Refugee Convention was geographically limited, which was removed by the 1967 Protocol. Currently, only Turkey maintains the geographical restriction.
[371] Article 42 (1) Refugee Convention; Article VII (1) 1967 Protocol.
[372] See other non-derogable rights: Art. 4 (2) ICCPR: the right to life, the right to be free from torture and other inhumane or degrading treatment or punishment, the right to be free from slavery or servitude, prohibition of imprisonment because of inability to fulfil a contractual obligation, the recognition as a person before the law, and freedom of thought, conscience and religion, see also Art. 15 (2) ECHR.
[373] See also UNHCR, 'Introductory note by the Office of the United Nations High Commissioner for Refugees (UNHCR) - Convention and Protocol Relating to the Status of Refugees' (Geneva, December 2010) at 3: emphasising that the convention 'is underpinned by a number of fundamental principles, most notably non-discrimination, non-penalization and non-refoulement'.
[374] Originally signed by 19 states, other states subsequently acceded or succeeded, see UNHCR, 'States parties, including reservations and declarations, to the 1951 Refugee Convention' <https://www.unhcr.org/media/states-parties-including-reservations-and-declarations-1951-refugee-

centrality to the Refugee Convention, the prohibition of reservations and the wide acceptance[375] by the majority of the 193 UN member states, Article 3 can be considered universally accepted.

It may be objected that the provision nonetheless does not apply to migrants who are not asylum-seekers or refugees. This holds true for the direct application of the rights and duties in the Convention.[376] However, preventing migrants from accessing the asylum procedure and other rights through pushbacks and similar deterring practices and thereby circumventing the applicability of the Refugee Convention is one of the central issues in the migration context. Denying access to the protection scope of the Refugee Convention is one of the fundamental and central rights that migrants are deprived of. Moreover, the 'other grounds' clause in Article 7 (1)(h) ICC Statute is designed as a tool to protect human rights by criminalising acts that harm persons based on their identity.[377] Persecution covers the perpetrator's attribution and may extend to all migrants who are perceived as persons wanting to exercise their fundamental rights as potential future asylum-seekers. The rationale of Article 7 (1)(h) speaks for the applicability to all migrants as members of a particularly vulnerable group otherwise outside the protection of a state, irrespective of their legal status.

Since Article 3 Refugee Convention can be considered a universally accepted provision, discrimination on the listed grounds is impermissible according to Article 7 (1)(h). Country of origin thus needs to be defined in light of the rules and principles of ICL. Costello and Foster describe it as 'the neat encapsulation of the intersection between "national origin"

convention>; see for the 1967 Protocol (147 parties) UNHCR, 'States parties, including reservations and declarations, to the 1967 Protocol Relating to the Status of Refugees' <https://www.unhcr.org/media/states-parties-including-reservations-and-declarations-1967-protocol-relating-status-refugees>.

[375] Universally accepted does not mean that all states recognise a right or prohibition, 'widely accepted' suffices, see Powderly and Hayes, 'Article 7' (n 233) para 174.

[376] Hathaway *et al.*, 'The Michigan Guidelines on Refugee Freedom of Movement' (n 97) General Principles No 1.

[377] Ambos and Wirth, 'The Current Law of Crimes Against Humanity' (n 19) 82, 84.

and "country of nationality".'[378] This description shows how the country-of-origin concept encompasses the components already covered by the expressly codified grounds under Article 7 (1)(h). Both are, in one way or the other, already covered by racial, ethnic, and national grounds, covering the national origin or descent.[379]

The country-of-origin concept is central and unique to the migration context. From the outset, the 1951 Refugee Convention was adopted to protect stateless persons (*de facto* and *de jure*) and those unable to remain in their country of origin.[380] The scope, however, was not always clear. The ICRC suggested protecting persons from 'grave events'[381] who are outside the 'country of ordinary residence'.[382] While not adopted as such,[383] the Refugee Convention's aim was to cover individuals outside the protection of their own state. In its adopted version, the refugee definition postulates that a refugee must be 'outside the country of his nationality'.[384] It continues to describe cases when someone does not have a nationality (stateless) or if someone has more than one nationality.[385] This aims to protect persons from political or other forms of persecution by the state where they are originally from.[386] The refugee definition in Article 1 (A)(2) Refugee Convention does not use the term country of origin; it refers to country of nationality and country of former habitual residence for stateless persons. Article 3 of the Refugee Convention, the non-discrimination clause, explicitly refers to country of origin.[387] Thereby, it recognises the different elements stipulated by Article 1 Refugee Convention by including persons

[378] Costello and Foster, '(Some) refugees welcome' (n 210) 248.
[379] Powderly and Hayes, 'Article 7' (n 233) paras 160-162, see also cultural grounds, para 163.
[380] Gilbert Jaeger, 'On the history of the international protection of refugees', IRRC 83 No 843 (September 2001) 731-733.
[381] UN GA, 'Aide Memoire on the Refugee Question, Statement submitted by the International Committee on the Red Cross', UN Doc A/CONF./NGO.2 (4 July 1951) 3.
[382] Ibid.
[383] Instead, it covers an individualised threat of persecution on a comprehensive number of grounds.
[384] Article 1 (A)(2) Refugee Convention.
[385] Ibid.
[386] Ibid.
[387] Article 3 Refugee Convention.

without a nationality and referring to country of origin instead of country of nationality. It acknowledges that nationality may not adequately describe a person's life reality. Cecilia Manzotti argues that nationality is unanimously understood 'as a politico-legal term meaning "membership of a State" and the applicant's country of nationality as the *State* of which the person holds citizenship'.[388] By using the country-of-origin concept in Article 3, the Convention recognises that nationality, citizenship, former habitual residence, and national origin invoke entitlement to protection if a person is persecuted. It aims to prevent discrimination based on these grounds by the *receiving* state, clarifying that all persons must have access to the guarantees.

Today, the country-of-origin concept is the prevalent notion in the migration/refugee context. It is used, among others, by the UNHCR,[389] and border agencies and states.[390] Moreover, Refugee Status Determination (RSD) crucially depends on the country of origin of the applicant – the determination is based on country-of-origin information (COI) available to the decision-making authority. The UNHCR provides Country Guidance for decision-makers, which it describes as 'legal interpretations (…) on the basis of the human rights and security situation in the *country of origin* (…)'.[391]

Likewise, in the EU, the European Union Asylum Agency (EUAA) regularly releases COI 'to support EU+ asylum and migration authorities in reaching accurate and fair decisions in

[388] Cecilia Manzotti, 'Nationality Status Determination in Asylum Procedures under the CEAS and the Potential Impact of the 'New Pact on Migration and Asylum'', 35 International Journal of Refugee Law 2 (2023) 196.
[389] UNHCR, 'Introductory note' (n 373) 3; UNHCR, 'Refugees' and 'Migrants' – Frequently Asked Questions (FAQs) (16 March 2016) <https://www.unhcr.org/us/news/stories/refugees-and-migrants-frequently-asked-questions-faqs>.
[390] For instance, the US CBP, 'Nation-wide Encounters' uses both 'citizenship' and 'country-of-origin' interchangeably (last modified 21 October 2023) <https://www.cbp.gov/newsroom/stats/nationwide-encounters>; Frontex, 'Monitoring and Risk Analysis' (data as of September 2023) <https://frontex.europa.eu/what-we-do/monitoring-and-risk-analysis/migratory-map/>; European Commission, 'Overall figures of immigrants in European society' (1 January 2022) <https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/promoting-our-european-way-life/statistics-migration-europe_en#overall-figures-of-immigrants-in-european-society>.
[391] UNHCR, 'Refugee Status Determination'(UNHCR 2001-2023) (emphasis added) <https://www.unhcr.org/what-we-do/protect-human-rights/protection/refugee-status-determination>.

asylum procedures, or support policy-making'.[392] The European Country of Origin Information Network further provides an online platform for the RSD procedure.[393] Australian authorities rely on Country Information Reports by the Department of Foreign Affairs and Trade (DFAT) that complement traditional COI.[394] In the US, the Citizenship and Immigration Services (USCIS) 'consider[s] the conditions in the country of origin and evaluate[s] the individual's credibility'.[395]

In parallel to the use of the term and its significance for RSD, statistics and recognition rates are calculated based on the country of origin of the applicants.[396] These numbers and rates profoundly influence political decisions, including the 'safe country of origin concept',[397] 'clustering',[398] and fast-track procedures.[399] These procedures are designed to accelerate asylum claims based on low recognition rates and/or the belief that a country is *prima facie* safe.[400] Concerns were raised about the discriminatory nature of this country of origin-based differentiation because it circumvents legal guarantees for asylum-seekers.[401] This is essential to assessing country of origin as a prohibited ground under Article 7 (1)(h) because differential treatment resulting in the deprivation of fundamental rights may amount to unlawful conduct.

The crime of persecution requires that migrants be singled out and targeted on such a ground. They must be targeted *because* they are members of a certain group – hence, in

[392] EUAA, 'Country of Origin Information' (2025) <https://euaa.europa.eu/country-origin-information> including a COI Portal.
[393] European Country of Origin Information Network, ecoi.net <https://www.ecoi.net/>.
[394] Australian Government, 'Country Information Reports', (2023) <https://www.dfat.gov.au/about-us/publications/country-information-reports>.
[395] USCIS, 'Refugee Eligibility Determination' (Last Reviewed/Updated: 30 March 2021) <https://www.uscis.gov/humanitarian/refugees-and-asylum/refugees/refugee-eligibility-determination>.
[396] Manzotti, 'Nationality Status Determination' (n 388) 194, used interchangeably with nationality.
[397] Costello and Foster, '(Some) refugees welcome' (n 210) 266.
[398] Paula Hoffmeyer-Zlotnik and Marlene Stiller, 'Differential treatment of specific nationalities in the procedure: Germany', AIDA – ECRE (last updated 6 April 2023).
[399] Manzotti, 'Nationality Status Determination' (n 388) 206.
[400] Ibid; AIDA, 'Accelerated, prioritised and fast-track asylum procedures: Legal frameworks and practice in Europe', ECRE (May 2017) 9.
[401] Ibid, 206; AIDA, 'Accelerated, prioritised' (n 400) 9.

this case, because they are actually or *perceived* to be from a certain country of origin. If so, the country of origin applies as an impermissible and discriminatory ground in the context of this thesis. With the country-of-origin concept, the asylum system has created its own category, originally designed to protect, not to attack. Yet, it has developed into a categorisation system that allows states to number, rate, and in- or exclude migrants. It must, therefore, be investigated whether this constructed legal category directly results or contributes to the mistreatment at and beyond borders.

For instance, in the Ukrainian context, racialised third-country nationals, albeit formally carrying the Ukrainian nationality, have faced exclusion.[402] Moreover, sea-borne migration may result in a subjective attribution of an unwanted country of origin based on geographical peculiarities, such as those from Sub-Saharan African countries.[403] Differential treatment in hotspots based on country of origin was further recorded.[404] Unlike, for instance, in the former Yugoslavia, where ethnic and religious elements overlapped but clearly defined groups,[405] the contours within the realm of migration as a phenomenon are less clear. The heterogeneous composition of most groups, but especially within global migratory movements, requires a holistic perspective, not excluding persecution from the assessment. Quite the opposite, as held in the judgment against *Ongwen*,

> the particular political, social, and cultural context are relevant, as are, in addition to the objective factors relevant to the discriminatory ground alleged, the subjective perception of belonging of both the perpetrator and the victim.[406]

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[402] IOM, 'Discrimination and Racism Against Third Country Nationals Fleeing Ukraine Must End: IOM Director General', Statement (3 March 2022) <https://www.iom.int/news/discrimination-and-racism-against-third-country-nationals-fleeing-ukraine-must-end-iom-director-general>.
[403] AIDA, 'Country Report: Italy – Short overview of the reception system', ECRE (last updated 31 May 2023).
[404] ECRE, 'The implementation of the hotspots in Italy and Greece: A study' (December 2016) 14 <https://www.ecre.org/wp-content/uploads/2016/12/HOTSPOTS-Report-5.12.2016..pdf>.
[405] *Tadić* (Judgment) (n 1) para 717 ('non-Serbs on the basis of religious and political discrimination'); *Prosecutor v. Miroslav Kvočka et al.* (Judgement) ICTY, IT-98-30/1-T (2 November 2001) paras 194-196 (Bosnian Muslims, Bosnian Croats, non-Serbs); see also Powderly and Hayes, 'Article 7' (n 233) para 150.
[406] *Ongwen* (Judgment) (n 145) para 2736.

Following the ICC example, the migrant abuses do not show a homogenous attribution of one or several countries of origin facing exclusion. The complexities within migratory flows warrant thorough investigations into the underlying reasons for targeting migrants in the respective regional, social, or cultural context.

In summary, the country-of-origin concept, defined as the intersection between national origin and nationality, carries a specific meaning in the context of migration. The negative attribution of such meaning by the perpetrator, resulting in the exclusion and targeting of individuals at the borders, should, therefore, be considered. *Prima facie*, there is sufficient information to believe that migrants are targeted based on their country of origin. The discriminatory ground, as well as the cumulative effect of the measures resulting in basic rights infringements, requires a deeper engagement by the OTP.

Having provided an analysis of persecution as an especially relevant enlisted act for the purposes of this thesis and having suggested the need for thorough engagement by the OTP in this regard, the next critical aspect for this thesis is the policy element as part of the contextual background of Article 7. The OTP must ascertain whether the alleged crimes were committed in a widespread and systematic manner and pursuant to or in furtherance of a state or organisational policy, as shown by scholars in the field. The next section turns to these contextual elements, focusing on the policy since this element is contested.

4.3. The Contextual Elements of Article 7

This section briefly demonstrates that the widespread or systematic nature of the incidents is rather uncontested in migration-related violations and moves to discuss the controversial but critical policy element in detail. It presents the arguments that an active state policy can

be ascertained and interrogates the quality of the passive behaviour of states, especially the systematic lack of accountability. The enduring impunity indicates the policy of toleration. This form of policy requires interpretation, as case law is limited and the policy only applies in exceptional cases.

The widespread and systematic character must exhibit a pattern, organisation, or method behind the violence. In *Kenyatta*, the ICC clarified that the attack must not be 'a spontaneous occurrence of violence'.[407] In the judgment against *Katanga*, the Chamber further held that the violence must be organised and show 'the improbability of [its] random occurrence',[408] establishing the 'existence of a pattern of repeated conduct'.[409]

Researchers and additional reports by the UN and human rights organisations have highlighted how states orchestrate and organise the use of pushbacks and pullbacks, the widespread restriction of movement and/or detention, often under inhumane conditions, the systematic exclusion from accessing the asylum procedure and the repetitive mistreatment at borders.[410] These sources suggest that the acts are not random, but have a systematic and widespread character as a large number of migrants have been affected over a long period of time and spread across vast territorial areas, following the states' deterrence and defence

[407] *Prosecutor v. Muthaura, Kenyatta and Ali* (Decision on the confirmation of charges) PTC II, ICC-01/09-02/11 (23 January 2012) para 158.
[408] *Katanga* (Judgment) (n 28) para 1123; *Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")* (Decision on the Prosecution Application Under Article 58(7) of the Statute (2)), PTC I, ICC-02/05-01/07-1-Corr (27 April 2007) para. 62.
[409] Ibid, para 1113.
[410] Morales, 'Report: Pushbacks of Migrants' (n 212) para 100, CSDM, 'Information Submitted under Article 20 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2020) para 2; Amnesty International, 'Malta: Waves of Impunity. Malta's human rights violations and Europe's responsibilities in the Central Mediterranean' (7 September 2020); Amnesty International, 'Greece: Violence, Lies, And Pushbacks: Refugees and Migrants Still Denied Safety and Asylum at Europe's Borders' (23 June 2021); Hungarian Helsinki Committee *et al.*, 'Pushed, Beaten, Left to Die: European Pushback Report 2024' (February 2025) 2.

strategy.[411] This strategic use of violations following the overarching objective to prevent migration at all costs indicates the policy.

The element is scrutinised in detail below as it has a specific character in migration governance and, highlighted above, may be the critical element in the legal reasoning of the OTP.

4.3.1. The State Policy Element in Migration Governance

Kalpouzos and Mann contend that '[a] state's asylum policy, dysfunctional as it may be, clearly qualifies' as a state policy.[412] An official policy is further characterised by a straight line of operational tasks and coordination, indicating systematicity.[413] The relevant asylum policies explicitly restrict the freedom of movement; some even order mandatory detention,[414] and others impose high administrative requirements on private Search and Rescue (SAR) operations.[415] Arbitrary and prolonged detention under inhumane conditions, omissions to search and rescue resulting in death, and unlawful push- and pullbacks occur with regularity and continuance; however, the policies resulting in these

[411] Mann, 'Border Violence as Crime' (n 5) 721; Shatz and Branco, 'Communication: Central Med' (n 5) paras 697-708; SJAC, 'Communication: Greece' (n 5) para 46 (deterrence); von Förster, '*Verbrechen gegen die Menschlichkeit'* (n 5) 111-114.
[412] Kalpouzos and Mann, 'Banal crimes against humanity' (n 5) 13.
[413] *Bemba* (Decision) (n 142) para 81.
[414] Detention was mandatory in Malta until 2014: HRW, 'Dispatches: When Will Malta Admit Enough is Enough?' (23 October 2013); in particular after closing the ports in 2020: Council of Europe, 'Report to the Maltese Government on the visit to Malta carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 17 to 22 September 2020', CoE CPT/Inf (2021) 1 (10 March 2021) 7; Amnesty International, 'Greece: Worrying legal developments for asylum-seekers and NGOs', Public Statement no EUR 25/2259/2020 (4 May 2020) 2-5; Memorandum from the Attorney General for Federal Prosecutors Along the Southwest Border, 'Zero-Tolerance for Offences Under 8 U.S.C. § 1325(a)' Office of the Attorney General, Washington D.C. 20530 (6 April 2018); Memorandum from the Secretary of the DHS, 'Policy Guidance for Implementation of the Migrant Protection Protocols', DHS, Washington D.C. 20530 (25 January 2019).
[415] Greek Council for Refugees, 'Input for the forthcoming report of the Special Rapporteur on the human rights of migrants with respect to human rights violations at international borders: trends, prevention and accountability' (Athens 28 February 2022) 4.

violations are not explicitly adopted as such. Migration and asylum policies do not expressly order the commission of these acts.

In the judgment against *Gbagbo*, the ICC demanded a high threshold for the policy element, such as proof of official adoption.[416] However, this is an exceptional case. The dominant jurisprudence recognises that the policy must not be officially adopted, formalised, or promulgated in advance.[417] It may 'crystallise and develop only as actions are undertaken'.[418] It is acknowledged that it can be inferred from 'repeated actions occurring according to a same sequence, or the existence of preparations or collective mobilisation orchestrated and coordinated'.[419] Similarly, Darryl Robinson notes that the policy element does not require proof of secret meetings and internal communication but can be 'inferred from the manner in which the acts occur'.[420] It does not need to be 'declared expressly'[421] or defined precisely.[422] In several cases before the ICC, the Chambers held that the policy *enables* the pattern of violence,[423] it thus facilitates the systematic commission of multiple crimes. The implicit approval of criminal conduct may further suffice, indicating the relevance of passive behaviour.[424] The Elements of Crimes specifically include that a policy may be realised by deliberate inaction that consciously encourages crimes.[425]

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[416] *Gbagbo* (Judgment) (n 33) para 275 (decision confirmed by the Appeal Chamber on 31 March 2021). In contrast to the decision in *Kunarac* where the chamber doubted that under customary law a policy is required overall, see *Kunarac et al.* (Judgment) (n 142) para 432. See Chapter III for the historical development of the policy requirement.
[417] *Katanga* (Judgment) (n 28) para 1108 as opposed to the previous decision by the PTC I in *Katanga* (Confirmation Decision) (n 150) para 396; *Ntaganda* (Judgment) (n 144) para 674.
[418] *Ongwen* (Judgment) (n 145) para 2679.
[419] *Katanga* (Judgment) (n 28) para 1109.
[420] Robinson, 'A Better Policy on 'Policy'' (n 148) at 4; *Ongwen* (Judgment) (n 145) para 2679.
[421] *Blaškić* (Judgment) (n 150) para 205.
[422] Bassiouni and Schabas, *The Legislative History* (n 13) 171.
[423] *Katanga* (Judgment) (n 28) para 1123; *Ntaganda* (Judgment) (n 144) para 692; *Kenya* Decision 2010 (n 33) para 117 (however see also Dissenting Opinion of Judge Hans-Peter Kaul rejecting the organisational structure).
[424] *Kupreškić et al.* (Judgment) (n 150) para 555 ('explicit or implicit approval'); *Akayesu* (Judgment) (n 26) para 693.
[425] Article 7, Introduction, para 3, fn. 6, Elements of Crimes.

Shatz and Branco demonstrate that one official EU policy related to search and rescue enables the commission of murder by omission due to the failure to rescue persons in distress despite a duty to act.[426] Moreover, they argue that a second EU policy enables interceptions and arbitrary imprisonment in Libyan detention camps.[427] SJAC submits that the policy in Greece 'is implemented through a series of legislative, executive and judicial practices aimed at stripping victims of their rights, increasing their misery and likelihood of death',[428] with the support of the EU.[429] Similarly, Stine von Förster shows that the Greek policy of harsh deterrence is a political priority and practised 'at all costs'.[430] She points out that the unlawful acts are not investigated, not by law enforcement nor within the Greek Coast Guard.[431] Moreover, in the Bulgarian context, she highlights that the 'Containment Plan' enacted by the authorities is not criminal as such, but the measures, officially aiming to reduce migration and maintain order, in practice, enable the alleged crimes whilst authorities fail to prevent or prosecute crimes.[432] Convincing arguments for state policies have been submitted for Spain, Italy, Malta, and the US.[433] The US family separation policy, most apparently an officially adopted policy, still does not expressly order torture, but the separation of families. This directly causes bodily and mental harm, which, according to Professor Condon, is inflicted 'for strategic purposes'.[434]

The Australian offshore and detention policies expressly ordered 'stopping the boats' and the transfer of migrants to PNG and Nauru, where they were held in mandatory

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[426] Shatz and Branco, 'Communication: Central Med' (n 5) paras 578-621, 673, 768.
[427] Ibid, paras 713, 791-792.
[428] SJAC, 'Communication: Greece' (n 5) 2.
[429] Ibid, 2 and paras 28-30.
[430] von Förster, '*Verbrechen gegen die Menschlichkeit'* (n 5) 133.
[431] Ibid, 134.
[432] Ibid, 142.
[433] Ibid, Spain, which enacted *the Ley Orgánica 4/2015, de 30 de Marzo, de Protección de la Seguridad Ciudana* in violation of the ECHR and enabled systematic returns from the exclave Melilla, at 147; Italy, at 154-156, referring to the long-standing pushback practice as a policy.
[434] Condon, 'When Cruelty Is the Point' (n 183) 65; see also the 'Remain in Mexico Policy' which also resulted in family separation, Hairapetian, 'A Culture of Impunity' (n 136) 18.

detention.[435] These actions followed official Australian immigration policies and memoranda of understanding with third states.[436] Scholars and civil society actors submitted that these policies deliberately aimed to deter migrants through the severe deprivation of liberty and other alleged acts, causing mental and physical suffering.[437] Scholar Jamal Barnes concludes that 'there is sufficient evidence to suggest that these conditions were part of a deliberate campaign to inflict pain and suffering'.[438]

Despite the persuasive and abundant material made available to the OTP, it reasoned that it could not find that the alleged crimes were connected to a state policy in the Australian case.[439] According to Shatz and Branco, the OTP also questioned the existence of an EU policy, although the case awaits a formal response. The policy element may, therefore, have a critical role in the context of migration. While, as evidenced above, the policy element has been discussed by international tribunals and examined by scholars, the passive form of a state policy merits a more thorough analysis,

4.3.2. The Policy of Toleration

Legal scholarship has shown that certain practices, such as systematic pushbacks or arbitrary detention, are actively pursued. Researchers have further considered the lack of accountability and acts of omission, both elements of passive behaviour of states. As mentioned, Shatz and Branco propose considering the EU policy based on the failure to rescue, and Stine von Förster examines the passive dimension of several policies involved,

[435] Analysed by Henderson, 'Australia's Treatment of Asylum Seekers' (n 5) 1163-1165, starting with the 2011 'Pacific Solution'.
[436] Ibid; Stanford, 'Communication: Nauru and Manus Island' (n 5) 13-19.
[437] Ibid, 1170-1175; Stanford, 'Communication: Nauru and Manus Island' (n 5) 63-74.
[438] Jamal Barnes, 'Suffering to Save Lives: Torture, Cruelty, and Moral Disengagement in Australia's Offshore Detention Centres', 35 Journal of Refugee Studies 4 (December 2022) 1512.
[439] ICC-OTP, Report on Preliminary Examinations (n 50) paras 54-55.

arguing that sanction-free acts indicate the policy of toleration.[440] This version of a policy has nonetheless received limited attention in scholarship and case law overall, but its relevance in the migration context is significant.[441] The ongoing impunity supports its consideration as a critical aspect of the policies, as states deliberately fail to investigate and prosecute criminal acts and thereby satisfy the policy by passive behaviour. The development in recent years highlights that impunity has become systematic in the context of migration. The sections below outline the degree of impunity for violations of migrants' rights and explore how the policy of toleration may be interpreted in ICL.

4.3.2.1 Sanction-Free Acts

Several authors and human rights organisations have demonstrated that border violations are not sanctioned, and impunity endures widely.[442] In the early years, individual cases such as charges against Matteo Salvini, former Italian Interior Minister, for kidnapping,[443] or Maltese Prime Minister Robert Abela for the 'Easter Massacre' drew attention,[444] however, none of these cases resulted in criminal charges against a state agent. In more

[440] von Förster, *Verbrechen gegen die Menschlichkeit* (n 5) 118; Shatz and Branco, 'Communication: Central Med' (n 5) paras 578-621.
[441] Exceptionally, Holvoet, 'The Prototype of Passively Encouraged Crimes' (n 262).
[442] Karen Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights', 100 Cornell Law Review (2014) 1069-1128; Mann, 'Border Violence as Crime' (n 5) 675-736; Hodgson, 'Resisting the State Crimes' (n 5) 161-163; AI, 'Malta: Waves of Impunity' (n 410) 16; Amnesty International, 'Morocco: "They beat him in the head, to check if he was dead" Evidence of Crimes under International Law by Morocco and Spain at the Melilla Border' Index: MDE 29/6249/2022 (December 2022); Legal Centre Lesvos, 'Crimes against Humanity in the Aegean' (1 February 2021) 32; European Alternatives to Detention Network, '"Black Holes": CILD's report reveals human rights violations in Italy's immigration detention centres' (4 July 2022).
[443] Wladimir Pantaleone and Angelo Amante, 'Italian deputy PM Salvini acquitted of migrant kidnapping charges', Reuters (20 December 2024).
[444] The so-called 'Easter Massacre' resulted in 12 deaths and over 50 pushbacks to Libya, including minors. Republikka, a human rights NGO, subsequently filed a criminal complaint accusing Prime Minister Robert Abela and an army official of homicide. Following a government inquiry, all actors were cleared of responsibility. The investigation was criticised as inadequate, see The Shift, 'Speedy conclusion of inquiry into migrant deaths 'not normal'' (27 May 2020) <https://theshiftnews.com/2020/05/27/speedy-conclusion-of-inquiry-into-migrant-deaths-not-normal/>; The inquiry was published on 26 May 2020, available at <https://www.gov.mt/en/Government/DOI/Press%20Releases/PublishingImages/Pages/2020/May/30/pr201030/pr201030a.pdf>; see also ECCHR, 'Communication: Interceptions' (n 5) para 468-471.

recent years, the systematic nature of impunity became more evident. Following a thorough investigation by Special Rapporteur Morales into pushbacks in 2021, he concluded that in several states, but especially EU countries, '[i]mpunity for pushbacks is prevalent',[445] and that states fail to 'adequately address and prevent violations'.[446]

In July 2024, the Fundamental Rights Agency (FRA) of the European Union published guidelines on investigating alleged ill-treatment at borders.[447] The EU violations, FRA concluded, are insufficiently investigated, noting that 'a sense of impunity prevails'.[448] It investigated numerous cases of alleged wrongdoing and 'could find only three criminal convictions'.[449] The three criminal convictions resulted in financial penalties, a suspended imprisonment sentence, and a 6-month sentence.[450] Considering the number of recorded acts of border violence, speaking of a 'sense' of impunity is an understatement. The information sufficiently supports the conclusion that impunity is prevalent across the EU and raises the question of whether it has become a part of the system. State agents do not face consequences for violations of fundamental rights of migrants in any EU Member State.

Similarly, forced transfers and alleged violations in Australian offshore centres remain sanction-free. In 2015, Australia conducted an investigation into the abuses in offshore detention facilities. It published the Moss Review in 2015, finding that sexual exploitation and other forms of mistreatment occurred, but criminal prosecutions were not initiated.[451]

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[445] Morales, 'Report: Pushbacks of Migrants' (n 212) para 103; see also Callamard, 'Unlawful death of refugees and migrants' (n 359) para 40 (systematic failure).
[446] Ibid, para 103.
[447] FRA, 'Guidance on Investigating Alleged Ill-Treatment at Borders' (n 47).
[448] Ibid, 14/47.
[449] Ibid, 14/47.
[450] Ibid, 15/47.
[451] Australian Parliamentary Inquiry, Select Committee on the Recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru [Moss Review] (August 2015) para 5.16 (finding that Australia had sufficient control over the facilities, para 2.7); see also Miho Kitamura, 'Australia's Offshore Detention Regime and Crimes Against Humanity', Global Justice Journal Queen's University (16 August 2021).

Australia continued to forcibly transfer migrants to the facilities for several years before the official closure.[452] Other pathways to accountability have been pursued, such as a class action based on alleged crimes against humanity, which resulted in a settlement.[453] Since, thus far, the OTP has rejected further engagement with the alleged crimes, it closed the door to remedying the domestic impunity, at least for the time being. In Chapter V, it is proposed that the Australian case be reassessed and preliminary examinations be opened as new interpretations and additional information may urge the Prosecution to reconsider its arguments.

Alleged violations at the US-Mexican border likewise remain sanction-free. While Mexico created a Unit for the Investigation of Crimes for Migrants (*Unidad de Investigación de Delitos para Personas Migrantes*, UIDPM),[454] most cases remain unsolved. According to a research report by WOLA, an advocacy NGO for human rights in the Americas, 99% of all crimes committed against migrants between 2014-2016 resulted in impunity.[455] A 2014 study by the American Immigration Council further found that 95,9% of reported misconduct filed against the US Border Patrol agents 'resulted in "no action".'[456] Based on the report and other independent sources, in 2020, HRW concluded that the US Border Patrol has violated detainees' rights for several years with enduring impunity.[457] According to the American Civil Liberties Union (ACLU), the US Border Patrol has been involved in

[452] Morales, 'Report: Pushbacks of Migrants' (n 212) para 68.
[453] Mann, 'Border Violence as Crime' (n 5) 727; Hodgson, 'Resisting the State Crimes' (n 5) 10; *Kamasaee v Commonwealth of Australia & Ors S CI 2014 6770*, Supreme Court Victoria, Notice of Proposed Settlement (24 July 2017).
[454] Fiscalía General de la República, 'Unidad de investigación de delitos para personas migrantes – UIDPM', (13 July 2017).
[455] Ximena Suárez *et al.*, 'Access to Justice for Migrants in Mexico – A Right That Exists Only on the Books', WOLA – Advocacy for Human Rights in the Americas (July 2017).
[456] Katy Murdza and Walter Ewing, 'The Legacy of Racism within the U.S. Border Patrol', American Immigration Council: Special Report (February 2021) 16.
[457] HRW, 'US: Stop Using Untrained, Abusive Agencies at Protests: Immigration, Border Control Have History of Abuse, Lack Accountability' (5 June 2020).

violence and deaths on a large scale. It counted at least 191 deaths in the decade 2011-2021.[458] Regarding criminal investigations, the ACLU stated that

> [s]ix of these deaths were caused by Border Patrol agents shooting across the border into Mexico — yet no agent was held accountable for the killings. The agency lacks basic accountability practices: No agent has ever been convicted of criminal wrongdoing while on duty, despite deaths in custody and uses of excessive, deadly force.[459]

These records provide important information that further justifies the turn to international criminal law as the domestic criminal systems fail. Simultaneously, migrants face extensive criminalisation. Existing criminal norms are interpreted overly broadly to investigate migrants and those in solidarity with them,[460] adverse *de facto* consequences of extant criminal law are denied,[461] and new penal norms are adopted,[462] further criminalising humanitarian action. Opponents of applying (international) criminal law against potential perpetrators in the realm of migration refuse to acknowledge that criminal law is already being applied in this context, yet against migrants and those in solidarity with them.[463] Criminal law is the emerging dominating instrument in the field.[464] Opposing

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[458] Shaw Drake and Kate Huddleston, 'Addressing Racialized Violence Against Migrants Requires a Complete Overhaul of Customs and Border Protection', ACLU News&Commentary (24 September 2021).

[459] Ibid; see also claim for damages in *Jesus C. Hernández et al. v. Jesus Mesa*, United States Supreme Court, 589 U.S.(2020), (25 February 2020), declined on the precedent *Biven*, not applicable to cross-border shootings.

[460] Moreno-Lax *et al.*, 'Between Life, Security and Rights' (n 211) 2; Greek Council for Refugees, 'At Europe's Borders: Between Impunity and Criminalization', Report (2023) 41-45; Morales, 'Report: Pushbacks of Migrants' (n 212) para 107 (e).

[461] Marta Minetti, 'The Facilitators Package, penal populism and the Rule of Law: Lessons from Italy', 11 New Journal of European Criminal Law 3 (2020) 335-350; see for the arguments that the concealment of the adverse consequences indicates the gravity, Kalpouzos and Mann, 'Banal crimes against humanity' (n 5) 4; Mann, 'Border Crimes as Crimes against Humanity' (n 5) 1185.

[462] Ibid; Council of the European Union, 'Presidency non-paper on Articles 3, 4 and 9 of the proposal for a Directive laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the Union', Council doc 7673/24, LIMITE (Brussels 21 March 2024).

[463] Mann, 'Border Violence as Crime' (n 5) 719, bringing forward several other arguments applied by opponents of criminal law in the migration context, such as absent justification and criminal trials as part of and (re)writing history. See also the concept of 'crimmigration': Juliet P. Stumpf, 'Crimmigration: Encountering the leviathan' in Sharon Pickering and Julie Ham (eds), *The Routledge Handbook on Crime and International Migration* (1st ed) (Routledge 2014).

[464] Valsamis Mitsilegas, Violeta Moreno-Lax and Niovi Vavoula (eds), *Securitising Asylum Flows – Deflection, Criminalisation and Challenges for Human Rights* (CUP 2021); Marta Minetti, 'Uses and Abuses of the Anti-smuggling Law in Italy', CJN (15 April 2020); David Alan Sklansky, 'Crime, Immigration, and Ad Hoc Instrumentalism', 15 New Criminal Law Review 2 (2012) 157-223; Cetta Mainwaring and Daniela DeBono, 'Criminalizing solidarity: Search and rescue in a neo-colonial sea', 39 Environment and Planning C: Politics and Space 5 (2021) 1030-1048; Commissioner for Human Rights, 'Issue Paper – Criminalisation of Migration in Europe: Human Rights Implications', Council of Europe, CommDH/IssuePaper 1 - Original version (2010);

the use of criminal law in the realm of migration to provide legal remedy to the *victims* masks the prevalent use of criminal law against them, turning victims into perpetrators worthy of punishment for exercising their fundamental rights.[465] The sanction-free acts thus appear as part and parcel of the systematic violation of fundamental rights committed by state agents, combined with the instrumental and abusive use of criminal law against the victims. These are indicators for a structural dimension of impunity as the lack of accountability is embedded into the system. The quality and dimension of impunity are further discussed in Chapter IV. Moreover, it is being suggested that the *deliberate* lack of action by states concerning the prevention and punishment of crimes against migrants – whilst concurrently running a criminalisation campaign against migrants – can be acknowledged under the policy of toleration according to Article 7 ICC Statute. As this form of policy is exceptional, the following section briefly outlines how it is interpreted. Due to a lack of case law and research, a more detailed proposal for its interpretation is made in Chapter V.

4.3.2.2 Interpreting the Policy of Toleration

International criminal tribunals have dealt with this form of policy, however, only in few cases relevant to this thesis. In armed conflict, the ICTY dealt with the passive form of a policy in *Kupreškić et al.* and held that when private actors commit such crimes 'some sort of explicit or implicit approval or endorsement by State or governmental authorities' must

Deanna Dadusc and Chiara Denaro, 'Criminalising Solidarity: Silencing Critical Voices and Erasing the Critical Gaze on Border Violence', Border Criminologies – University of Oxford (16 April 2021).

[465] Julia Winkler and Lotta Mayr, 'A Legal Vacuum - The Systematic Criminalisation of Migrants For Driving a Boat or Car to Greece', borderline-europe (July 2023); ARCI Porco Rosso and borderline-europe, 'From Sea to Prison - The Criminalization of Boat Drivers in Italy' (15 October 2021). See also: Cathryn Costello, 'Victim or Perpetrator? The Criminalization of Migration and the Idea of 'Harm' in the Labour Market Context' in Alan Bogg *et al.* (eds), *Criminality at Work* (OUP 2020) 308-326.

be proven.[466] Also in the context of an internal armed conflict, the ICTR recognised this version of a state policy in the judgment against *Jean-Paul Akayesu,* who allowed, encouraged, and signalled the official tolerance of mass sexual violence.[467]

A relevant case for peacetime contexts is the Situation in the Philippines. After the Prosecution submitted that the Duterte government actively engaged in killing drug users and further failed to investigate and prosecute the incidents, the Chamber acknowledged the active *and* passive behaviour by the state under the state policy requirement, authorising the investigation.[468] The passive dimension is not mentioned in the Rome Statute, however, the Chambers acknowledge this version interpreted under Article 7 (2)(a). Moreover, a specific version of this policy is foreseen in the Elements of Crimes:

> A policy which has a civilian population as the object of the attack would be implemented by State or organizational 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 organizational action.[469]

This form of state policy is exceptional since it refers to a state policy *only* implemented by passive behaviour, requiring conscious inaction. However, as a result of a compromise during negotiations, the absence of action alone does not suffice.[470] As Kai Ambos notes, 'an (implicit or explicit) announcement of impunity from prosecution for crimes'[471] sufficiently describes this version of a state 'action' provided that authorities would be 'legally obliged and able to intervene'.[472]

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[466] *Kupreškić et al.* (Judgment) (n 150) para 555.
[467] *Akayesu* (Judgment) (n 26) paras 9, 693.
[468] Authorisation Decision Philippines (n 46) para 101, in detail Chapter V at 4.2.2
[469] Article 7, Introduction, para 3, fn. 6, Elements of Crimes.
[470] Ambos, *Treatise, Volume II* (n 30) 71.
[471] Ibid, 72.
[472] Ibid.

Especially in light of the OTP's declining to investigate the Australian case, arguing that a *policy* could not be established,[473] it warrants further analysis. The policy of toleration may be a suitable reference for describing the underlying policy in migration cases because states refrain from preventing further violations, fully aware of the consequences. Exceptionally, in a blogpost, Mathias Holvoet addressed this policy in the context of Australia's offshore detention as the 'prototype of passively encouraged crimes against humanity'.[474] His arguments are especially relevant, and Chapter V engages more thoroughly with the passive policy in the Australian context and beyond. Overall, the existence of information indicating passive encouragement should further invoke heightened vigilance by the OTP since crimes committed with impunity are not solely within its clear mandate, but unaddressed systematic criminality risks further encouragement and normalisation.[475]

In sum, the passive policy is indicated by the sanction-free acts that occur with systematicity. Under the Statute, the state is not required to attack the civilian population actively and may be held accountable for crimes against humanity when it does not prevent and prosecute crimes despite a duty to act. However, it remains exceptional within the Statute. Consequently, a delineation of crimes committed by omission and the parameters for this policy must be established before assessing whether the state's absence of legally required action in the migration context fulfils this element. In particular, how this version of a policy should be interpreted in peacetime contexts. Chapters IV and V address these questions and propose an interpretation for this form of policy beyond situations of armed conflict.

[473] ICC-OTP, Report on Preliminary Examinations (n 50) paras 54-55.
[474] Holvoet, 'The Prototype of Passively Encouraged Crimes' (n 262).
[475] Ambos, *Treatise, Volume I* (n 24) 56; Moreno-Lax, 'The "Crisification" of Migration Law' (n 47) 11.

4.4. Concluding Remarks on Alleged Crimes against Migrants: Status of Investigations

[T]he Chamber considers that it does not follow that an investigation should not be opened where facts or accounts are difficult to establish, unclear, or conflicting. Such circumstances in fact call for an investigation to be opened, provided that the relevant requirements have been met.[476]

The question of whether the fundamental rights violations against migrants qualify as crimes against humanity remains a controversial matter. The existing body of knowledge provides sufficient information to justify the demand for thorough investigations to ascertain whether the allegations persist. Due to the complexity of the situations involving several actors from diverse states, transnational movements, and extraterritorial action, an assessment on a case-by-case basis is crucial, and the OTP is the most suitable institution to investigate the accusations.

Before investigations are carried out, the OTP opens PE into a situation. Since preliminary measures do not pre-empt conclusions that are only discernible from full investigations or prosecutions,[477] the standard for opening PE is critical. It foresees that the crimes must '*appear* to fall within the jurisdiction of the Court'.[478] The evidentiary standard for this procedural stage is low compared to commencing full investigations, for which a reasonable basis to proceed must be proven.[479] To date, the OTP has not engaged in *examinations* that deal exclusively or, considering the extent of the crimes and their

[476] Authorisation Decision Philippines (n 46) para 12, referring to the evidentiary standard of a 'reasonable basis to proceed,' i.e. a more advanced stage following the request for an authorisation.
[477] Ibid.
[478] OTP, PPPE (n 123) para 39 (emphasis added); Amitis Khojasteh, 'The OTP Policy Paper on Preliminary Examinations Pre-Preliminary Examination Stage: Theory and Practice of the OTP's Phase 1 Activities', in Morten Bergsmo and Carsten Stahn (eds) *Quality Control in Preliminary Examinations Volume 1* (TOAEP 2018) 234. In detail, Chapter IV at 2.1.
[479] Article 15 (3) and 53 ICC Statue.

potential perpetrators, adequately with crimes against migrants. As explored, the alleged crimes were subject to only one *Pre*-Preliminary Examination, namely in the case of Australia, and the OTP rejected proceeding further to the PE stage.[480]

Moreover, although the OTP has been investigating crimes in relation to the conflict in Libya since 2011, including crimes against migrants,[481] strong criticism has been voiced over the extent to which crimes against migrants are considered.[482] On the one hand, the OTP predominantly referred to prosecutions on the domestic level, invoking complementarity (Article 17 ICC Statute);[483] however, thus far, only two Eritrean smugglers have been charged with 'human smuggling, hostage-taking, extortion and violence including sexual violence' by Dutch authorities.[484] On the other hand, the OTP's 2024 report to the UN SC suggests that smugglers and militias are the perpetrators of the crimes; Libyan authorities and, above all, EU actors are not mentioned.[485] The report further details that the OTP collaborates with an established 'Joint Team investigating crimes against migrants on the Central Mediterranean Route'.[486] From the report, it is not discernible which crimes are considered and which actors are investigated.

From previous reports, however, it appears that the OTP has reduced its complementarity standard to demanding trials based on trafficking and smuggling; crimes against humanity by Libyan and EU state actors are not subject to the investigations.[487] In light of the OTP's

[480] ICC-OTP, Report on Preliminary Examinations (n 50) para 55.
[481] Situation in Libya (n 138); ICC, Statement of ICC Prosecutor, Karim A. A. Khan KC, to the United Nations Security Council on the Situation in Libya, pursuant to Resolution 1970 (2011) (14 May 2024).
[482] *Supra* (n 283).
[483] 27th Report to the UNSC: Libya (n 283) para 102. The OTP applies a 'positive complementarity' approach, promoting national proceedings, see 'renewed investigative strategy' for Libya, ICC-OTP, 'Twenty-Third Report of The Prosecutor of The International Criminal Court to The United Nations Security Council Pursuant to Resolution 1970 (2011)' (28 April 2022) [23rd Report to the UNSC: Libya] para 30.
[484] Ibid, para 53.
[485] Ibid, para 57.
[486] Ibid, para 30.
[487] ICC-OTP, 'Twenty-Sixth Report of The Prosecutor of The International Criminal Court to The United Nations Security Council Pursuant to Resolution 1970 (2011)' (8 November 2023) [26th Report to the UNSC: Libya] paras 45-46, 51-55; 23rd Report to the UNSC: Libya (n 483) para 25; see also Meloni and Zhang, 'Complementarity Is No Excuse' (n 283).

objective to complete the Libya investigation at the end of 2025,[488] it can be concluded that the alleged crimes against migrants were not and, with a high likelihood, will not be adequately addressed within this mandate.

Except for these two activities related to the alleged crimes, no other public information suggests that the OTP takes or plans to take action in the context of migration. In addition to the impunity for crimes against migrants on the domestic level,[489] impunity also prevails on the international level. Fundamentally, crimes against migrants are largely committed without consequences.

The ongoing violence and impunity, combined with the presented overwhelming information, have prompted scholarship to think beyond the traditional boundaries of ICL. Arguably, the OTP's widely critiqued response to the Australian case in 2020 led to the second phase of research posing more general questions. If the extensive information available does not suffice to convince the Prosecutor to at least open PE, what other, more profound issues lie beneath this inaction and what value lies in engaging further with ICL in the context of migration?

[488] ICC, 'ICC Deputy Prosecutor Nazhat Shameem Khan concludes official visit to Tripoli, discusses cooperation towards completion', Press Release (25 April 2024) <https://www.icc-cpi.int/news/icc-deputy-prosecutor-nazhat-shameem-khan-concludes-official-visit-tripoli-discusses>; 27th Report to the UNSC: Libya (n 282) para 99, acknowledging the need for activities beyond the end of the investigation.

[489] *Inter alia*, Mann, 'Border Violence as Crime' (n 5); Hairapetian, 'A Culture of Impunity' (n 136); 26th Report to the UNSC: Libya (n 487) para 44; FRA, 'Guidance on Investigating Alleged Ill-Treatment at Borders' (n 47) 37/47; see accountability through different lenses the Special Issue, 'Border Justice', German Law Journal (n 102).

4.5. International Criminal Law and Migration: Exposing Structural Issues

Since the alleged migration-related abuses continue to be committed and actors largely evade accountability, the reasons for the prevailing impunity require further attention. This section presents the body of scholarship that engaged with these questions and outlines the gap in research in which this thesis is situated, namely the peacetime context, which may be the principal cause for impunity.

The second phase in scholarship can be summarised as a meta-perspective on the previous academic and civil society engagement with specific instances of alleged crimes. It is characterised by claims for a more global view by critically reflecting on the structural dimension underlying the violence against migrants and challenging the traditional and hegemonic nature of ICL. Among others, in this phase, scholarship turned to the benefit of ICL as an expressive tool,[490] an instrument to resist state crime,[491] and articulated foundational theories on crimes against humanity.[492] Of particular interest for this research are theories proposing how crimes against humanity should be interpreted in light of border violence, in particular, the research dealing with structural violence, as systemic, presumably invisible, and non-criminal violence.[493]

Following the OTP's refusal to investigate Australian offshore crimes, Kalpouzos argues that ICL is inherently biased and hegemonic, which results in selectivity and the risk of perpetuating the existing power imbalance.[494] In a similar vein, Natalie Hodgson and

[490] Kalpouzos, 'Violence against Migrants' (n 5) 576.
[491] Hodgson, 'ICL and civil society resistance' (n 5) 452; Hodgson, 'Resisting the State Crimes' (n 5).
[492] Mann, 'Border Crimes as Crimes against Humanity' (n 5) 1179-1189.
[493] Galtung, 'Violence, Peace, and Peace Research' (n 6) 170-171.
[494] Kalpouzos, 'Violence against Migrants' (n 5) 595; Hodgson, 'Resisting the State Crimes' (n 5) 152; however, ICL can challenge the hegemonic beliefs that enable state crime, aiming to reshape the societal understanding of state conduct.

Astghik Hairapetian challenge the ongoing state violence and resulting impunity based on the power dynamics of Global North states, with a focus on Australia and the US, respectively.[495] Although ICL can be a powerful counter tool, Kalpouzos warns that ICL should not be 'fetishized'[496] as this would contravene a (self)critical reflection on ICL as a mechanism to address crimes against migrants. According to Kalpouzos, ICL can serve a more complex role provided that it considers socio-political and legal contexts that create 'asymmetry and injustice'.[497] Mann also challenges narratives underlying the turn to international criminal law, questioning whether the 'vocabulary of mass atrocity be futile, perhaps even counterproductive'.[498]

However, Mann convincingly defends the 'anti-impunity movement' against several critiques. Among them, the possibility of whether the violence against migrants is mere, non-criminal structural violence, i.e. individual criminal responsibility is an inappropriate response.[499] Yet, according to Mann, the global turn and the underlying inequality may serve to justify addressing structural violence with criminal law as a transformative political and legal tool.[500] In another work, Mann builds upon these notions and the work of researchers in the field and formulates three theories on why crimes against migrants qualify as crimes against humanity. In particular, structural violence appears as 'natural',[501] and the exclusion of migrants from protection as inevitable in violent border systems. As Kalpouzos and Mann have previously challenged that 'banal crimes' lack the shock value of mass atrocities,[502] Mann then exposes the means by which migrants are deprived of their basic rights, such as instrumentalisation/weaponisation, i.e. using human beings to deter

[495] Hodgson, 'Resisting the State Crimes' (n 5) 152; Hairapetian, 'A Culture of Impunity' (n 136) 5.
[496] Kalpouzos, 'Violence against Migrants' (n 5) 576.
[497] Ibid, 597.
[498] Mann, 'Border Violence as Crime' (n 5) 717.
[499] Ibid, 724.
[500] Ibid, 725, 729
[501] Mann, 'Border Crimes as Crimes against Humanity' (n 5) 1190.
[502] Kalpouzos and Mann, 'Banal crimes against humanity' (n 5) 26.

others.[503] Instrumentalisation is not *per se* criminally relevant but rather a Kantian moral wrong.[504] The degree of suffering imposed on migrants to deter others, however, and the inherent violation of the dignity of the victims when degraded to mere objects, a core protected legal value under ICL rules, may justify that these practices amount to unlawful conduct under Article 7, such as inhuman and degrading treatment.[505]

These two theories, the weaponisation of migrants and the structural violence against them, appear as migration-specific, but they also provide general theoretical underpinnings, especially for peacetime contexts in which functioning and organised states act. The theories are of particular interest to this research as they lay the foundations for thinking beyond the traditional extreme physical violence narrative of international crimes and place a stronger emphasis on the systemic deprivation and oppression of certain groups within a community.

Mann's third theory uses a rather traditional understanding of crimes against humanity as political crimes against the nature of social and political beings, drawing from David Luban's famous allegory of 'politics gone cancerous'.[506] The migrant abuses qualify as crimes against humanity, Mann argues, because they attack not only the political but the cosmopolitical nature of humanity as a whole, risking societal division.[507] Most importantly, the theories do not apply alternatively but explain the specifics of crimes against migrants complementarily. Connecting the interpretative theories can create a positive, 'larger shared vision of justice'.[508]

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[503] Mann, 'Border Crimes as Crimes against Humanity' (n 5) 1179-1183.
[504] Ibid, 1180.
[505] Ibid, 1182-1183.
[506] Ibid, 1186; Luban, 'A Theory of Crimes Against Humanity' (n 1) 90. See also Sadat, 'The Forgotten Crime' (n 2) 530. In more detail, Chapter III, at 2.
[507] Ibid, 1188, to the extent that several authors have called the border regime a global apartheid system, see at 1189-1190, and *supra* (n 190).
[508] Ibid, 1190.

Several aspects of these theories inform the following chapters of this thesis. The next chapter traces the origins of crimes against humanity, proposing that the early idea of crimes against humanity aligns with the abuse of state authority, arguing that the third theory is particularly suitable to describe the original rationale of crimes against humanity. The chapter further explores additional arguments as to why crimes against migrants are widely committed with impunity, studying arguments that have not been articulated so far and directly addressing the primary research question.

Since the analysis above has shown that the OTP considers crimes against migrants in its investigation in Libya, but no other migration-related situation, the hypothesis arose that it investigates the crimes because they are connected to an armed conflict. To test the hypothesis, the history of crimes against humanity is useful since the crimes were originally connected to armed conflict via the so-called war-*nexus*. This may partially explain why the crimes in Libya have, although insufficiently, been considered. To assess the hypothesis against a higher number of cases, Chapter IV analyses the prosecution practice before the ICC. In addition, the subsequent chapters also revisit the potential of crimes against humanity to address structural violence, not only in the context of migration but for peacetime contexts more broadly, responding to Mann's second theory. This involves aspects of the first theory on weaponisation/instrumentalisation. These chapters draw significantly from Peace and Conflict Studies, where some of the most influential theories on structural violence originated. It demonstrates the importance of considering other disciplines in refining the understanding of the concept of crimes against humanity. As mentioned in the introductory chapter, this application of PCS theory to ICL is a key

contribution of this thesis, following scholars such as Grech who have argued for a greater integration of PCS theory and practice into international law.[509]

5. Conclusion

Europe has one of the best and most effective regional systems of human rights protection. However, most cruel atrocities occur on other continents, and this is why our task and responsibility is to strengthen other regional systems.[510]

Europe's human rights regime may be deemed internationally influential and relatively effective overall, yet the systematic violence against migrants takes place at and within its borders without adequate scrutiny. As the quote suggests, atrocities elsewhere seem to distract and shift the attention away from what takes place in the closest proximity. Scholars in the field of ICL and migration and related Article 15 submissions serve to give prevalence to the potential crimes committed or unfolding on territories with ostensibly robust protection schemes, challenging the assumption that cruel atrocities occur elsewhere. This chapter reflects the failure of states to provide the purported level of protection in Europe, as well as the US and Australia.

The existing body of research has established that relevant unlawful acts occur systematically and follow an overarching policy centred around the plan to deter migration and defend borders at all costs. This indicates the organised nature of the attack and the collective operation by the perpetrators. It is submitted that the linkage between those acts and the contextual elements, crucial for establishing an attack overall, has been sufficiently

[509] Grech, *The International Law of Peacebuilding* (n 52) 50.
[510] Piotr Hofmański, 'International and national courts confronting large-scale violation of human rights: Genocide, crimes against humanity and war crimes', ECtHR (Strasbourg 29 January 2016) para 2.

demonstrated. The abuse of state authority, as a central component of the crime, can also materialise as a policy of toleration when crimes are committed sanction-free despite a duty to intervene, consciously encouraging the crimes. This aspect underscores the dangerous nature underlying the setting, as the perpetrators, through the protection of the state or organisation, are not held accountable. Moreover, Article 7 protects civilians irrespective of their nationality. Migrants, as a civilian population, are particularly vulnerable and do not have the possibility to find protection elsewhere. Crimes against humanity seek to protect any population from a powerful entity that turns against it.

Based on the work of scholars and civil society, this chapter concluded that the information and additional material available support that the alleged crimes against migrants *prima facie* amount to crimes against humanity under Article 7 of the ICC Statute. The current investigative status of the OTP into the alleged crimes, however, remains opaque and incomprehensive. As violence and exclusion are ongoing and impunity prevails domestically and internationally, the reasons for the disregard of crimes against migrants warrant a deeper examination.

A second body of scholarship has engaged with some of these questions, taking a meta-perspective on crimes against humanity as a concept to address border violations and on ICL as a whole. The lack of international attention implies inherent power imbalances, causing impunity, and reinforced criticism about its biased and selective nature. Nonetheless, several scholars offer important avenues for using ICL as an instrument to challenge the legitimacy of state action and continue to demand improvement. This chapter presented the conceptions about crimes against humanity offered in scholarship, particularly the relevant notions for addressing structural violence, the instrumentalisation of human beings, and the political nature of the crimes. These ideas significantly inform

the subsequent chapters and assist in formulating a refined understanding of crimes against humanity in peacetime contexts.

This chapter further articulated a set of questions that emerged from the review. First, it highlighted that the crime of persecution should be reconsidered, in particular in light of the cumulative effect of measures indicating the severity of fundamental rights deprivation and the risk of gradually aggravating, similar to the mistreatment of women and girls in Afghanistan. In addition, the differential treatment of Ukrainian refugees exposed that other migrants may be discriminated against based on the country of origin as an impermissible ground. The country-of-origin concept is a central category in the migration context, carrying a specific meaning and is abused to identify and target migrants at sea and land borders. Second, the policy of toleration received limited attention, and this chapter proposed a more thorough engagement with this form of policy. It must be delineated from omission, although an overlap is apparent. The passive behaviour of a state operating in an institutionally functioning system, however, requires an adequate interpretation as case law is not sufficiently available. Moreover, the chapter raised the question of whether the OTP investigates crimes against migrants in Libya because the crimes are connected to the armed conflict. This pivotal question is revisited in the next chapter.

More precisely, the next chapter explores the reasons for this connection, namely the historical connection between crimes against humanity and WWII, when the crimes were first legally codified. Since the alleged crimes against migrants arguably satisfy the constitutive elements of crimes against humanity under the current interpretation as provided in this chapter, it appears that other reasons impede prosecutions. The next chapter analyses additional underlying reasons for the persistent impunity for crimes

against migrants, not yet articulated in scholarship. It focuses especially – but not limited to – the historical war *nexus*.

Chapter III: Underlying Causes of Impunity

So, it is mistaken to locate the origins of an entire doctrine of crimes against humanity in Lauterpacht's thought in 1945, and thereby reduce to one voice the depth and diversity of 80 years' worth of legal and philosophical debate.[511]

1. Introduction

The previous chapter has demonstrated that, at least *prima facie,* sufficient information and supplementary material support the hypothesis that the alleged crimes against migrants amount to crimes against humanity under the existing legal framework. If interpreted according to the researcher's proposals, it can be argued that the plain meaning of Article 7 permits drawing such a conclusion. Therefore, it is suggested that the reasons for persistent impunity may lie beyond the already explored arguments provided in literature. This chapter examines additional reasons underlying the impunity, delving into the primary research question of why migration-related crimes are not hitherto prosecuted before the ICC.

[511] Irvin-Erickson, 'Hersch Lauterpacht' (n 40) 4.

Beyond the plain meaning, the rationale of crimes and the object and purpose of the Rome Statute must be considered when interpreting ICL norms.[512] The underlying rationale of crimes against humanity has time and again sparked controversial debates, has seemingly changed over time, and remains in flux.[513] However, whether the OTP opens PE in the context of the migrant-related crimes may be contingent on a *specific* interpretation of crimes against humanity that the OTP has not explicitly expressed. Since the Australian case is the only case concerning migration that provides insights, this rejection is of particular importance for this thesis.[514] The OTP did not refer to a specific rationale of crimes against humanity, but, decisively, refused that the recognised unlawful acts follow a (purposefully designed) policy.[515] The policy requirement is a highly debated element, and its legacy is further intrinsically connected to the inception of crimes against humanity in the London Charter, the legal basis for trying Axis criminals following WWII.[516] The historical interpretation in cases before the ICC has further invoked disagreement about the correct understanding of the rationale of crimes against humanity.[517]

At the forefront of this debate is the historical connection to war, legally reflected in the so-called war *nexus* that limited the prosecution of Axis criminals to crimes for which a connection to the aggressive war could be established.[518] This chapter traces the legacy of the war *nexus*, its evolution into a policy, and its informative value for the underlying rationale of crimes against humanity. If the rationale suggests that crimes against humanity are inherently crimes in armed conflict, the alleged crimes against migrants may not be prosecuted because they are not connected to such a context – despite the fact that the

[512] Werle and Burghardt, 'State or a 'State-Like' Organization?' (n 151) 1154.
[513] See Chapter I at 2.
[514] ICC-OTP, Report on Preliminary Examinations (n 50) paras 54-55.
[515] Ibid, para 54.
[516] IMT Charter (n 17).
[517] In particular, the controversial *Kenya* Decision 2010 (n 33), see *infra* at 2. and 4.1.
[518] Article 6 (c) IMT Charter, in detail *infra* 3.2.

wording of Article 7 does not explicitly foresee such an element. If the rationale suggests otherwise, disregarding the alleged crimes may not be justified – or hinge on other arguments yet to be explored.

The intention of this chapter is not to provide another general analysis of the Nuremberg Charter and the post-Charter development, as numerous compelling contributions exist.[519] However, focusing on the sequences of law developments, it aims to highlight the originally designed conception of crimes against humanity, which can be understood as crimes unrelated to armed conflict.[520] Especially in the pre-Nuremberg phase, the legal notion represented a desired law (*lex desiderata*). During the brief but intensive phase of negotiating the prosecution of Axis crimes leading to the adoption of the Nuremberg Charter, the legal concept of crimes against humanity represented the future law as it should have been (*lex ferenda*). This chapter thus offers a corrected historical interpretation based on the *lex desiderata* at the time and emphasises the exceptional promise underlying crimes against humanity, particularly for peacetime contexts.

The chapter consists of three main parts. First, it outlines the rationale of crimes against humanity and reiterates the scholarly theory that they describe crimes against the political nature of human beings, to explore whether this notion is reflected in the *lex desiderata*. Second, it traces the historical development of the concept of crimes against humanity to underscore the different phases, leading to the adoption of the Rome Statute. This part is divided into several sub-sections, which are presented chronologically – early evolution,

[519] *Inter alia:* Bassiouni, *Crimes Against Humanity* (2011) (n 28); Luban, 'A Theory of Crimes Against Humanity' (n 1); Jalloh, 'What Makes a Crime Against Humanity' (n 13); Van Schaack, 'The Definition of Crimes Against Humanity' (n 13); deGuzman, 'The Road from Rome' (n 36); Irvin-Erickson, 'Hersch Lauterpacht' (n 40); Sands, *East West Street* (n 13); Ambos and Wirth, 'The Current Law of Crimes Against Humanity' (n 19); van den Herik, 'Using Custom to Reconceptualize Crimes Against Humanity' (n 18); Tan, 'Prosecuting in Bangladesh' (n 36); Tan, *The Rome Statute as Evidence of Customary International Law* (n 18) 134-188.

[520] For the sequences of international law developments, see Drumbl, *Reimagining Child Soldiers* (n 58) 102, and in detail Chapter VI at 2.2.

pre-IMT Charter, IMT Charter and judgment, post-IMT Charter, ICC – to set clear boundaries to the sequences of law developments. These sections discuss the ambiguity of the available sources and the transition of the link to war into a state or organisational policy in the Rome Statute. Given that the *nexus* to war resurfaced in cases before the ICC, the third section revisits its legacy in contemporary cases. It identifies (mis)perceptions about the rationale of crimes against humanity, influencing the prosecutorial attention on crimes in armed conflict. The section sets the foundation for the claim that the prosecution of crimes against humanity is still significantly limited by the historical requirement of a link to war, although it can be argued that armed conflict is not part of the rationale of crimes against humanity.

The *perception* that crimes against humanity are inherently connected to conflict limits the potential for a wider application of the norm in thought and practice. Moreover, it frustrates the creators' intention to protect civilians of any nationality or other attribute, whether in times of war or peace, from the abuse of state or organisational power.[521] The chapter thus pinpoints when misconceptions took root and whether they justifiably persist. The limitation of this chapter is a narrow focus on the doctrinal development, focusing on crimes against humanity as a peacetime concept, leaving aside power politics and other extra-legal issues.

The chapter concludes by formulating additional hypotheses that form the basis for the subsequent chapters. In particular, the question arises whether impunity for crimes against migrants endures because the ICC system disregards crimes beyond conflict more broadly. Alternatively, as hypothesised in the previous chapter, it posits that impunity persists because the ICC system tends to apply a higher threshold of severity to crimes committed

[521] Irvin-Erickson, 'Hersch Lauterpacht' (n 40) 9.

within the confines of armed conflict. Recognising that concerns of overly broadening the concept of crimes against humanity are legitimate, the present chapter explores essential components describing the rationale of crimes against humanity that prepare the ground for proposing a more adequate interpretation of crimes against humanity without overstretching it. The proposal is based on corrected misperceptions identified as contributing factors to impunity in the context of migration.

2. Rationale of Crimes Against Humanity

Given that the rationale of crimes against humanity is a determining factor for its interpretation, this section outlines the most important elements describing its current understanding. The rationale of crimes against humanity includes some aspects inherent to all core crimes and some exclusively characteristic to Article 7. All international crimes are labelled the 'most serious crimes',[522] and derive their legal basis from the desire to protect human dignity.[523] They cover the infliction of physical harm, humiliation, degradation, and the imposition of mental pain and suffering, including the deprivation of basic living conditions necessary for a dignified existence.[524] Protecting these basic values is considered to be inherently in the interest of all individuals and states.[525]

The ICC Statute and the provisions therein must be interpreted according to general rules. According to Werle and Burghardt, the rules for interpreting the ICC Statute provide that

> [u]nder Article 21, the ICC Statute essentially forms a self-contained legal regime. Thus any argument must be intrinsic to the Statute. The methodology for interpreting the Statute is found, via Article 21(1)(b), in Article 31(1) of the Vienna Convention on the Law of

[522] Preamble of the ICC Statute; Article 1 ICC Statute; Article 5 ICC Statute.
[523] Otto Triffterer, Morten Bergsmo, and Kai Ambos, 'Preamble' in Ambos, *Rome Statute: 2022 Commentary* (n 1) paras 9-11.
[524] Ibid, para 11.
[525] Bassiouni, *Crimes Against Humanity* (2011) (n 28) 8.

Treaties. The starting point for interpretation is contained in the wording – that is, the ordinary meaning. In addition, consideration must be given to the context, as well as to the object and purpose of the treaty provisions and the treaty as a whole.[526]

Accordingly, when interpreting the elements of crimes, they must reflect the concept's intended meaning and be strictly construed.[527]

As the preamble of the ICC Statute postulates, the commission of a core crime is of 'concern to the international community as a whole'.[528] In crimes against humanity, this concern is predominantly embedded in the widespread or systematic nature of an attack against a civilian population.[529] Thus, the nature of such crimes is two-fold. Firstly, the perpetrator attacks the inviolability of personal dignity by the act committed.[530] Secondly, the gravity of the crimes attacks the international community's values (peace, security and well-being of the world) by its pervasiveness or magnitude.[531] A single unlawful act by one person may be a starting point for a 'situation',[532] but generally, isolated conduct or acts of excessive violence do not invoke the Statute's application.[533] All core crimes protect the collectivity of persons, even if individuals are attacked.[534] Crimes against humanity protect the 'individuality' as well as 'humankind'.[535] Moreover, core crimes committed are 'transcending the interest of any one State'.[536] International tribunals are 'trying *on behalf* of the international community'.[537] This implies that the values and interests of the

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[526] Werle and Burghardt, 'State or a 'State-Like' Organization?' (n 151) 1154 ff (footnotes omitted).
[527] Article 22 (2) ICC Statute.
[528] Preamble of the ICC Statute: '***Determined***…' (2nd).
[529] Article 7 (1) ICC Statute.
[530] Triffterer *et al.,* 'Preamble' in Ambos, *Rome Statute: 2022 Commentary* (n 1) para 11; Luban, 'A Theory of Crimes Against Humanity' (n 1) 98.
[531] Preamble of the ICC Statute: '***Recognizing***…'.
[532] Article 13 (a), (b) ICC Statute.
[533] *Kunarac et al.* (Judgment) (n 142) paras 422, 428, 431.
[534] Triffterer *et al.,* 'Preamble' in Ambos, *Rome Statute: 2022 Commentary* (n 1) para 21. See also the crime of persecution, Article 7 (1)(h) ICC Statute: David Nersessian, 'Comparative Approaches to Punishing Hate: The Intersection of Genocide and Crimes Against Humanity', Stanford Journal of International Law 43 (2007) 221, genocide protects the group as such, crimes against humanity, the individual belonging to a group.
[535] Ambos, 'Article 7' in Ambos, *Rome Statute: 2022 Commentary* (n 1) para 3.
[536] *Prosecutor v. Duško Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) AC, ICTY IT-94-1-AR72 (2 October 1995) para 59, citing TC Decision, IT-94-1-T (10 August 1995) para 42.
[537] Ibid, (emphasis added).

international community overrule sovereign power. In the face of the abuse of state or organisational authority and the multitude of perpetrators in contrast to ordinary individual crimes, the danger is significantly increased for the civilian victims.[538]

Grasping the very essence of crimes against humanity, however, is complex and contested. Numerous theories and conceptualisations have been proposed. Among other existing conceptualisations,[539] one segment of scholarship places politics at its centre. David Luban famously described the essence of crimes against humanity as crimes against the political nature of humans and exclusion from participation; as 'politics gone cancerous'.[540] Based on this notion, Leila Nadya Sadat developed the 'atrocity cascade',[541] warning that human rights violations may 'grow and eventually metastasize, overcoming the ability of national systems to address them'.[542] Mann, identifying three theories of crimes against humanity as suitable references for addressing border crimes as presented in Chapter II,[543] builds upon Luban's theory and suggests that crimes against migrants constitute crimes of exclusion from moral and political recognition in the cosmopolitan community, overcoming the territorial limitation in Luban's conception.[544]

The state turning its force against a political community is a convincing reference. Kai Ambos also notes that the crimes have been discussed as 'a state crime in the sense of a "systematic inversion" of the powers justifying the state's existence'.[545] Yet, the state crime debate is contested, and is briefly discussed in Chapter IV. The crime against

[538] Ambos, *Treatise, Volume II* (n 30) 56.
[539] See *supra* (n 13).
[540] Luban, 'A Theory of Crimes Against Humanity' (n 1) 90.
[541] Sadat, 'The Forgotten Crime' (n 2) 530.
[542] Ibid, 530.
[543] Mann, 'Border Crimes as Crimes against Humanity' (n 5) 1179-1189; Chapter II at 4.5.
[544] Ibid, 1186.
[545] Ambos, *Treatise, Volume II* (n 30) 47, 57 (footnotes omitted), assessing Vernon, 'What Is Crime Against Humanity?' (n 13) 245; critiqued and rejected because of its limited scope in Ambos, 'Article 7' in Ambos, *Rome Statute: 2022 Commentary* (n 1) para 3. For the understanding of the 'migration crisis' as a structural conflict that rests on the state's use of violence to maintain itself, see Chapter V at 2.2.

migrants, however, may qualify because the decision-making authority and the state agents turn against migrants as a vulnerable group, systematically excluding them from participation and the exercise of their fundamental rights. The state uses systematic violence in a political campaign of deterrence and defence, as Chapter II highlighted.[546] If the abuse of political authority is reflected in the original rationale of crimes against humanity, it may be a suitable interpretation of Article 7 and cover the systematic violations of migrants' right.

Thus far, all efforts to present an adequate interpretation of crimes against humanity to address crimes against migrants, including the (cosmo)political theory, have not been successful in practice. A recurring matter is the threshold required to lift these fundamental rights violations to crimes against humanity, which needs to be reflected in the rationale of the concept.[547] It was already suggested to recognise the cumulative effect of acts of persecution in Chapter II,[548] however, the historical development of crimes against humanity frequently resurfaces as profoundly informing the rationale of crimes against humanity. The decisive question revolves around the influence of the initial connection to war, legally codified in the 1945 IMT Charter to prosecute Axis war criminals at Nuremberg, the so-called war *nexus*.[549]

Although the Rome Statute does not explicitly require such a link, interpreting it narrowly as contingent on its historical understanding could lead to excluding certain conduct from the purview of the protected interest due to the legacy of the war linkage. This question

[546] The deterrence theory pertains to the Kantian paradigm of not using humans as means to an end, amounting to instrumentalisation, for Mann an indicator for the *mens rea* of the crimes, see Chapter II at 4.5. For the migration-related policies, see Chapter II at 4.1.2.; Chapter V at 2.2.3.
[547] 1996 PrepCom report (n 79) para 90; Pérez-León Acevedo, 'The Close Relationship Between Serious Human Rights Violations and Crimes Against Humanity' (n 25); Roberts, 'On the Definition of Crimes Against Humanity and Other Widespread or Systematic Human Rights Violations' (n 25) 1-27.
[548] Chapter II at 4.2.2.1.
[549] Article 6 (c) IMT Charter.

and conflicting views arose especially following the ICC's 2010 *Kenya* Decision related to post-election violence.[550] Dissenting Judge Kaul construed the term 'organisation' in crimes against humanity more narrowly than the majority, and disagreed with authorising the investigation.[551] When Kaul interpreted the 'object and purpose'[552] of crimes against humanity, he drew from the concept's *history*, as a concept born out of WWII. Finding that the crimes in Kenya were 'characterized by chaos, anarchy, a collapse of State authority in most parts of the country and almost total failure of law enforcement agencies',[553] Kaul argued that the policy/organisation requirement was not met, as it lacked a sufficiently designed organisation.[554] He referred to the *raison d'être* of the norm and its connection to WWII, which implied that crimes against humanity aim to criminalise systematic and organised state violence during conflict.[555] He put forward:

> (…) I believe that the historic origins are decisive in understanding the specific nature and fundamental rationale of this category of international crime. It is this understanding which guides me to conclude that a demarcation line must be drawn between international crimes and human rights infractions (…).[556]

This statement reinvigorated the debate about the historical relationship between crimes against humanity and armed conflict. Leila Nadya Sadat strongly opposes the equalisation of contemporary forms of atrocities with the Nuremberg paradigm and argues that Kaul's dissent 'effectively reinsert[ed] a link to armed conflict that had been deleted by the Diplomatic Conference'.[557] She demonstrates that the dissenting opinion had a considerable influence on the ICC and scholarship, aligning with Judge Kaul's

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[550] *Kenya* Decision 2010 (n 33).
[551] Ibid; Dissenting Opinion of Judge Hans-Peter Kaul, para 53; for a thorough analysis, see Jalloh, 'What Makes a Crime Against Humanity' (n 13) 410-435.
[552] Ibid, para 56.
[553] Ibid, para 153.
[554] Ibid, paras 82, 112, 149-153.
[555] Ibid, paras 64-65.
[556] Ibid, para 65.
[557] Sadat, 'Crimes Against Humanity in the Modern Age' (n 2) 370-371. See *infra* 3.2.3 for the details of the deletion.

reasoning.[558] Sadat objects to the importance given to the historical argument and notes that 'history may offer an understanding of the origins of crimes against humanity but cannot properly serve as a comprehensive guide to its current application'.[559] Although Judge Kaul predominantly referred to the difference between a state and a non-state organisational policy, the *nexus*' legacy describing the contextual background of crimes against humanity may thus be indicative of one of the reasons why the ICC is reluctant to prosecute crimes against humanity beyond conflict. Kaul's approach, however, underscores a broader tendency in international criminal law to elevate historical form over present function – a move that risks freezing a transitional legal concept in a moment of political compromise.

As a result, despite the non-existence of the link in the Rome Statute, it must be examined whether interpreting Article 7 according to the reasoning and interpretation adopted by Judge Kaul has merit. The contention that crimes against migrants are not recognised as crimes against humanity because they lack a linkage to conflict could then be justified, even without the explicit requirement. Revisiting this question is therefore paramount to investigate why the ICC does not examine migrant-related crimes. However, this chapter demonstrates that the historical development of crimes against humanity, in particular the early history, may be better interpreted as a concept originally designed to define crimes that penalise systematic abuse of state or state-like power against civilians and not requiring a link to armed conflict. This suggested approach would render crimes against humanity particularly pertinent in addressing the systematic and severe violations of the fundamental rights of migrants. The following section explores the historical evolution of crimes against humanity to pinpoint its original meaning. The dissenting opinion is then

[558] Ibid, 335.
[559] Ibid, 370.

revisited in the last section of this chapter to explore whether the arguments align with the historical interpretation.

3. Historical Evolution of the Concept of Crimes Against Humanity

In 1924, the Assembly of the League of Nations adopted the Geneva Protocol for the Pacific Settlement of International Disputes.[560] In the Preamble, the Assembly asserted that a war of aggression constituted an international crime.[561] Since the Protocol was never ratified, it did not directly become positive international law.[562] When Germany waged WWII, the question of whether this war would legally qualify as a crime thus reappeared. The Allied forces mandated the United Nations War Crimes Commission (UNWCC) to prepare the prosecution of Axis war criminals.[563] The legality of the criminal charges was an important question for the Commission.

In an explanatory note of 1944, the Czech delegate to the UNWCC, Bohuslav Ečer, asked whether 'law should go backwards when social changes require progress'.[564] Ečer was referring to the Geneva Protocol and the opinion the international community had expressed with it. He concluded that the Protocol 'denounced war as an international

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[560] League of Nations, 'Protocol for the Pacific Settlement of International Disputes, adopted by the Fifth Assembly of the League of Nations on October 2nd, 1924', available at Library of Congress <https://www.loc.gov/resource/gdcwdl.wdl_11582/?sp=1>.

[561] Ibid, Preamble.

[562] For the codification process of the crime of aggression, see Kirsten Sellars, '*Crimes against Peace' and International Law* (CUP 2013).

[563] The Inter-Allied Declaration 'Punishment For War Crimes signed at St. James's Palace' (London on 13 January 1942) Document issued by the Inter-Allied Information Committee, 4 (3) <https://nla.gov.au/nla.obj-648522001/view?partId=nla.obj-648522082#page/n0/mode/1up> The declaration succeeded the first inter-Allied meeting that took place on 12 June 1941 at St James's Palace in London. Britain and the United States adopted the Atlantic Charter on 14 August 1941, to which several other states acceded subsequently. At the beginning of 1942, the Declaration of United Nations (the successor of the League of Nations) followed. See The Avalon Project (Yale Law School) *Atlantic Charter* (14 August 1941) <https://avalon.law.yale.edu/wwii/atlantic.asp> and the *Declaration by the United Nations* (1 January 1942) <https://avalon.law.yale.edu/20th_century/decade03.asp>.

[564] Bohuslav Ečer, 'Scope of the Retributive Action of the United Nations According to Their Official Declaration: The Problem of "War Crimes" in Connection with the Second World War', Explanatory and Additional Note by Dr. Ečer to his report (Doc. III/4), UNWCC Committee III, III/4(a) (12 May 1944) 7.

crime'.[565] The principle of legality should therefore not impede prosecuting the aggressive war. In the same note, the Czech lawyer argued that the Germans 'are not only committing war crimes stricto sensu but crimes which are crimes against humanity'.[566] Unlike war crimes, crimes against humanity were not yet fully legally shaped and recognised. These early sources that led to their recognition are critical to refining the current interpretation.

Although several contributions in literature assess the early evolution of crimes against humanity,[567] its implications for the rationale of the crimes are underestimated. Scholars investigating the *nexus* to war, which was inserted in the IMT Charter in 1945 for the first time, regularly assess the Charter itself and the post-Nuremberg developments as the road *from* Nuremberg. Although they are crucial, and the Charter is the birth of the criminal concept, the road *to* Nuremberg is likewise important, as the opening quote by Douglas Irvin-Erickson suggests.[568] Several exiled lawyers delegated to the UNWCC, and most prominently Hersch Lauterpacht, played a key role in shaping the concept of crimes against humanity. Their ideas give profound insights into the original notion underlying the crimes and were strongly influenced by preceding events.

Although Irvin-Erickson notes that Lauterpacht's thought in 1945 should not be viewed in isolation, referring to his influence on the IMT Charter's drafters,[569] he also recognises that Lauterpacht had a different vision altogether, expressly rejecting that the *nexus* to war was attributable to him. Irvin-Erickson takes a broader perspective and writes:

In all of Hersch Lauterpacht's work, there was no explicit formulation that crimes against humanity had to be a crime committed in connection to aggressive war. In fact,

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[565] Ibid, 6-7.
[566] Ibid, 7.
[567] For instance, however only briefly, Jalloh, 'What Makes a Crime Against Humanity' (n 13) 391-392; in detail: Irvin-Erickson, 'Hersch Lauterpacht' (n 40); Sands, *East West Street* (n 13); Van Sliedregt, 'The Humaneness-side of Humanity' (n 36).
[568] Similarly, Lindsay Moir, 'Crimes Against Humanity in Historical Perspective', 3 New Zealand Yearbook of International Law (2006) 101-130.
[569] See *infra* 3.2.1.

Lauterpacht and previous jurists such as George Washington Williams had invoked the concept to signify offenses committed by sovereign governments against their individual subjects—regardless of whether the offenses were committed in connection to colonization and enslavement (Williams) or during times of formal peace (Lauterpacht, who was quite willing to contemplate "Jim Crowism" in the US as a crime against humanity).[570]

Reading the early legal ideas of prominent figures and legal thought before the IMT Charter's adoption casts doubt on the assumption that the war *nexus* was meant to describe the rationale of crimes against humanity. In this vein, the following sections trace the essential steps in this law-making phase to underscore that the concept of crimes against humanity was designed to describe crimes outside of armed conflict, especially as a category of crimes distinct from already existing war crimes. In order to pinpoint the moments when potential misperceptions about the crimes' essence and purpose emerged 1) the early evolution, 2) the critical negotiation phase, and 3) the post-Nuremberg developments are examined.

3.1. Early Evolution: Sovereignty, Slavery, and the Armenian Atrocities

The origins of the concept of crimes against humanity trace back to the concept of humanity and human dignity developed during the Enlightenment era.[571] Violent conflicts

[570] Irvin-Erickson, 'Hersch Lauterpacht' (n 40) 9.

[571] Among the most influential works are those of Emer de Vattel, Francisco de Vitoria, Immanuel Kant, and Hugo Grotius: Emmerich de Vattel, *Le Droit des Gens, ou Principes de la Loi Naturelle, appliqués à la Conduite et aux Affaires des Nations et des Souverains*, 3 volumes (Aux Depens de la Compagnie 1758); Francisco de Vitoria (1486-1546) in Anthony Pagden and Jeremy Lawrance (eds) *Vitoria: Political Writings* (CUP 1991). Theologian de Vitoria was inspired by Thomas Aquinas and taught his anticolonial views at the University of Salamanca, Spain; Immanuel Kant, *Zum ewigen Frieden, Ein philosophischer Entwurf* (Perpetual Peace: A Philosophical Sketch) (Königsberg 1795) in Königlich Preußische Akademie der Wissenschaften (Hrsg.) *Kants gesammelte Schriften*. Abt. 1: Werke, Bd. 8: Abhandlungen nach 1781 (Berlin 1912) 341-386. Kant's ideas were heavily influenced by the French Revolution (1789-1799) which was ongoing at the time of his work on perpetual peace; Hugo Grotius, *De Jure Bellis ac Pacis* (On the Law of War and Peace) (Paris 1625). See also Oscar Schachter 'Human Dignity as a Normative Concept', 77 American Journal of International Law 848 (1983) 849; Fabian Klose and Mirjam Thulin (eds), *Humanity. A History of European Concepts in Practice from the Sixteenth Century to the Present* (Vandenhoeck & Ruprecht, Göttingen 2016).

in the second half of the 19th century led to the emergence of the Laws of War.[572] The drafters of these laws desired to reduce human suffering and fulfil the humanitarian aspirations of the so-called civilised nations.[573] The experience of previous wars had resulted in the strong conviction that only state sovereignty and non-interference in domestic affairs could guarantee global peace and a balance of power, including efforts to outlaw war.[574] The model was based on the mutual respect among states regarding their sovereign exercise of power. It assured the absolute independence of external authority or intervention concerning internal questions.[575] Internal autonomy was thus guaranteed.[576] It

[572] For instance, the Civil War in the United States induced the Lieber Code in 1863: Francis Lieber, *Instructions for the Government of Armies of the United States in the Field*, Originally Issued as General Orders No. 100, Adjutant General's Office 1863 (Washington, 1898) [Lieber Code]. The battle of Solferino motivated Henry Dunant to found the International Committee of the Red Cross in the same year. The desire to ameliorate the condition of soldiers during war led to the adoption of the First Geneva Convention in 1864. It set minimum standards for the treatment of the wounded and sick in warfare; the first Convention of 1864 was replaced by the Geneva Conventions of 1906, 1929 and 1949, and amended by the 1966 Additional Protocols, see ICRC, IHL Databases <https://ihl-databases.icrc.org/ihl/COM/470-750065?OpenDocument>; see also John Fabian Witt, *Lincoln's Code: The Laws of War in American History* (Free Press 2012) 4. Witt explores the history of the Laws of War in America from the War of Independence (1775-1783) to the Civil War (1861-1865) and assesses the influence of the Lieber Code (adopted during the Civil War) on the shaping of US history and identity today. Dietrich Schindler, 'J.C. Bluntschli's Contribution to the Law of War' in Marcelo G. Kohen (ed) *Promoting Justice, Human Rights and Conflict Resolution through International Law/La promotion de la justice, des droits de l'homme et du règlement des conflits par le droit international* (Liber Amicorum Lucius Caflisch 2006) 437-454; Danièle Bujard, 'The Geneva Convention of 1864 and the Brussels Conference of 1874', 575 International Review of the Red Cross 164 (1974) 582. Czar Alexander II initiated the Brussels Conference which resulted in the Brussels Declaration of 1874 on the same subject. Yet, a Brussels Convention was not ratified; Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (The Hague, 29 July 1899) [1899 Hague Convention].

[573] Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (CUP 2004); Martti Koskenniemi, 'Nationalism, Universalism, Empire: International Law in 1871 and 1919', Conference Paper: Whose International Community? Universalism and the Legacies of Empire, Columbia Department of History (April 2005) 2.

[574] Samantha Besson, 'Sovereignty', Max Planck Encyclopedias of International Law [MPIL], published in OPIL (March 2011) para 30. In particular, after the suffering of the Franco-Prussian War (1870-1871) that violated the recent liberal progress, but also enhanced its continuation, Koskenniemi, 'Nationalism, Universalism, Empire' (n 573) 2; Oona A. Hathaway and Scott J. Shapiro, *The Internationalists: And Their Plan to Outlaw War* (Penguin Books 2018, first published Simon & Schuster 2017); Samuel Moyn, 'From Aggression to Atrocity: Rethinking the History of International Criminal Law' in Heller *et al*., *The Oxford Handbook of International Criminal Law* (n 51) 344. Moyn argues that outlawing war was the purpose of international law and ICL (including crimes against humanity), in essence, serves to prevent and punish armed conflict. This is a fundamentally different view than the one expressed in this thesis.

[575] Ibid, para 30. It is commonly accepted that sovereignty was established with the Treaty of Westphalia in 1648, ending the Thirty Years' War in Europe, but Besson points out that this view is simplified since as early as 1555 in the Peace of Augsburg, sovereignty had been practised. However, the Peace of Westphalia determined the exercise of secular authority over a territory and freedom from external exercise of power, especially independent from religious domination. The internal organisation of states towards their citizens was described by Thomas Hobbes (*Leviathan*), John Locke (social contract theory), Hugo Grotius, Alberico Gentili, Francisco Suarez, Jeremy Bentham (constitutionalism), Jean-Jacques Rousseau (social contract) and others.

[576] Ibid, para 31; Grech, *Human Rights and the Northern Ireland Conflict* (n 166) 14.

meant freedom for states from accountability to foreign powers.[577] Any abuse of the state against its citizens was therefore purely a domestic matter. Citizens had no right to be protected by any entity other than their own government. Hence, they were also subject to its benevolence.

This absolute freedom of states within their borders was first questioned by the movements against the slave trade. Early writings of Alberico Gentili (1552 – 1608) record piracy and the slave trade as a violation *erga omnes* and therefore punishable by anyone.[578] His ideas contested immunity for perpetrators when 'higher laws' were violated. Whereas slavery was practised further, the humanitarian promises progressed until, at the beginning of the 19th century, a British-led campaign against the trading of persons outlawed the practice. Britain claimed 'that the slave trade was contrary to all principles of humanity'.[579] The US, Spain and Brazil followed suit throughout the century.[580] According to scholar Jenny S. Martinez, the US and Great Britain considered the trading of slaves a crime of international concern.[581] A trader of human beings should thus be treated like a pirate who was a *hostis humani generis* – an enemy of the human race.[582] The slave trade was considered to be so heinous that it constituted a violation of human dignity and a breach of the higher law of humanity.[583] The idea progressed that state behaviour could be restricted due to the seriousness of certain practices. Martinez further points out that the concept of humanity

[577] Ibid; Grech, *Human Rights and the Northern Ireland Conflict* (n 166) 14.
[578] Jenny S. Martinez, *The Slave Trade and the Origins of International Human Rights Law* (OUP 2012) 117.
[579] Fabian Klose, 'A War of Justice and Humanity' in Fabian Klose and Mirjam Thulin (eds), *Humanity: A History of European Concepts in Practice From the Sixteenth Century to the Present* (Vandenhoeck & Ruprecht 2016) 185.
[580] Ibid, 185-186.
[581] Martinez, *The Slave Trade* (n 578) 120-123.
[582] Ibid; Van Sliedregt, 'The Humaneness-side of Humanity' (n 36).
[583] Ibid, 115; different views on slavery have been expressed in literature: Geras, *Crimes Against Humanity: Birth of a Concept* (n 13) 4; Edwin Bikundo, 'Enslavement as a Crime against Humanity: Some Doctrinal, Historical, and Theoretical Considerations' in Heller *et al.*, *The Oxford Handbook of International Criminal Law* (n 51) 361-376; Luban, 'The Enemy of All Humanity' in Heller *et al.*, *The Oxford Handbook of International Criminal Law* (n 51) 586, describing slavery as a 'crimes against human nature' at 572; Kerstin von Lingen, 'Fulfilling the Martens Clause' in Klose and Thulin, *Humanity* (n 579) 190.

was later abused to justify imperialist enterprises in colonies, which stained its reputation as a protection mechanism for oppressed populations.[584] Fabian Klose also addresses the ambivalence of this development since it triggered European colonialism and imperialism based on forced labour of indigenous people in the colonies, especially in Africa.[585]

Yet, the colonial atrocities committed in the Congo Free State under Belgian King Leopold's rule were early references to crimes against humanity. There is no consensus in literature on when the term crimes against humanity was used for the first time,[586] but the colonial mistreatment of locals, including the slave trade, was denounced by African-American writer and journalist George Washington Williams, who visited the Belgian Congo, as early as 1890,[587] as also mentioned by Irvin-Erickson. In a letter sent on 15 September 1890 to James G. Blaine, US Secretary of State, he claimed that the State of Congo, colonised under Leopold II, is 'guilty of many crimes against humanity'.[588]

Although these references did not yet define a legal concept but rather described political and moral connotations,[589] they indicate that crimes against humanity were closely connected to the large-scale mistreatment of human beings and the violation of their dignity.[590] This ambiguity reflects an early trend in international law, when moral outrage preceded legal codification. Yet, the lack of precision continues to haunt efforts to define the legal contours of crimes against humanity. The so-called higher laws or natural law did not prevail at the time, denounced as purely subjective, and positivist views dominated.[591]

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[584] Martinez, *The Slave Trade* (n 578) 119.
[585] Klose, 'A War of Justice and Humanity' (n 579) 185-186.
[586] Geras, *Crimes Against Humanity: Birth of a Concept* (n 13) 4; Irvin-Erickson, 'Hersch Lauterpacht' (n 40) 3; William A. Schabas, 'Crimes Against Humanity', Encyclopedia of Genocide and Crimes Against Humanity <https://www.encyclopedia.com/international/encyclopedias-almanacs-transcripts-and-maps/crimes-against-humanity>.
[587] Geras, *Crimes Against Humanity: Birth of a Concept* (n 13) 4; Irvin-Erickson, 'Hersch Lauterpacht' (n 40) 9.
[588] Ibid.
[589] Ibid, 5.
[590] Van Sliedregt, 'The Humaneness-side of Humanity' (n 36).
[591] Rupert Ticehurst, 'The Martens Clause and the Laws of Armed Conflict', International Review of the Red Cross 317 (30 April 1997) 133; Kelsen, *Das Problem der Souveränität* (n 62) 85-87.

And yet, there is consensus that the first legal reference is made in the 1899 Martens Clause, the preamble to the Hague Convention, implying that a breach of the 'laws of humanity and the requirements of the public conscience' could constitute a crime against humanity.[592] The Clause was not regarded as legally binding in 1899,[593] but became accepted as a legal principle by replication in the following 1907 Hague Convention and the Geneva Conventions of 1929 and 1949.[594] The Martens Clause, although part of a treaty related to the laws of war, indicated the emergence of crimes against humanity as a distinct category. The Clause had a significant impact on the future of crimes against humanity, not merely as a legal thought but in particular for later deliberations on the legality of prosecuting crimes against humanity due to the principle of *nullum crimen sine lege*.[595]

The core aspect of this principle is the predictability of legal decisions and the trust in legal certainty.[596] The principle is based on individual responsibility and the consequences of serious punishment for the accused. Everyone must have the possibility to be certain of the effects of their own actions. This responsibility must reflect personal culpability and be based on clearly defined norms.[597] The principle is violated when the accused could not have recognised the criminal character but is punished for that conduct.[598]

After the Ottoman massacre of the Armenians and German atrocities during World War I (WWI), hesitation in prosecuting the crimes was based on doubt about this fundamental

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[592] Preamble to 1899 Hague Convention (n 572).
[593] Ticehurst, 'The Martens Clause and the Laws of Armed Conflict' (n 591) 133.
[594] von Lingen 'Fulfilling the Martens Clause' (n 579) 194.
[595] 'No crime without law'; see also *nullum poena sine lege* (no punishment without law). Translation available at Legal Information Institute <https://www.law.cornell.edu/wex/nullum_crimen_sine_lege>.
[596] Boot, *Nullum crimen sine lege* (Intersentia 2002) 271.
[597] Ibid, 300.
[598] Ibid, 271. For the subsequent debated question and major defence of the accused that their acts were legal under domestic law, see for example, Matthew Lippman, 'They Shoot Lawyers Don't They?: Law in the Third Reich and the Global Threat to the Independence of the Judiciary', 23 California Western International Law Journal 2 (1993) 301 ff.

principle. A violation of the rule of *nullum crimen sine lege* would have 'constituted (prohibited) retroactive penal legislation'.[599] Crimes against humanity were not yet sufficiently codified, despite discussions about this new category of crimes at the Paris Peace Conference of 1919.[600] The delegates acknowledged crimes against civilisation and the laws of humanity as unjustifiable under military necessity.[601] It was discussed whether the Martens Clause could serve as a legal basis to prosecute such crimes internationally. Especially the US representation voiced doubt,[602] hence the Martens Clause was not considered to satisfy this absolute principle after WWI as an international legal basis. German collective responsibility for waging the aggressive war against other nations and atrocities committed therein should be prosecuted as war crimes and crimes against peace.[603] The Versailles Treaty provided the legal basis for the prosecution in Articles 227-229, but did not contain crimes against humanity.[604] Lacking an agreement on rules for an international trial, perpetrators were tried domestically and merely for crimes against other nationals.[605] The so-called Leipzig trials are said to have failed greatly and resulted in widespread impunity for the WWI atrocities.[606] Similarly, Turkish forces eventually overthrew the Ottoman government, resulting in the Treaty of Lausanne of 1923, containing a Declaration of Amnesty for all crimes committed after 1 August 1914.[607]

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[599] Theodore Meron, 'The Martens Clause, Principles of Humanity, and Dictates of Public Conscience', 94 The American Journal of International Law 1 (2000) 80 (parenthesis added).
[600] von Lingen, 'Fulfilling the Martens Clause' (n 579) 196.
[601] Ibid.
[602] Ibid.
[603] MacNeil, *Legality Matters* (n 14) 86, fn. 16.
[604] Treaty of Peace with Germany (Treaty of Versailles 1919) available in *Treaties and other International Agreements of the United States of America, 1776-1949,* Vol 2 (Multilateral 1918-1930) 136-137, compiled by Charles I. Bevans (electronic copy from HathiTrust).
[605] William A. Schabas, *The Trial of the Kaiser* (OUP 2018) 224.
[606] Gerd Hanke, 'Leipzig War Crimes Trials' International Encyclopedia of the First World War, 1914-1918 online (Freie Universität Berlin 2016). From a list of only 45, twelve low-ranking officials were tried at the Leipzig War Crimes Trials in 1921, selected by the Germans themselves. Six of them were acquitted, the others were only given very lenient sentences.
[607] Irvin-Erickson, 'Hersch Lauterpacht' (n 40) 4.

Before the amnesties for crimes by Turkish and Greek officials were declared in 1923, between 1919 and 1922, the British nonetheless pushed the domestic investigations.[608] More than one hundred Turkish officials were arrested, eighteen were indicted, and three low officials of the Turkish government were executed after facing trial in Constantinople.[609] These three convictions of the Ottoman officials were based on 'crimes against humanity'.[610] The three men sentenced to death in Istanbul can be considered the first convictions on the charge of crimes against humanity. Although no high officials were prosecuted,[611] the trials are undervalued as they record an important event in the evolution of crimes against humanity.[612] Historians Dadrian and Akçam opine that the 'context of war emerges as a decisive factor'[613] and 'would become a focal point in the formulation of the Nuremberg principles'.[614] However, they further show that the Key Indictment asserts that the Ottomans 'were taking advantage of the fact that Europe was preoccupied with war',[615] but the crimes were secretly designed long before the beginning of WWI.[616] The indictment speaks for an understanding of crimes against humanity as independent from the war, recognising them as crimes against a state's own population.[617]

This pre-Nuremberg experience and the domestic prosecutions in Istanbul should be considered more influential for the rationale of crimes against humanity. It can be objected that the Armenian massacres were *de facto* connected to war. However, Armenians had

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608 Ibid.
609 Michelle Tusan, '"Crimes against Humanity": Human Rights, the British Empire, and the Origins of the Response to the Armenian Genocide', 119 The American Historical Review 1 (2014) 65. For slightly other numbers, see: Bassiouni, *Crimes Against Humanity* (2011) (n 28) 93.
610 Vahakn N. Dadrian and Taner Akçam, *Judgment at Istanbul: The Armenian Genocide Trials* (Berghahn Books 2011) 16.
611 Bassiouni, *Crimes Against Humanity* (2011) (n 28) 88.
612 Against this view, see Tan, *The Rome Statute as Evidence of Customary International Law* (n 18) 141-142, giving these developments little value.
613 Dadrian and Akçam, *Judgment at Istanbul* (n 610) 134.
614 Ibid.
615 Ibid, citing the Key Indictment.
616 Ibid.
617 MacNeil, *Legality Matters* (n 14) 86, not giving this event much importance.

faced discrimination and domination by the ruling Muslim majority for decades.[618] In the midst of WWI, the Ottoman officials carried out the extermination campaign that was preceded by long-lasting oppression with several episodes of massacres against Armenians.[619] Using the war as a necessity for describing the Armenian atrocities thus fails to acknowledge the previous oppression and discrimination, which culminated in the internal attack *under the pretext* of the war and discredits the legal precedent of the Istanbul trials.

Moreover, the diplomatic document from 28 May 1915 in which Russia, Great Britain, and France denounced the massacre of the Armenians by the Ottoman Empire as a 'crime against civilisation and humanity'[620] is often cited. Due to Great Britain's role as a Christian world power, the Russians suggested exchanging the term 'civilisation' with 'Christianity'.[621] This idea of portraying Britain as a protector of faith was rejected. However, the reference to religion exposes an additional understanding of the concept of the crimes. Historian Michelle Tusan makes an important observation:

> The British Empire was a Protestant empire embracing, in the worldview of nineteenth-century liberalism, diverse regions and peoples. A tension between the belief in its role as a defender of oppressed Christian peoples and a tolerant global empire made up of many faiths, including Islam, came under pressure during World War I and influenced thinking about international justice at the moment when the world's attention first turned to the Armenian massacres.[622]

Despite the rejection of a narrow focus on Christians by the Great powers, this perspective highlights that crimes against humanity were discussed as a mechanism to protect religious

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[618] Dadrian and Akçam, *Judgment at Istanbul* (n 610) 14-15; Vahakn N. Dadrian, 'The Armenian Genocide: Review of Its Historical, Political, and Legal Aspects', 5 University of St. Thomas Journal of Law & Public Policy 135 (2010) 135.
[619] Ibid, 15. See also the so-called 'Blue Book', a collection of documents describing 'The Treatment of Armenians in the Ottoman Empire 1915-1916' written by James Bryce and Arnold Toynbee.
[620] Bassiouni, *Crimes Against Humanity* (2011) (n 28) 93; van den Herik, 'Using Custom to Reconceptualize Crimes Against Humanity' (n 18) 81.
[621] von Lingen, 'Fulfilling the Martens Clause' (n 579) 195.
[622] Tusan, 'Crimes against Humanity' (n 609) 51-52.

minorities from oppression – and influenced the later characterisation of the atrocities as genocide.[623]

The early history of crimes against humanity is particularly important since its origins demonstrate the humanitarian foundation of these developments, challenging the model of absolute sovereignty and the slave trade. In essence, the history of crimes against humanity shows the gradual departure from the absolute model of non-interference in domestic affairs towards the protection of individual human rights against violations by the state. This phase further highlights that the concept of crimes against humanity was designed to become an independent category from the laws of war, although their development is closely connected. The section shows that crimes against humanity were originally conceived to protect civilians from state violence, irrespective of war. The following section highlights that the normative link to war was a later political compromise.

3.2. The Criminal Concept and Its Limitations

The early history towards Nuremberg represents critical steps in the shaping of new international law and shows the gradual evolution from a public moral sentiment towards a legal concept. Accepting the legal value underlying the crimes finally led to the incorporation of 'crimes against humanity' in the IMT Charter in Article 6 (c). The IMT Charter can be considered the formal birth of the criminal concept of crimes against humanity. However, by inserting the so-called war *nexus*, the drafters considerably narrowed the scope of its application. The link to war is one of the most controversially discussed topics related to the origins of crimes against humanity.

[623] Irvin-Erickson, 'Hersch Lauterpacht' (n 40) 6.

This section thus proceeds by highlighting that there was an understanding of crimes against humanity *before* (the UNWCC and negotiations), *during* (the IMT Charter and trials against the major war criminals), and *after* Nuremberg (post-IMT Charter principles, treaties, statutes, and case law). All three phases are essential to clarify the nuances underlying the crimes' historical origins. The section points out that before the adoption of the IMT Charter, the concept was much more clearly understood as described above. From the point of the adoption of the IMT Charter onwards, controversy and ambiguity about its rationale created conflicting views in case law, drafting negotiations, and scholarship. In particular, the events and sources following Nuremberg create significant confusion and ambiguity, as shown below.

3.2.1. Before: Hersch Lauterpacht, the UNWCC, and the Unfulfilled *Lex Desiderata*

Important thinkers and jurists accompanied and assisted the evolutionary process from a moral idea to a legal and then a criminal concept. Hersch Lauterpacht, a Polish Jew and jurist, is regarded as the founding father of crimes against humanity; his counterpart Raphaël Lemkin became known for the recognition of genocide.[624] Moreover, the exiled lawyers delegated to the UNWCC significantly shaped the new international law.[625] Without those key figures, crimes against humanity would not have been codified and prosecuted at Nuremberg. It is therefore important to review the legal thought by the most influential figures and their vision of the new legal concept of crimes against humanity.

[624] Vrdoljak, 'Human Rights and Genocide' (n 41) 1163-1194. For a detailed analysis of the life and work of both men and their interplay: Sands, *East West Street* (n 13). For the life of Hersch Lauterpacht and his work: Koskenniemi, *The Gentle Civilizer of Nations* (n 573); Koskenniemi, 'Hersch Lauterpacht' (n 39) 810–825. For an intellectual biography of Lemkin see Douglas Irvin-Erickson, *Raphaël Lemkin and the Concept of Genocide* (University of Pennsylvania Press 2017).
[625] von Lingen, 'Legal Flows' (n 39).

Lauterpacht and Lemkin dedicated their lives to promoting human rights and international law. Both did not accept the *status quo,* which depicted the state as a sacrosanct and omnipotent entity 'beyond the reach of the law'.[626] Lemkin promoted criminalising genocide and explicitly addressed the protection of national, religious, or racial minorities from their own governments.[627] Lauterpacht deconstructed the state as an abstract entity.[628] He criticised the positivist view that the legal order was shaped by states and argued that individuals forming the states are at the centre of the international legal system.[629] His ideas helped formulate universal basic rights of the individual, which international criminal rules should protect.[630] Lauterpacht's notion of individual rights encompassed individual responsibilities. Since the state was composed of individuals with responsibilities, they must be held criminally and individually responsible for their actions.[631] He argued that states and their organs could not have criminal intent; human beings, however, do.[632] For violations of the higher laws of humanity, even heads of state, state officials, and other military personnel could be held liable. International criminal law thus holds the individual accountable for personal responsibility.[633]

Among other prominent thinkers, Lauterpacht's ideas, strongly influenced by the Grotian tradition, gave considerable stimulus to general questions of modern international law.[634]

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[626] Vrdoljak, 'Human Rights and Genocide' (n 41) 1194.
[627] Ibid, 1185.
[628] Hersch Lauterpacht, 'The Law of Nations and the Punishment of War Crimes', in Guénaël Mettraux (ed), *Perspectives on the Nuremberg Trial* (OUP 2008) 13-55, (originally published in *British Year Book of International Law*, Vol 21, 1944) 20.
[629] Ibid, 21; Vrdoljak, 'Human Rights and Genocide' (n 41) 1173.
[630] Ibid; Irvin-Erickson, 'Hersch Lauterpacht' (n 40) 2.
[631] Ibid, 21.
[632] Ibid, 20; Vrdoljak, 'Human Rights and Genocide' (n 41) 1187.
[633] Foundational: Kai Ambos, *Der Allgemeine Teil des Völkerstrafrechts: Ansätze einer Dogmatisierung* (Dunkler & Humblot, 2002); Ciara Damgaard, *Individual Criminal Responsibility for Core International Crimes* (Springer 2008); Elies van Sliedregt, *Individual Criminal Responsibility in International Law* (OUP 2012); Carsten Stahn, *A Critical Introduction to International Criminal Law* (CUP 2019) 117-158.
[634] Martti Koskenniemi, 'Lauterpacht: The Victorian Tradition in International Law' in Koskenniemi, *The Gentle Civilizer of Nations* (n 573) 388. These ideas influenced, e.g., the 1945 Charter of the United Nations and the 1948 Universal Declaration of Human Rights, see Grech, *Human Rights and the Northern Ireland Conflict* (n 166) 15.

Lauterpacht was credited for the term and concept of crimes against humanity at Nuremberg as an 'eminent scholar of international law'[635] by Robert H. Jackson. Jackson, the Chief US prosecutor, negotiated the London Charter with the Allied delegates.[636] His 1946 report can be considered one of the most important historical records of the negotiations. The report significantly informs the sections below, as they give insight into the IMT Charter negotiations and the motives behind including the linkage to war.

Lauterpacht was further significantly involved in the UNWCC, created in 1942,[637] where he hosted meetings and led legal debates.[638] The Commission's objective was to collect evidence to assist the Allies in the prosecution of the perpetrators in the wake of the surrender.[639] Legal historian Kerstin von Lingen describes the UNWCC as the 'London hub',[640]

> a hub of legal thought during the war, an epistemic community initially formed by European protagonists forced into exile by German occupation, along with Chinese representatives who likewise suffered under Japanese occupation.[641]

The exiled intellectuals were, according to von Lingen, shaping legal concepts and triggering 'legal flows'.[642] Von Lingen's concept of 'legal flows' highlights the diversity of law traditions, the personal backgrounds of marginalised jurists, and their influence in power politics in the process of forging new law.[643] The efforts of the exiled lawyers,

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[635] Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials (London 1945) Department of State Publication 3080 (February 1949) [Jackson's Report], Conference on Military Trials, Document LIX 416.
[636] Sellars, *'Crimes against Peace'* (n 562) 86.
[637] The Inter-Allied Declaration, 'Punishment For War Crimes', St. James's Palace, London (13 January 1942) at 4 (3), issued by the Inter-Allied Information Committee <https://nla.gov.au/nla.obj-648522001/view?partId=nla.obj-648522082#page/n0/mode/1up>.
[638] von Lingen, 'Legal Flows' (n 39) 514.
[639] Eryk Habowski, 'Declassified UN files' Pilecki Institute, Interview (3 February 2020) <https://instytutpileckiego.pl/en/instytut/aktualnosci/odtajnione-akta-onz-wywiad>.
[640] von Lingen, 'Legal Flows' (n 39) 513.
[641] Ibid, 507.
[642] Ibid, 511.
[643] Ibid, 509, 511, 521.

however, have long been under-researched despite their significant influence on the final emergence of crimes against humanity.

Two key figures deserve particular credit for their involvement in shaping crimes against humanity. First, the Czech delegate Bohuslav Ečer, introduced above, is said to have used the term 'crimes against humanity' for the first time as the exact phrase – Lauterpacht named it 'crimes against civilians'.[644] Ečer was further directly influenced by Herbert C. Pell, the US representative to the Commission. Scholar Graham Cox examined Pell's role in the UNWCC and argues that without his presence, crimes against humanity may not have been prosecuted at all.[645] The influence was mutual, as a report by Ečer records. He mentioned Pell regarding the retributive action of the United Nations. On 12 May 1944, he noted:

> Further I should like to underline that crimes against humanity committed because of race, religion and nationality and described in Mr. Pell's motion and my report as the real cause of all the other crimes, as the source of the war, as the malum in se, (…).[646]

Ečer and Pell's exchange reinforces the assumption that crimes against humanity have a unique meaning, independent of war crimes. Ečer's conception is reminiscent of the later discussion of whether crimes against humanity require discriminatory intent overall – which was clarified and rejected by the ICTY Appeal Chamber.[647] It highlights that crimes against humanity should protect minorities targeted by the state; however, represents a

[644] Ibid, 516. For the report of the Commission's analysis of the origins of crimes against humanity see: Egon Schwelb, 'Material for the Preparation of a Definition of "Crimes Against Humanity"', Committee III, UNWCC (3 March 1946) ICC Legal Tools (database record no 238656) <https://www.legal-tools.org/doc/c52df5/>.
[645] Graham Cox, 'Seeking Justice for the Holocaust: Herbert C. Pell versus the US State Department' 23 Criminal Law Forum 77 (2014) 79; see also UNWCC, Resolution moved by Mr. Pell on 16 March 1944, Committee II, III/1 (18 March 1944).
[646] Ečer, 'Scope of the Retributive Action' (n 564).
[647] *Prosecutor v. Dusko Tadić* (Appeal Judgment) AC, ICTY IT-94-1-A (15 July 1999) para 299. According to the definition in the ICTR Statute, all acts require discriminatory intent, however, it is unique for the Rwanda tribunal.

version much closer to the later genocide definition, similar to the conception describing the Armenian massacres.[648]

Irvin-Erickson argues that this is what Lauterpacht had in mind when he followed the Grotian tradition and desired a 'universal moral code'[649] that limits state behaviour and protects civilian populations.[650] Lauterpacht's idea of the new international law was designed to protect any individual, whether a national of the abusive state or not, and he did not suggest a connection to war.[651] His concept of crimes against humanity aimed at constituting a law for humankind, irrespective of which community an individual belonged to.[652] According to Lauterpacht, every individual belonged to the wider community of the human species, which was worth protecting. A state that turned against its citizens turned against humankind as a whole.[653] Yet, the limitation in the IMT Charter marked a deviation from this vision rather than its fulfilment, revealing the distance between the intellectual foundations of crimes against humanity and their initial legal expression.

Moreover, Ečer's note from 1944 further shows that he understood crimes against humanity as the source of the war. This could indicate that not wars enabled crimes against humanity, but crimes against humanity enabled – or led to – wars. Similar to the Armenian genocide, the crimes were committed under the pretext of the war, previously designed, and not incidental or inherent to the war.[654] This interpretation of crimes against humanity in relation to war and conflict suggests that, before the war *nexus* became positive law

[648] See *supra* 3.1. Irvin-Erickson, 'Hersch Lauterpacht' (n 40) 12, speaking of the 'intertwined histories of genocide and crimes against humanity'.
[649] Lauterpacht, 'The Grotian Tradition in International Law' (n 39) 51, formulated in 1946 ('What Grotius did was to endow international law with unprecedented dignity and authority by making it part not only of a general system of jurisprudence but also of a universal moral code.'); Irvin-Erickson, 'Hersch Lauterpacht' (n 40) 5.
[650] Irvin-Erickson, 'Hersch Lauterpacht' (n 40) 9.
[651] Ibid, see the quote *supra* (n 570).
[652] Luban, 'A Theory of Crimes Against Humanity' (n 1) 86.
[653] Vrdoljak, 'Human Rights and Genocide' (n 41) 1188-1190.
[654] *Supra* 3.1.

through the IMT Charter, there was a tendency to describe crimes against humanity as a precursor to war. Some commentators argue that this supports the connection, i.e. that crimes against humanity are crimes committed in armed conflict, describing atrocities that are not absorbed by war crimes.[655]

However, more convincingly, Sadat formulated a compelling theory based on this notion, introduced above.[656] In the 'atrocity cascade',[657] she visualises how crimes against humanity descend into armed conflict and even genocide, but exist beyond, or rather precede, the outbreak of an armed conflict. Sadat's theory is more critically examined in Chapter IV as it informs a more detailed understanding of the concept of crimes against humanity detached from armed conflict.[658] Moreover, based on this conception, Chapter VI proposes a reimagined concept of crimes against humanity beyond armed conflict that considers the early developments of the concept as presented above and Sadat's notion because they reflect the original conception more adequately.

Despite this broader conception of crimes against humanity before the IMT Charter existed, in 1945, the war *nexus* was explicitly inserted and interrupted the development towards an independent norm. At the London Conference on 26 June 1945, preceding the adoption, the US, the United Kingdom (UK), the Soviet Union, and France negotiated an agreement for the trial of the major war criminals.[659] Robert H. Jackson adopted Lauterpacht's suggestion of 'crimes against humanity'.[660] Article 6 (c) of the annexed Charter to the London Agreement, signed on 8 August 1945, criminalised the following acts:

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[655] Tan, *The Rome Statute as Evidence of Customary International Law* (n 18) 142-144.
[656] Sadat, 'The Forgotten Crime' (n 2), see also *supra* 2.
[657] Ibid, 530.
[658] Ibid.
[659] Schabas, 'Crimes Against Humanity' (n 586).
[660] Luban, 'A Theory of Crimes Against Humanity' (n 1) 86; von Lingen, 'Legal Flows' (n 39) 516.

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.[661]

The two categories of crimes, murder and persecution-type crimes, should cover commonly punishable acts such as murder and torture as well as discriminatory conduct on prohibited grounds.[662] The latter category addressed crimes that were not *per se* criminal under all legal systems, but the large-scale and highly organised manner in which the totalitarian state committed them elevated them to international concern.[663]

However, Nazi Germany had started systematically persecuting Jewish citizens throughout the 1930s and 40s. Yet, Article 6 (c) IMT Charter limited the prosecution to acts committed after the outbreak of the war or in connection with it. The phrase 'in execution of or in connection with any crime within the jurisdiction of the Tribunal' referred to war crimes or crimes against the peace.[664] Any act committed before the invasion of Poland on 1 September 1939 was excluded, unless a link to the war could be established.[665]

The aspiration to forge the adoption of an independent norm that would be universally applicable to states violating the most fundamental rights of their own or any civilian population was frustrated through the war *nexus* – the *lex desiderata*, which already advanced into a *lex ferenda*, failed to be fulfilled shortly before its codification. Article 6 (c) of the London Charter, the then *lex lata*, only applied to the Axis powers and only to acts committed in relation to the war and represents a missed opportunity to criminalise mass human rights violations beyond conflict.

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[661] Article 6 (c) IMT Charter (emphases added).
[662] Irvin-Erickson, 'Hersch Lauterpacht' (n 40) 8.
[663] Schabas, 'Crimes Against Humanity' (n 586).
[664] MacNeil, *Legality Matters* (n 14) 87.
[665] Tan, 'Prosecuting in Bangladesh' (n 36) 305.

Although the early evolution and aspirations underlying crimes against humanity may be interpreted as crimes unrelated to war, this moment prompted the (mis)conception that crimes against humanity and war are inherently interrelated. This is especially due to the fact that the legal nature of the *nexus*, as substantially describing the rationale of crimes against humanity or as simply defining the jurisdictional scope of the IMT, remains a myth. The sources related to the IMT Charter and post-Nuremberg events create more uncertainty regarding its legal nature. For this reason, the next section focuses on the Allies' motives for including the *nexus*. For the delegates, the linkage had a legal and political *function*, which sheds some light on its informative value for the rationale of crimes against humanity.

3.2.2. During: The Function of the War *Nexus* in the IMT Charter

The important question raised in scholarship and with far-reaching ramifications for the rationale of crimes against humanity is whether the Allies inserted the *nexus* to describe the essence of the crimes (material element) or the IMT's scope (jurisdictional element).[666] The questions are essential since the wording of the two critical phrases, 1) 'before or after the war' and 2) 'in execution of or in connection with any crime within the jurisdiction of the Tribunal' are not unequivocal and can be read either way.

The subsequent sections thus examine the underlying intention of the drafters of the IMT Charter to include the *nexus* in 1945, which is discernible from the negotiation records, is based on four primary reasons: 1) To adhere to the principle of legality, 2) the principle of non-inference, 3) to define the jurisdiction of the IMT, and 4) to avoid repercussions in the

[666] Ambos and Wirth, 'The Current Law of Crimes Against Humanity' (n 19) 5.

Allied home states. Although it is difficult to describe these motives without referring to later supporting or disproving arguments, this section assesses them in isolation to explore their implications for the historical argument. Predominantly relying on the *post*-Nuremberg developments to corroborate a position creates a problem since post-Nuremberg sources often cause more confusion than they clarify.

3.2.2.1 *Nullum Crimen Sine Lege*

The discussion around the legality of the Nuremberg trials overall is well known.[667] Although the Martens Clause was deemed insufficient to satisfy the principle of legality after WWI,[668] it became the central normative point of reference during the IMT Charter negotiations.[669] Concern was raised, but in asserting that it represented customary law, the Allies concluded that the IMT Charter did not violate the principle of legality.[670] Although the Martens Clause alleviated the concern, it could not completely dismiss it, particularly concerning crimes against humanity.

Marco Milanovic revisits the legality question concerning a contemporary judgment of the ECtHR. He provides a comprehensive recap of the question of whether 'the London Charter was either declaratory of pre-existing custom, or a substantive retroactive imposition of criminal responsibility'.[671] He explains:

> There has always been a tension in international criminal law between the requirements of strict legality and considerations of substantive justice. Time and again, the positive law has proven inadequate precisely when it was most needed. This, in turn, lead judges either

[667] See for example, Shklar, *Legalism* (n 14); Bassiouni, *Crimes Against Humanity* (2011) (n 28) 341 f.; Bassiouni, 'The Need for a Specialized Convention' (n 13) 457 ff.
[668] See *supra* 3.1.
[669] von Lingen, 'Legal Flows' (n 39) 511-512.
[670] Meron, 'The Martens Clause' (n 599) 80; deGuzman, 'The Road from Rome' (n 36) 344; Shklar, *Legalism* (n 14); Schabas, *The Trial of the Kaiser* (n 605) 45.
[671] Marco Milanovic, 'Was Nuremberg a Violation of the Principle of Legality?', EJIL: Talk! (18 May 2010) <https://www.ejiltalk.org/was-nuremberg-a-violation-of-the-principle-of-legality/>.

to downgrade *nullum crimen* to a mere 'principle of justice,' as was arguably done by the IMT, that would be satisfied even by a showing that the perpetrators of heinous acts knew that what they were doing was wrongful – if not illegal – or to creatively 'discover' supposedly pre-existing law to fill in the gap between the factual and the normative, (…).[672]

The case concerned accusations of war crimes, allegedly committed in 1944. The applicant's complaint to have been retrospectively prosecuted was dismissed, but three dissenting judges held that war crimes were not sufficiently defined in 1944.[673] This view is questionable since war crimes were considered substantive legal norms by the time of the Nuremberg trials, as the majority reasoned in the case.[674] On the contrary, crimes against humanity were not yet sufficiently legally shaped. Inserting the war *nexus* to connect them with legally accepted war crimes mitigated the doubts about the prohibition of applying penal provisions retrospectively.[675] Since crimes against humanity were still a legal grey area, it is probable that had they been codified without the linkage to war and directly applied, a much wider argument regarding the violation of fundamental legal principles would have unfolded. The delegates considered it necessary to limit the new law by the *nexus* to war.[676] However, such a maneuver arguably prioritised legal defensibility over conceptual clarity, leaving the nascent doctrine vulnerable to misinterpretation in the decades that followed.

In practice, the IMT established the link to war easily,[677] and its reputation as a prejudiced tribunal persisted.[678] It is thus debatable to what degree the link to war was suitable to

[672] Ibid.
[673] Ibid; see also William A. Schabas, 'Kononov War Crimes Judgment Issued by European Court of Human Rights Grand Chamber', humanrightsdoctorate.com (17 May 2010).
[674] Ibid.
[675] See *supra* 3.1.
[676] Jackson's Report (n 635) Document XLIV, Minutes of Conference Session (23 July 1945) 337.
[677] Ambos and Wirth, 'The Current Law of Crimes Against Humanity' (n 19) 5.
[678] Christian Tomuschat, 'The Legacy of Nuremberg', 4 JICJ 4 (2006) 833 ff.

counter allegations that the trials were biased and arbitrarily established.[679] The drafters connected the new crimes to the crime against peace because they could justify that war was outlawed long before 1 September 1939.[680] They believed this link would avoid potential conflict with the legality principle. Yet scholar Gillian MacNeil shows that in the major legal systems in the pre-Nuremberg phase, the principle has not been applied in an absolute sense, nor in a uniform manner.[681] She notes that it is difficult to deem *nullum crimen* a general principle in the international order at the time of the Nuremberg trials overall.[682] Even if the principle was accepted, the *nexus* requirement did not fully remedy the allegations. MacNeil concludes that crimes against humanity were retroactive laws at Nuremberg.[683] Indeed, the principle of legality was a fundamental question to be addressed, but the *nexus* predominantly served to alleviate the concerns of the drafters that prosecuting crimes against humanity would not be accepted without the connection to the aggressive war. It must be doubted that it should describe the essence of the crimes. Instead, it led to the impediment of the progressive development of the new concept as an independent norm applicable beyond conflict.[684]

3.2.2.2 The Principle of Non-Intervention

The second argument for incorporating the *nexus* requirement pertains to the principle of non-intervention. On 23 July 1945, in the London Conference meeting on military trials,

[679] For the 'Victors' Justice' debate, see for instance, William Schabas, 'Victors' Justice? Selecting Targets for Prosecution' in (ibid) *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (OUP 2012); Lauterpacht, 'The Law of Nations' (n 628) 14-15.
[680] Moyn, 'From Aggression to Atrocity' (n 574) 349, labelling Nuremberg an 'aggression trial.' One strong argument is the Briand-Kellogg-Pact of 1928, which intended to outlaw war entirely, thus an aggressive war *a fortiori.*
[681] MacNeil, *Legality Matters* (n 14) 45.
[682] Ibid.
[683] Ibid, 7, arguing that they remained retroactive until the 1990s.
[684] See generally, Mohamed Shahabuddeen, 'Does the Principle of Legality Stand in the Way of Progressive Development of Law?', JICJ 4 (2004) 1007-1017.

Jackson stated that 'ordinarily we do not consider that the acts of a government toward its own citizens warrant our interference'.[685] The sovereign was still considered to be inviolable, and internal affairs should not provoke intervention. The crimes prosecuted as crimes against humanity were committed by Germans against Germans. Doubt was raised whether stopping Germany from mass criminal conduct against its own population would contravene international norms.[686] The Allies feared being stigmatised as interventionalists imposing power onto other states' internal businesses.[687] Jackson lamented that '[u]nless we have a war connection as a basis for reaching them, I would think we have no basis for dealing with atrocities'.[688] The link to war should ensure that the general notion of non-interference in internal affairs was maintained.[689] However, in the *Justice* case, the US Military Tribunal demonstrated that it had already been common practice to intervene in humanitarian crises by that time.[690]

Humanitarian intervention was not a new concept, and exceptions had been formulated regularly,[691] especially in extreme circumstances.[692] The Holocaust would have certainly been accepted as such an exception after the extent of the atrocity became known. And yet, the international prosecution of the leaders of a state was not widely practised.[693] The crimes by Germans against Germans were the essence of crimes against humanity at Nuremberg, and their very prosecution challenged the concept of non-interference and sovereignty.[694] Some therefore argue that the war *nexus* served as the internationalising

[685] Jackson's Report (n 635) Document LIX, 333.
[686] Ibid, 183.
[687] Matthew Lippman, 'Crimes Against Humanity', 17 B.C. Third World L.J. 2 (1997) 183.
[688] Jackson's Report (n 635) Document LIX, 331.
[689] Van Schaack, 'The Definition of Crimes Against Humanity' (n 13) 847.
[690] *United States of America v. Altstoetter et al.* (Judgment) US Military Tribunal III (Case No 3 of the 'Subsequent Nuremberg Proceeding) (4 December 1947) 974 [*Justice* Case] 980-982.
[691] Alexis Heraclides and Ada Dialla, 'Intervention and non-intervention in international political theory' in (ibid eds), *Humanitarian Intervention in the Long Nineteenth Century* (MUP 2015) 82.
[692] Ibid.
[693] See *supra* 3.1. for the WWI prosecutions.
[694] Van Schaack, 'The Definition of Crimes Against Humanity' (n 13) 864.

element to overcome this barrier, indicating its material nature.[695] However, the sources are not clear, and, as demonstrated above, the large scale of the atrocities and their highly organised nature served to lift those crimes not commonly criminalised in all legal systems (persecution-type acts) to the concern of the international community. Arguably, large-scale murder-type acts would have already been accepted under the humanitarian exception.[696] Indeed, uncertainty about the principle persisted, but the usefulness of the principle of non-interference for describing the original rationale of crimes against humanity is limited.

The principle is certainly a core question of ICL since the very essence of the crimes is their international dimension and involves interference by an international body.[697] Arguing that the war *nexus* served to justify the prosecution seems warranted, but this could likewise refer to the jurisdiction of the IMT only. It does not necessarily describe the *raison d'être* of crimes against humanity, since the large scale of the violations could have fulfilled the same function.

3.2.2.3 Jurisdictional Limitation

Since Article 6 (c) IMT Charter explicitly included the phrase 'within the jurisdiction of the Tribunal', it was argued that the war *nexus* constituted a jurisdictional link for the IMT and justified the international prosecution by *this* Tribunal. In a session of the London Conference, the French delegate Professor Gros stated:

> And after that[698] would come the jurisdiction of the Tribunal, and that would provide for trial of the crimes and atrocities committed by the Axis powers because we have been put

[695] Tan, 'Prosecuting in Bangladesh' (n 36); see also Ambos, *Treatise, Volume II* (n 30) 50.
[696] Van Schaack, 'The Definition of Crimes Against Humanity' (n 13) 847.
[697] Greenwalt, 'What is an International Crime?' (n 153) 316.
[698] Referring to the *chapeau* of the article.

in charge of that job only, and are not to set up a general international court. That would give satisfaction to Mr. Justice Jackson.[699]

Some delegates had raised doubts about the limitation of prosecuting *only* Axis crimes. While Professor Gros shared the concern, he argued that the crimes should be defined narrowly enough to live up to the clear mandate.[700] By including the *nexus*, this objective seemed to be feasible. It would only cover acts by Axis members committed after the start of or in connection with the aggressive war.[701]

The drafters of the Charter made clear that they had different attitudes towards Nazi Germany. Article 6 (c) should thus send different signals to their respective governments and the public. The United States drew upon the fact that the war was illegal and an attack on international peace.[702] The European states were direct targets of the aggression and 'want(ed) to show that the Nazis were bandits'.[703] The common ground was found by setting up a tribunal equipped with a legal code reflecting these goals cumulatively. It certainly appeared more achievable to the Allies to establish a tribunal that investigated crimes against humanity related to the war instead of constitutionalising humanity. To scholar Matthew Lippman, this is an apparent motive:

There was no pretension of propounding universal principles, since the Anglo-French proposal envisioned the charter as a constitutive document which merely defined the jurisdiction of the Allied Tribunal.[704]

Albeit clearly concluding that the link was jurisdiction, Lippman's view also raises doubt whether crimes against humanity should be a universal code. The sources and opinions

[699] Jackson's Report (n 635) Document LI. Minutes of Conference Session (25 July 1945) 377.
[700] Ibid, 379.
[701] 'Common plan' was a substitute for 'conspiracy' since there were technical differences in the interpretation between the continental and common law systems. See Jackson's Report (n 635) Document LI, 387.
[702] Jackson's Report (n 635) Document LI, 383.
[703] Ibid, 383.
[704] Lippman, 'Crimes Against Humanity' (n 687) 186.

remain vague but also show that crimes against humanity had the *capacity* to codify universal principles.

Shortly after the adoption of the Charter, a translation dissimilarity was seen as an argument supporting the jurisdictional nature, as Lippman claims. The so-called 'comma issue,' a discrepancy in the Russian translation from the English and French versions, led to confusion and required clarification on the *nexus*' scope. The English and French versions were read as requiring the link only for persecution needed to be connected to war, the Russian version as requiring it for all acts.[705] With the Berlin Protocol, the Allied delegates corrected the French and English, not the Russian text.[706] For some scholars, this rectification was a sign that the *nexus* constituted a jurisdictional restriction.[707] Yudan Tan, however, demonstrates that this reference could also be read in favour of the opposite argument, arguing that the comma appeared in no other text, casting doubt that the profound consequences were mistakenly disregarded.[708] Margaret McAuliffe deGuzman notes that including all acts was an *intentional* decision,[709] yet highlights that the link's *legal nature* 'remains uncertain'.[710] Only later developments and sources more clearly suggest that the *nexus* was jurisdictional in nature; the original sources remain obscure.

It nonetheless became clear that the Allies intended to restrict the prosecution in Nuremberg to the Axis criminals – which was not guaranteed without the connection to war. The political circumstances in the home states of the Allies, above all, in the United

[705] deGuzman, 'The Road from Rome' (n 36) 355, fn. 87.
[706] Jackson's Report (n 635) Document LXI. Protocol to Agreement and Charter (6 October 1945) 429.
[707] Analysed by Tan, 'Prosecuting in Bangladesh' (n 36) 304.
[708] Tan, *The Rome Statute as Evidence of Customary International Law* (n 18) 157.
[709] deGuzman, 'The Road from Rome' (n 36) 355, fn. 87.
[710] Ibid, 355. For a clear position that the *nexus* is a jurisdictional restriction, see Sands, *East West Street* (n 13) chapter 144. For the opposite view, see Tan, 'Prosecuting in Bangladesh' (n 36) 315.

States, support this claim, and may be the most convincing argument for considering it a precondition for the IMT's jurisdiction.

3.2.2.4 A Legal and Political Compromise

On 23 July 1945, Robert Jackson stated: 'We have some regrettable circumstances at times in our own country in which minorities are unfairly treated'.[711] Lippman cautiously notes that Jackson 'may have feared that a contravention of Germany's domestic jurisdiction would lead to scrutiny of racial segregation in the United States'.[712] More decisively, scholar Graham Cox denounces the US motives as a failure to incorporate an all-encompassing norm to protect minorities, especially from racial persecution.[713] The Soviets were more forthright and made clear that the code merely served to try Axis crimes, not to be a code 'which could be applied at all times and under all circumstances'.[714] Similar to Lippman's statement above, it supports the view that until the IMT Charter was drafted, the idea of crimes against humanity reflected a concept that *could* be applied at all times without the *nexus*. Importantly, the concept's potential seems to have been acknowledged by the drafters, yet they deliberately limited the scope because of their specific mandate. They were tasked with achieving prosecutions of Axis criminals. The sources do not indicate that they believed that, without a *nexus*, the legal text would not adequately describe the underlying idea of crimes against humanity. The essential

[711] Lippman, 'Crimes Against Humanity' (n 687) 184, fn. 52; Jackson's Report (n 635) Document XLIV, 333.
[712] Ibid; see also Schabas, *The Trial of the Kaiser* (n 605) 152; Shklar, *Legalism* (n 14) 177.
[713] Graham Cox, *'What irony! Herbert C. Pell, crimes against humanity, and the negro problem'* (University of Houston, PhD Thesis, 2008) v.
[714] Lippman, 'Crimes Against Humanity' (n 687) 184, fn. 52. See also Bassiouni, *Crimes Against Humanity* (2011) (n 28) 33.

notion of crimes against humanity indeed indicated a universal norm, as desired by Lauterpacht and others.[715]

Additionally, the Allies' concern that the scope included domestic policies could not be alleviated by substantially changing other legal elements of Article 6 (c). Persecution on political, religious, and above all, racial grounds defined the nature of the crimes against Jews.[716] German Jews were persecuted by their fellow citizens and the government, the ordinary German people did not need protection. The Nazi German narrative was that Aryans were superior to Jews. Similarly, the belief that white people were naturally superior defined segregation in the US.[717] Lynchings, labour discrimination, segregation, and other violations of basic rights were common in the US at the time.[718] Indeed, holding only those in Europe and the Far East to account for racists policies, created a legal and political dilemma, which Cox summarises bluntly: 'The unprecedented inhumanity of Nazi Germany required them to construct a method to attack racism abroad and at the same time sustain it at home'.[719] The drafters of the London Charter thus had to navigate around potential repercussions for their actions. This view, while historically accurate, arguably overstates the legal coherence of the IMT's rationale.

Although unease was voiced that trying only Axis criminals may be unjust,[720] the domestic predicament and political pressure made it nearly impossible to codify an all-encompassing

[715] See *supra* 3.2.1.
[716] Cox, '*What Irony!*' (n 713) 8.
[717] Ibid, 10.
[718] Elizabeth Borgwardt, *A New Deal for the World: America's Vision for Human Rights* (HUP 2005) 693.
[719] Cox, '*What Irony!*' (n 713) 11. Cox admits that the comparison between the segregation issue and the Holocaust is an 'awkward endeavour.' He refers to the similarities in (false) racial classifications from which racism as such is constructed. See also James Q. Whitman, *Hitler's American Model: The United States and the Making of Nazi Race Law* (Princeton University Press 2018) 5. According to Whitman, the US racial policy influenced Hitler's antisemitic policies. Hitler even rejected some of them as too racist.
[720] Jackson's Report (n 635) Document LI, 377.

article.[721] The link to (*this*) war mitigated the drafters' primary political concerns. Without the *nexus,* it could have been a norm protecting any population from the ill-treatment of its own government, above all, minorities that belonged to other racial, religious, and ethnic groups than the majority. As mentioned above, Irvin-Erickson notes that Lauterpacht considered Jim Crowism when he deliberated on the new law.[722] The desired law pre-IMT Charter thus reflected the universal code to protect civilians.

This argument could certainly indicate the material nature of the link, claiming that the Allies intended to substantially limit the concept's applicability to racial, religious or political persecution in *wartime*. However, reading these sources with the jurisdictional lens indicates that the Charter should guarantee the prosecution of Axis crimes, i.e. restricting it to specific *perpetrators*, not circumstances, whilst evading potential repercussions. Notably, the sources indicate a general awareness that the mistreatment of part of the population in the delegates' home states may conceptually and normatively qualify. Overall, the *nexus* appears as a legal and political compromise, rather than a necessary element to describe crimes against humanity.

In summary, this section analysed the phase *leading to* the adoption of the Charter. It highlighted that the intentions of the Allied delegates to impose the limitation in 1945 were multifaceted. Several arguments support or challenge its characterisation as a material element or jurisdictional restriction. Besides intending to create compliance with fundamental legal principles such as non-intervention and legality, the political circumstances in the home states of the delegates arguably influenced the decision. This section has shown that it can reasonably be argued that the Nuremberg prosecutions should

[721] On the circumstances in the US at the time, see Elizabeth Borgwardt, 'The Nuremberg Idea: Crimes against Humanity in History, Law & Politics', Speech at the Woodrow Wilson Center in cooperation with the National History Center (February 2016).
[722] See *supra* (n 570).

be limited to specific actors and a specific time, i.e. Axis members and WWII, indicating that the limitation was jurisdictional.

The negotiation records and scholarship support that the concept of crimes against humanity did not necessarily and substantially describe crimes committed in relation to armed conflict, although the *nexus'* legacy remains unsolved. It provides only marginal insight into the rationale of crimes against humanity. The section demonstrated that *up until* the adoption, it rather represented a precondition for the IMT. Nevertheless, it can be inferred that a *perception* of an intrinsic link to conflict emerged and played a formative role in legal and political thought. The next section turns to the influence of this decision beyond the Charter's adoption and explores how the concept of crimes against humanity evolved after 1945.

3.2.3. After: Developments Following the IMT Charter's Adoption

Having examined the early evolution of crimes against humanity and the function of the *nexus* leading to the IMT's Charter's adoption, this section studies the impact of restricting crimes against humanity. It examines the period from 1945 until the adoption of the Rome Statute in 1998 – adopted without a linkage to armed conflict. The question whether the link was jurisdictional or material was continuously addressed, however, the developments following the IMT Charter are particularly inconsistent.[723] Judgments are conflicting, sources may be interpreted as supporting or rejecting either position, and the transition

[723] Van Schaack, 'The Definition of Crimes Against Humanity' (n 13) 85.

from a context of war to 'some kind of authority',[724] i.e. the eventual adoption of a state policy element, is fluid.[725]

This section discusses the most prominent references, focusing on the controversial readings of the sources and the transition into the State or organisational policy element in Article 7 (2)(a) ICC Statute. The early phase includes the IMT judgment, cases under Control Council Law No. 10, and the Tokyo trials. Moreover, conventions adopted in the aftermath of WWII, as well as the statutes and case law of the *ad-hoc* tribunals, the ICTY and ICTR, played a decisive role. The International Law Commission (ILC) draft codes and the Preparatory Committee for the ICC further give valuable insight into the understanding of the concept of crimes against humanity. It concludes by underscoring that the concept as codified in the Rome Statute best reflects the *lex desiderata* as it existed in the pre-IMT-Charter time.

Yudan Tan conducted one of the most thorough examinations of the *nexus'* legacy. She identifies two theories, which she labels the 'Big Bang Theory' and the 'Steady State Theory'.[726] Tan contends:

> The Steady State theory argues that the link with an armed conflict was never a legal but a jurisdictional requirement since the 1945 IMT in Nuremberg. Thus, it is not necessary to discuss when this link has disappeared as it never existed. The Big Bang theory claims that the nexus with an armed conflict was a legal requirement before the IMT, while it disappeared at some time. If the Big Bang theory is justified, a further question is whether that link has disappeared under customary law (…).[727]

Tan supports the Big Bang Theory after a detailed review of the post-WWII cases and documents.[728] Although this clear division assists in assessing the conflicting positions, the

[724] Ambos, *Treatise, Volume II* (n 30) 51.
[725] Jalloh, 'What Makes a Crime Against Humanity' (n 13) 439.
[726] Tan, 'Prosecuting in Bangladesh' (n 36) 304.
[727] Ibid, 304.
[728] Ibid, 304; Tan, *The Rome Statute as Evidence of Customary International Law* (n 18) 166.

available information is highly ambiguous and several sources can be read as supporting either theory, as Tan also notes.[729] The following analysis sheds light on the persistent doubt in the development and explores how crimes against humanity were applied in practice. Rather than concluding with a clear position, it aims to reflect the uncertainty and its consequences on the conception of crimes against humanity since 1945.

3.2.3.1 The IMT, Control Council Law No. 10, and the Tokyo Trials

For most of the leadership defendants who were tried before the IMT, the connection to war was established for the count of crimes against humanity, such as Wilhelm Frick, Herman Goering, and Hans Frank.[730] Only for Rudolf Hess, whose orders could not be 'connected with the commission of War Crimes',[731] indicating the dependence between the charges and supporting the material character of the linkage.[732] Less clear, however, is the value of two prominent convictions. In the cases against *Baldur von Schirach* and *Julius Streicher*, the IMT loosely established a connection to the aggressive war.[733] *Von Schirach* was only convicted of crimes against humanity, never charged with war crimes, and acquitted of crimes against peace.[734] The IMT saw the necessary link to war in the common plan of aggression under which Austria was occupied.[735] *Streicher*, also acquitted of crimes against peace, was convicted of persecution on political and racial grounds; for

[729] Tan, *The Rome Statute as Evidence of Customary International Law* (n 18) 157. Also, van den Herik, 'Using Custom to Reconceptualize Crimes Against Humanity' (n 18) 85.
[730] International Military Tribunal (Judgment) in 'Trial of the Major War Criminals Before the International Military Tribunal' (Nuremberg, 14 November 1945 – 1 October 1946) Judgment of 1 October 1946 (published version of 1947, 171-341) [IMT Judgment] *Goering* at 282, *Frank* at 298, *Frick* at 301.
[731] Ibid, 284.
[732] Ibid.
[733] Ambos and Wirth, 'The Current Law of Crimes Against Humanity' (n 19) 5; citing *Kupreškić et al.* (Judgment) (n 150) para 576, a controversially viewed judgment.
[734] IMT Judgment (n 730) at 302, 318-320.
[735] Ibid, 318.

inciting the murder and extermination of thousands of Jews.[736] Without further reasoning, the IMT stated that the crimes were committed 'in connection with War Crimes, as defined by the Charter, (…)'.[737] The Tribunal held that it 'cannot make a general declaration that the acts before 1939 were Crimes against Humanity within the meaning of the Charter'.[738] The cases are important for examining crimes against humanity, yet it is unclear whether the IMT referred to acts outside of the jurisdiction or the material scope of crimes against humanity. It thereby failed to clarify the conceptual uncertainty created by the Allies.

In turn, Allied Control Council Law No. 10 (CCL No. 10), the legal basis for the prosecution of crimes in the respective occupied zones, codified crimes against humanity in Article II (1)(c).[739] It omitted the *nexus* to another crime (crimes against peace and war crimes). For the first time, crimes against humanity were established as independent crimes under international law.[740] In practice, only in two cases did the Tribunal not establish the link (the *Einsatzgruppen* and *Justice* cases).[741] Although the defendants in the *Flick* and the *Ministries* cases were charged with peacetime crimes against humanity,[742] the Tribunal rejected ruling on crimes without a connection to war,[743] arguing that it depended on the IMT and the judgment against *Goering et al*. in which the link was required.[744] The CCL No. 10 cases, therefore, highlight the practical obstacles and disagreement among the judges about the nature of the link to war.

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[736] Ibid, 302- 304.
[737] Ibid, 304.
[738] Ibid, 254; deGuzman, 'The Road from Rome' (n 36) 347, fn. 41.
[739] Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity (Berlin 20 December 1945) [CCL No. 10].
[740] Bassiouni, 'The Need for a Specialized Convention' (n 13) 463.
[741] See *infra* (n 751).
[742] Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (OUP 2011) 241-242.
[743] *United States v. Flick et al.* (Indictment) United States Military Tribunal (Case No 5) (Nuremberg 1947) Liability for War Crimes, Crimes Against Humanity and Membership of Criminal Organisations of leading German Industrialists (Trial of Friedrich Flick and Five Others) [*Flick* Indictment]; *United States v. Flick et al.* (Judgment) United States Military Tribunal (Case No 5) (Nuremberg 22 December 1947) [*Flick* Judgment] para 1212.
[744] *Flick* Judgment (n 743) para 1188.

Similarly, in the Far East, the Tokyo Charter echoed the Nuremberg Charter almost verbatim. Article 5 (c) of the Charter, however, omitted the elements 'religious' as a ground for persecution and 'any civilian population'.[745] Yet, crimes against humanity were not discussed, nor were any of the accused convicted of that charge.[746] At the International Military Tribunal for the Far East (IMTFE), counts potentially satisfying the norm were bundled under the account of 'Conventional War Crimes and Crimes against Humanity',[747] and fully absorbed by war crimes.

These sources are regularly cited to confirm the material nature of the *nexus*. However, for the contrary view, i.e. the jurisdictional nature of the linkage, the same sources can be named. As mentioned, the IMT judgment left room for speculation on the Tribunal's position. Overall, it did not comply with establishing the link strictly.[748] And although crimes against humanity were of little concern in the Far East trial,[749] former Judge of the IMTFE Röling opined that 'the connection did not restrict *the scope of the crime*, but only *the scope of [the court's] jurisdiction*',[750] leading to more uncertainty about its character. Under CCL No. 10, the Military Tribunal III held in *United States v. Altstoetter et al.* (*Justice* case) that the war *nexus* was 'deliberately omitted from the definition'.[751] It further held that CCL No. 10 should not be applied in a narrow sense and thus not be limited to

[745] Charter of the International Military Tribunal for the Far East, Tokyo (19 January 1946) [Tokyo Charter] Article 5 (c) of the Tokyo Charter.
[746] Lippman, 'Crimes Against Humanity' (n 687) 202.
[747] The International Military Tribunal for the Far East (Judgment) in Tokyo (29 April 1946 - 12 November 1948) Judgment of 12 November 1948 (Judgment of 4 November 1948 version) [Tokyo Judgment] para 48/449. See also, Viviane E. Dittrich, Kerstin von Lingen, Philipp Osten and Jolana Makraiová (eds), *The Tokyo Tribunal: Perspectives on Law, History and Memory* (TOAEP 2020) 32. For an assessment of the 700-page minority opinion of Justice Radhabinod Pal of India and its importance, see Latha Varadarajan, 'The Trials of Imperialism: Radhabinod Pal's Dissent at the Tokyo Tribunal', 21 European Journal of International Relations 4 (2014) 793-815.
[748] Ambos and Wirth, 'The Current Law of Crimes Against Humanity' (n 19) 5.
[749] Dittrich *et al.*, *The Tokyo Tribunal* (n 747) 3.
[750] Cited in Tan, *The Rome Statute as Evidence of Customary International Law* (n 18) 155, original source: Antonio Cassese and B. V. A. Röling, The Tokyo Trial and Beyond: Reflections of a Peacemonger (Polity Press 1993) 56.
[751] *Justice* Case (n 690) 947.

prosecutions of crimes linked to violations of the laws and customs of war.[752] Accordingly, in the *Einsatzgruppen* case, the Tribunal ruled that 'this law is not limited to offenses committed during war'.[753] This is correct in light of the plain meaning of CCL No. 10. However, the two cases were exceptions in this regard and as mentioned above, the opposite view was followed in the *Flick* and the *Ministries* cases under CCL No. 10.

Although the *Justice* case was an exception in rejecting the linkage as a legal element, the Tribunal expanded on its interpretation of the rationale of crimes against humanity. The judges held:

> We hold that crimes against humanity as defined in C. C: Law 10 must be strictly construed to exclude isolated cases of atrocity or persecution whether committed by private individuals or by governmental authority. As we construe it, that section provides for punishment of crimes committed against German nationals only where there is proof of conscious participation in systematic government organized or approved procedures amounting to atrocities and offenses of the kind specified in the act and committed against populations or amounting to persecutions on political, racial, or religious grounds.[754]

Thus, according to the Tribunal, the norm excluded isolated acts and required behaviour by private individuals or an authority to delimit crimes against humanity from ordinary crimes. Several national German courts ruled accordingly and applied CCL No. 10 in over a hundred cases.[755] Whereas in several cases, the courts required the *nexus* to one of the other crimes, in others, a certain context element to connect the acts to the totalitarian power of the Nazi regime was enough.[756] The interpretation in the *Justice* case, not requiring a link at all, but instead a governmental authority, indicated the shift to the policy requirement in crimes against humanity.

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[752] Ibid, 979.
[753] *Unites States v. Ohlendorf et al.* (Judgment) in IV Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10 (Case No 9) October 1946 – April 1949 (1950) [*Einsatzgruppen* Case] 499.
[754] *Justice* Case (n 690) 982.
[755] Ambos and Wirth, 'The Current Law of Crimes Against Humanity' (n 19) 6. The number refers only to the cases at the German Supreme Court.
[756] Ibid.

In sum, the cases in the immediate aftermath of WWII aimed to prosecute Axis criminals for the war and the atrocities against Jews. However, they also mark the failure to fully address the pre-war persecution of Jews unless a clear link was established, excluding several discriminatory policies from its purview. In Chapter IV, the ramifications of this exclusion are examined in more detail. The cases nonetheless indicate how instantly the link to war was questioned and a conceptual change initiated. As shown below, the concept's transition is reflected in several additional sources.

3.2.3.2 A Concept in Transition

In the years following the prosecutions of Axis war criminals, the concept of crimes against humanity appeared in several sources, such as international conventions and ILC draft codes, reviving the unresolved matter. This section illustrates the historical evolution beyond the WWII prosecutions to highlight the concept's gradual return to the initially designed idea – an idea disconnected from war.

In 1948, the Genocide Convention was adopted,[757] not requiring a link. Genocide, not yet recognised at Nuremberg, was considered an aggravated form of a crime against humanity.[758] If genocide, the more horrific crime, did not require the link, *a fortiori*, crimes against humanity should not require it either.[759] This was a critical step towards accepting peacetime crimes, since Article I of the Convention confirmed that genocide could be committed 'in times of peace or in times of war'.[760] Moreover, the ILC, mandated to

[757] Convention on the Prevention and Punishment of the Crime of Genocide. Adopted by the General Assembly of the United Nations on 9 December 1948 (entered into force on 12 January 1951) reprinted in UN Treaty Series 1951, No 1021 [Genocide Convention].
[758] Omar Grech, 'The contextual elements in crimes against humanity: key developments from the Nuremberg Tribunal to the Rome Statute' in Grech (ed), *Crimes against humanity* (n 40) 20.
[759] deGuzman, 'The Road from Rome' (n 36) 349. For an elaborate analysis of the Committee's meetings, see Lippman, 'Crimes Against Humanity' (n 687) 228 ff.
[760] Article I of the 1948 Genocide Convention.

formulate the Nuremberg Principles and prepare a Draft Code for Offences against the Peace and Security of Mankind,[761] did not echo the IMT Charter's wording. Principle VI (c) omitted the additional 'before or during a war'.[762] Antonio Cassese notes that '[t]he Commission considered that the phrase contained in article 6 referred to a particular war, the war of 1939'.[763] These sources highlight that the concept was viewed as independent from war crimes and conflict. For genocide, this was accepted easily; however, for crimes against humanity, doubt remained.

As mentioned by the judges in the *Justice* case, the ILC started explicitly recognising the element of an authority. The 1951 Draft Code described crimes against humanity as 'inhuman acts by the authorities of a State or by private individuals'.[764] In the 1954 Draft Code, reiterating the 1951 version, the ILC opined that private actors may commit the crimes provided that they act 'at the instigation or with the toleration of the authorities of a State'.[765] The ILC suggested removing the *nexus* to any other crime and instead including the state authority as an actor, instigator, or tolerator. This discussion is crucial since the IMT Charter included tolerating behaviour, but the IMT did not have to rule on it. This reflects the early versions of the policy of toleration. It signals that state-led negligence was considered equal to the active commission. Due to a lack of practical relevance, there is limited detail on its application. As shown in Chapter II, a few cases were adjudicated

[761] UN GA Resolution 177 (II), Formulation of the Principles Recognized in the Charter of the Nurnberg Tribunal and in the Judgment of the Tribunal, 123 plenary meeting (21 November 1947).
[762] Principle VI (c) of the ILC, 'Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal' in *Yearbook of the International Law Commission* (Vol II) (1950) para 97 [Nuremberg Principles].
[763] Antonio Cassese, 'Introductory Note to the Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal General Assembly Resolution 95 (I) (New York, 11 November 1946) (June 2009) 3-4.
[764] ILC, 'Draft Code of Offences against the Peace and Security of Mankind (with commentary)' in *Yearbook of the International Law Commission* (Volume II) Report of the ILC to the UN GA (1951) [1951 Draft Code] para 59, Article 2 (10).
[765] ILC, 'Draft Code of Offences against the Peace and Security of Mankind (with commentary)' in *Yearbook of the International Law Commission* (Volume II) Report of the ILC to the UN GA (1954) [1954 Draft Code] commentary to Article 2, para 11.

before the *ad-hoc* tribunals, but a more detailed interpretation is pending – one way to interpret it, is offered in Chapter V.

A major milestone for the advancement of crimes against humanity was the adoption of the 1968 Convention on the Non-Applicability of Statutory Limitation to War Crimes and Crimes against Humanity. According to Article I (b), no statutory limitation should apply to 'crimes against humanity whether committed in times of war or in times of peace'.[766] This explicit wording constituted a radical departure from the war *nexus* requirement. The document specified that the Convention applied to crimes against humanity as defined by the IMT Charter,[767] considering the link to conflict to have been purely jurisdictional for the IMT.[768] After the omission of 'before or during a war' in the Nuremberg Principle VI (c), the 1968 Convention explicitly included 'in times of peace' for the first time.

The Convention also led to a vivid discussion about the crime of apartheid. Article I (b) addressed 'inhuman acts resulting from the policy of apartheid'.[769] The question of whether the norm covered apartheid as a crime against humanity arose. The majority of states affirmed the view and argued that apartheid even satisfied some elements of genocide.[770] This discourse resulted in the adoption of the Apartheid Convention in 1973, which declared it a crime against humanity.[771] It further reassured that crimes against humanity were of 'multinational concern'.[772] The reaffirmation of the 1968 Convention in the 1973 Apartheid Convention strongly supported the applicability beyond conflict,

[766] Article I (b) of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Adopted and opened for signature, ratification and accession by General Assembly resolution 2391 (XXIII) of 26 November 1968, Entry into force: 11 November 1970, in accordance with article VIII.
[767] Ibid, Article I (b).
[768] Ambos and Wirth, 'The Current Law of Crimes Against Humanity' (n 19) 8. Article I of the Convention states 'irrespective of the date of their commission'.
[769] Article I (b) Convention on the Non-Applicability of Statutory Limitations (n 766).
[770] Lippman, 'Crimes Against Humanity' (n 687) 237.
[771] Article I of the International Convention on the Suppression and Punishment of the Crime of Apartheid, UN GA No 14861 (30 November 1973) [Apartheid Convention].
[772] Lippman, 'Crimes Against Humanity' (n 687) 237.

focusing on a policy causing the inhumane treatment ('resulting from').[773] The Conventions were important achievements since they explicitly extended the scope of crimes against humanity and confirmed it to be an independent norm unrelated to the context of armed conflict.

After a long intermission, Article 21 of the 1991 Draft Code criminalised any act or order of 'systematic or mass violation of human rights'.[774] In its commentary, the ILC, aligning with the 1954 Draft Code, clarified that an element that reflected the authoritarian dimension of the crime, such as a powerful state actor, was required.[775] The notion of a powerful entity appeared as a coherent element in these sources, substituting the linkage to war. The link was still not wholly rejected, as it remained a discussion point in all texts, but the transition progressed.

The acting authority, as an important legal element, was also addressed domestically, as the *Barbie* and *Touvier* cases before the French Court of Cassation, and the *Finta* case before the Supreme Court in Canada, highlight. The French court held that crimes against humanity were defined and distinguished by conduct pursuant to a certain state policy, a system of ideology or hegemony, and committed systematically.[776] The Canadian court ruled based on the *Criminal Code* of Canada, not requiring a relation to war or another crime, but the state action instead.[777] The court held:

> Although the *Code* does not stipulate that crimes against humanity must contain an element of state action or policy of persecution/discrimination, the expert witness, M. Cherif Bassiouni, testified that at the time the offences were alleged to have been

[773] Preamble to the Apartheid Convention '*Observing that (…)'*.
[774] 1991 Draft Code (n 19) Article 21, at 96.
[775] Ibid, 104.
[776] *Prosecutor v. Klaus Barbie* (*Arrêt*) French Court de Cassation, No 83-93194 (6 October 1983); confirmed in *Prosecutor v. Klaus Barbie* (*Arrêt*) French Court de Cassation, No 86-92714 (25 November 1986) and in *Prosecutor v. Paul Touvier* (*Cassation Partielle*) French Court de Cassation, No 92-82409 (27 November 1992). Both courts held: '*au nom d'un Etat pratiquant une politique d'hégémonie idéologique, ont été commis de façon systématique*'.
[777] *R. v. Imre Finta* (Judgment) Supreme Court of Canada, No 23023 and 23097 (24 March 1994) 36.

committed, "state action or policy" was a pre-requisite legal element of crimes against humanity.[778]

This is an interesting ruling, as the alleged offences occurred around 1944. *Imre Finta*, a captain of the Hungarian Gendarmerie, was accused of implementing the Baky Order, a decree requiring the isolation, expropriation, ghettoisation, concentration, entrainment, and eventual deportation of all Hungarian Jews.[779] The London Charter, adopted on 8 August 1945, did not explicitly mention state action or a policy. However, as the section on the development of the criminal concept of crimes against humanity has shown, the crimes' essence is reflected in M. Cherif Bassiouni's testimony. In particular, before the *nexus* limited crimes against humanity, it was intended to cover large-scale mistreatment committed through the abuse of state power. In parallel, Judge Kaul referred to this interpretation in his dissent to the Kenya authorisation.[780] However, Kaul effectively *restricted* the application of crimes against humanity by requiring this element for the alternative of 'organisational policy.' This reading is not consistent with the non-explicit element in 1945 and the subsequent progressive expansion of the concept.

Moreover, the circumstances in 1945 were critically different, as states were the only *capable* actors at that time. This is different in contemporary atrocities, in which powerful organisations may act. More importantly, when referring to the early conceptualisation, it must be noted that the IMT recognised the German 'policy of terror,' which was 'carried out on a vast scale, and in many cases (…) organized and systematic'.[781] This reflects the rationale behind the action and the danger it creates, although the policy was not an explicit element. The offence does not have to be connected to the state engaging in a war to create

[778] Ibid, 141.
[779] Ibid, 33.
[780] See *supra* at 2.
[781] IMT Judgment (n 730) 486.

the context; the scale and magnitude are determining. The Canadian Supreme Court also ruled that 'cruel and terrible actions which are essential elements of the offence were undertaken in pursuance of a policy of discrimination or persecution of an identifiable group or race'.[782] As mentioned above, the persecution of Jews had started long before 1939. Even though the pre-war policies could not be comprehensively prosecuted due to the *nexus* element, they shaped the post-Nuremberg understanding of what constituted such crimes.

In conclusion, this section discussed a period spanning over 50 years and underscored that the concept remained in transition throughout. The important takeaway from this period is that only the trials in the immediate aftermath of Nuremberg required the link to war, but most sources between these trials and the early 1990s deviated from this requirement. Instead, later legal texts and cases record the tendency to explicitly involve the state authority, which was only implicitly necessary at Nuremberg. The next section shows that this consistent trend was partly interrupted by the 1990s atrocities in the former Yugoslavia and Rwanda and the establishment of the *ad-hoc* tribunals.

3.2.3.3 The Critical Role of the ICTY and ICTR Statutes, and *Tadić*

The *ad-hoc* tribunals played an influential role in shaping the concept of crimes against humanity. These events created new uncertainty about the underlying rationale, although the previous phase contributed to describing the concept with more legal precision. This section briefly highlights how the Statutes' text revigorated the debate about the link to war and shows that jurisprudence intended to remedy the imprecise drafting.

[782] *R. v. Imre Finta* (Judgment) (n 777) 131.

Adopted in 1993, Article 5 of the ICTY Statute, codifying crimes against humanity, required a link to an armed conflict, 'international or internal in character'.[783] The Statute of the ICTY therefore 'effectively reverted to the Nuremberg definition'.[784] Whereas the question related to the war *nexus* was purely theoretical for the situation in the former Yugoslavia (at first it was an internal, later an international conflict), it had a strong influence on the general legal debate on crimes against humanity. In contrast, Article 3 of the ICTR Statute omitted the *nexus* to war and required a 'widespread or systematic attack' instead.[785] The ICTR Statute also introduced the discriminatory motive for all enlisted acts.[786] These contrasting requirements represented an ongoing uncertainty about a final definition, although the Statutes were drafted only a year apart. They also demonstrate that these Statutes responded directly to the circumstances for which they were drafted, instead of defining crimes against humanity in their most adequate conceptualisation. The same can be stated about the London Charter, which was a reaction to the crimes committed during WWII, i.e. reflected the war. Following all Statutes, however, a precise and adequate legal description of crimes against humanity independent of the specific, factual circumstances remained unfulfilled – to the extent that the judges had to correct the inaccurate legal drafting.

The different Statutes did not lead to contradictory interpretations, which, according to MacNeil, 'was most likely a function of their shared Appeals Chamber, which allowed the Tribunals to harmonize the customary law in spite of their differing statutes'.[787] The jurisprudence of the two tribunals remedied the statutory deviation. Especially, the proceedings against *Duško Tadić*, the President of the Local Board of the Serb Democratic

[783] Article 5 ICTY Statute.
[784] Grech, 'The contextual elements in crimes against humanity' (n 758) 22.
[785] Article 3 ICTR Statute.
[786] Ibid.
[787] MacNeil, *Legality Matters* (n 14) 96.

Party in Kozarac, had a significant influence on the matter. In the 1995 Interlocutory Appeal decision, the ICTY made a historical statement criticising its own legal basis:

[T]he 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 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.[788]

Moreover, implicitly responding to the concerns previously expressed by the Secretary-General, the ICTY held:

It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed, as the Prosecutor points out, customary international law may not require a connection between crimes against humanity and any conflict at all. Thus, by requiring that crimes against humanity be committed in either internal or international armed conflict, the Security Council may have defined the crime in Article 5 more narrowly than necessary under customary international law.[789]

Tan views these paragraphs as not unequivocal regarding the *nexus* as it refers to its abandonment, implying that it indeed existed as a legal requirement.[790] At the same time, the ICTY explicitly stated that it limited the IMT's jurisdiction. The ICTY's effort to clarify the IMT's legal basis remains another source of ambiguity. At least for the ICTY itself, the Appeal Chamber later clearly held that the armed conflict in the ICTY Statute was jurisdictional.[791] It ruled:

[T]he words "committed in armed conflict" in Article 5 of the Statute require nothing more than the *existence* of an armed conflict at the relevant time and place. The Prosecution is, moreover, correct in asserting that the armed conflict requirement is a *jurisdictional* element, (…).[792]

[788] *Tadić* (Interlocutory Appeal on Jurisdiction) (n 536) para 140.
[789] Ibid, para 141.
[790] Tan, *The Rome Statute as Evidence of Customary International Law* (n 18) 159.
[791] Ambos, *Treatise, Volume II* (n 30) 50.
[792] *Tadić* (Appeal Judgment) (n 647) para 249.

Had the IMT added a simple assertion as the ICTY in *Tadić* and consistently applied it to the cases, the mystery about the war *nexus*' nature, which preoccupied courts and scholars for decades, would never have been created. Instead, the IMT left a conceptual vacuum, which subsequent tribunals and scholars have filled with often conflicting assumptions about the purpose and scope of crimes against humanity. Moreover, the Appeal Chamber later held that not all crimes against humanity require discriminatory intent, as required in the ICTR Statute and corrected the legal uncertainty caused by the Statute's text.[793]

In summary, the Statutes of the ICTY and ICTR caused further confusion about the concept of crimes against humanity. Yet, the shared Appeal Chamber prevented conflicting interpretations. The next and last phase in the evolutionary history of crimes against humanity is especially relevant to this thesis, as it connects the original concept as described in the pre-Nuremberg Charter phase to the Rome Statute, and continues the previous trend of substituting the war *nexus* with the policy element.[794] The section explores the explicit insertion of a state (or state-like) action into Article 7 and sets the foundation for further interrogating the contested discussion surrounding the *raison d'être* of crimes against humanity.

3.2.3.4 From Implicit to Explicit: The Transition to the Policy Requirement

The matters considered above are traditionally part of analyses of crimes against humanity, as they critically shaped the post-Nuremberg legal thought. Even more important, especially for this thesis, is the phase leading to the adoption of the Rome Statute. This

[793] Ibid, para 302.
[794] For a different view, Andrew Clapham, 'Issues of complexity, complicity and complementarity' in Philippe Sands, *From Nuremberg to The Hague: The Future of International Criminal Justice* (CUP 2009) 42, fn. 13, arguing that 'civilian population' substituted the *nexus*.

section discusses the relevant steps that give insights into the last stages of the 'convoluted path'.[795] Drawing from ILC and Preparatory Committee sources, it focuses on the influence of the link to war on gravity and severity perceptions and its impact on the interpretation of the state policy element. It concludes by arguing that the Rome Statute most closely reflects the originally intended notion of crimes against humanity.

The 1996 Draft Code was the first adopted document that required the instigation or direction of the criminalised conduct 'by a Government or by any organization or group' in the opening clause (*chapeau*).[796] The ILC included a state's involvement not only in the *chapeau* but defined the 'systematic manner' as 'meaning pursuant to a preconceived plan or policy'.[797] It supported the idea that organised power constituted a core element of the crimes, although further refinement was necessary.[798] Almost in parallel, the Preparatory Committee *(travaux préparatoires)* on the Establishment of an International Criminal Court confirmed that the *nexus* was no longer a requirement but held the belief that crimes against humanity 'are invariably committed in situations involving some type of armed conflict'.[799] An international criterion, according to the Committee, could serve to overcome this deficit in times of peace.[800]

This important record exposes that the perception that crimes against humanity were *invariably* connected to conflict persisted. Moreover, *some type* of armed conflict is especially vague but highlights the idea that a conflict-like scenario may be sufficient, but

[795] Van Schaack, 'The Definition of Crimes Against Humanity' (n 13) 850.
[796] 1996 Draft Code (n 19) Article 18.
[797] Ibid, at (3).
[798] In the Rome Statute, 'systematic' was adopted as a chapeau element in Article 7 (1), the policy is described in its concretising sub-paragraph, Article 7 (2)(a).
[799] 1996 PrepCom report (n 79) para 88. There is no summary record of the Preparatory Committee's work available, see Christopher K. Hall, 'The First Two Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court', 91 American Journal of International Law 177 (1997) 178, fn. 4.; Philippe Kirsch and Valerie Oosterveld, 'The Preparatory Commission for the International Criminal Court', 25 Fordham Int'l L.J. 3 (2001) 564.
[800] Ibid, para 90.

also necessary. It further indicates that this perception was closely related to the *nexus* requirement's function to internationalise crimes against humanity. Kai Ambos also notes:

> [T]he context element has been converted into the 'international element' of crimes against humanity, which makes certain criminal conduct an object of international concern. The rationale of this 'internationalization' of certain crimes is their special gravity, often accompanied by the unwillingness or inability of national criminal justice systems to prosecute them.[801]

Ambos' interpretation of the rationale prompts further inquiry. If the crimes were initially internationalised via the *nexus* and later the policy element to underscore their *gravity*, this suggests that crimes in armed conflict were historically regarded as more grave. Correspondingly, if the policy replaced the *nexus*, the extent of state authority would now determine the gravity. In a similar vein, Kevin Jon Heller argues for considering the level of state involvement when assessing the gravity of a situation before the ICC.[802] In addition, Heller suggests using the systematicity and the 'social alarm' created in the international community to test the gravity.[803] However, gravity is an admissibility criterion,[804] and does not substantively describe the crimes. Moreover, systematicity is also a material element in crimes against humanity. There is continuous disagreement about whether the policy element is jurisdictional or a substantive element.

The entanglement of material and jurisdictional – and admissibility – criteria becomes evident.[805] For instance, Van Sliedregt argues that the rationale of crimes against humanity historically served to resolve 'a jurisdictional problem'.[806] She highlights that the

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[801] Ibid, 57.
[802] Kevin Jon Heller, 'Situational Gravity Under the Rome Statute' in Carsten Stahn and Larissa van den Herik, (eds), *Future Directions in International Criminal Justice* (CUP 2009), (published SSRN 2008) 3.
[803] Ibid.
[804] ICC-OTP, 'Policy Paper on Case Selection and Prioritisation' (15 September 2016) paras 35-41. Gravity of crimes is determined based on several factors, such as 'their scale, nature, manner of commission, and impact', see Regulation 29 (3) Regulation of the Office of the Prosecutor, ICC-BD/05-01-09, entry into force: 23rd April 2009, Official Journal Publication (ICC 2011); Article 53 (1)(b) and Article 17 (1)(d) ICC Statute.
[805] Van Sliedregt, 'The Humaneness-side of Humanity' (n 36).
[806] Ibid.

contextual elements ensure that piercing the sovereignty of a state is justified through lifting ordinary crimes to crimes against humanity, especially through their attack on human dignity.[807] In a response, Sadat agrees and recognises the overlap between several elements, clarifying that 'strictly speaking' the contextual elements pertain to the admissibility before the ICC.[808] Unlike jurisdictional and admissibility elements defining the Court's scope, arguably, the rationale of the crimes embedded in the constitutive elements of the article describes the severity. The history of crimes against humanity suggests that before the IMT Charter was adopted, the large-scale commission of criminalised acts against a population by an authority represented the level of *severity*. When the war *nexus* was inserted into the legal text, the discussion about its material or jurisdictional nature may be understood as a discussion about gravity versus severity. Considering the link to war as a material element meant that the crimes were sufficiently *severe*, and all crimes against humanity required this threshold of severity, i.e. a relation to conflict. Considering the link as jurisdictional arguably meant that the crimes were understood as sufficiently *grave* to trigger the IMT's jurisdiction. The confusion about the nature of the war connection may have caused a parallel uncertainty about the necessary degree of gravity versus severity of crimes against humanity.

This is critical for this thesis and the migration-related crimes. As examined in Chapter II, concern was raised that the crimes are not sufficiently grave, for instance, by Kalpouzos and Mann.[809] As the analysis of the crime of persecution has further shown, the severity threshold of the underlying crimes may not have been accepted by the OTP thus far.[810] Most importantly, understanding a conflict-*nexus* as a severity threshold is less flexible

[807] Ibid.
[808] Sadat, 'Sadat response to Robinson and van Sliedregt' (n 148).
[809] Kalpouzos and Mann, 'Banal crimes against humanity' (n 5) 26.
[810] Chapter II at 4.2.2.1.

than a gravity threshold. As a legal element, a conflict would be a prerequisite. As a gravity element, it would be an indicator, but the threshold could also be met otherwise. Considering the history presented so far, the latter interpretation is more persuasive. WWII may have served to understand the crimes as grave enough to prompt international attention, but outside of conflict, other denominators may serve to satisfy the gravity. However, the constant doubt about the link's legal nature suggests that the war element was associated with the *severity* of the crime, especially for the segment of legal opinion supporting its material nature, substantially describing the rationale.

The record of the *travaux préparatoires* is an important source. It asserts that an armed conflict is not strictly necessary, but the Committee required a substitute. Even if the policy represents such a supplement, materially implying the necessary severity, a perception that conflict-related crimes are more severe than those committed beyond the confines of conflict persists. The influence of this perception may continue to this day as the historical development significantly impacts legal thinking about crimes against humanity.

Given that the state action became the determining element, it must further be examined. The notion of the policy has a similarly long history as the linkage to war. Some authors, similar to the *Finta* case mentioned above, argue that it has always accompanied the concept of crimes against humanity.[811] Other commentators contend that it may accompany the crimes but should not be read as a prerequisite.[812] In 1997, the ICTY passed its influential judgment against *Tadić*. Although the ICTY Statute did not explicitly require a policy, the Trial Chamber held:

[T]he reason that crimes against humanity so shock the conscience of mankind and warrant intervention by the international community is because they are not isolated, random acts

[811] Bassiouni, *Crimes Against Humanity* (2011) (n 28) 14; Tan, *The Rome Statute as Evidence of Customary International Law* (n 18) 187.
[812] For instance, Mettraux, 'Crimes Against Humanity' (n 148) 152.

of individuals but rather result from a deliberate attempt to target a civilian population. *Traditionally* this requirement was understood to mean that there must be some form of policy to commit these acts.[813]

As mentioned earlier, the ICTY asserted that the armed conflict-*nexus* was a precondition for its jurisdiction and held the belief that it was also jurisdictional for the IMT.[814] Given this conviction, the description of the concept of crimes against humanity in *Tadić,* involving a policy to commit the crimes, is a unique record. Like the *Finta* case, it understands crimes against humanity in its originally envisioned conception, firstly adjudicated by an international criminal tribunal.[815] It reflects the concept in its early, pre-IMT Charter idea as illustrated in the sections above. Considering that the pre-IMT Charter conception was rather designed as a peacetime concept, the ICTY's interpretation may best describe the criteria that should guide the interpretation of crimes against humanity, including the importance of the policy, as later codified in Article 7 (2)(a) of the ICC Statute.

In summary, this section has shown that beyond armed conflict, the policy of a powerful entity promoting or enabling the crimes can be considered the critical element to provide the contextual background. The state action transitioned from the link to war and from the implicit to an explicit requirement in the Rome Statute. Before the IMT Charter was adopted, the understanding of the emerging concept of crimes against humanity reflected the severe mistreatment by the state, irrespective of war.[816] The definition in the Rome Statute arguably represents the *lex desiderata* that existed shortly before the adoption of the IMT Charter, as articulated in *Tadić*.[817] Article 7 reverted to that idea in its essence, rendering it a norm with significant potential to represent the pre-Nuremberg desired

[813] *Tadić* (Judgment) (n 1) para 653 (emphasis added).
[814] See *supra* (n 788).
[815] *Finta* case, *supra* (n 777).
[816] See *supra* 3.1.
[817] See *supra* 3.2.1.; *Tadić* (Judgment) (n 1) para 653.

universal code. The IMT Charter, with its restriction to war-related crimes and the confusion caused by the *nexus* element, constituted a major setback, although overall, it was a milestone and the inception of ICL as it is known today.

The section also highlighted that the controversy about the legal nature can be understood as a disagreement about the severity versus the gravity of the crimes. As the *nexus'* legacy remains unsolved, the attribution of gravity and severity to crimes against humanity seems to be likewise unresolved. The section demonstrated that the perception of a higher degree of severity for conflict-related crimes may nonetheless persist and profoundly influence the current prosecution, discussed in the following section. For the purpose of clarity, in the following, the conflict-connection is referred to as an association with a higher degree of severity, although an inherent overlap with gravity exists. Where necessary, the convolution is addressed to discuss the implications of the developments presented in the sections above.

4. Factors Contributing to Impunity

Since this chapter is limited to the doctrinal assessment of the law developments, locating the original *lex desiderata* of crimes against humanity in the pre-1945 legal thought, it excluded the analysis of additional political, historical, or other influential issues. The narrow view on the relation to war as a constraining element can thus only serve to highlight one of several contributing factors for impunity in contemporary cases.

The chapter also identified potential misperceptions arising from the legal development of the concept of crimes against humanity that may materialise in the current prosecution practice of the ICC. The strong influence of the war-*nexus* debate, irrespective of the

reasons why it was inserted in the London Charter, echoes far beyond the adoption of the Rome Statute, although Article 7 omits the link to an armed conflict. The historical assessment, with its teleological focus, suggests the hypothesis that the ICC bodies still require such a connection or at least some form of conflict in practice, assuming a higher degree of severity for conflict-related crimes. This section submits that the history of crimes against humanity and perceptions about the concept hinder the prosecution of peacetime crimes such as migration governance-related violence.

4.1. The Historical *Nexus* to War Before the ICC

As mentioned at the beginning of this chapter, Judge Kaul's dissenting opinion must be revisited and evaluated based on the findings of this chapter. In particular, whether crimes against humanity should be understood as crimes formulated in the IMT Charter, resembling the Nazi regimes atrocities. Generally, Judge Kaul had posed a legitimate question. In acknowledging *that* the conduct described in the Kenya investigation has occurred and is to be condemned, he opined that:

> The question is not whether or not those crimes have happened. The issue is whether the ICC is the right *forum* before which to investigate and prosecute those crimes.[818]

By rejecting the sufficiently designed structure of the organisation, whilst referring to the historical precedent of the Nazi regime,[819] Kaul intended to 'avoid a "banalisation" or "trivialization" of the crimes'.[820] The concern of overly broadening the concept of crimes against humanity is justified, yet, the means to determine the necessary threshold may vary

[818] *Kenya* Decision 2010 (n 33) Dissenting Opinion of Judge Hans-Peter Kaul para 6.
[819] Ibid, paras 82, 112, 149-153.
[820] Ibid, para 55.

considerably. Connecting crimes against humanity with their strict understanding during WWII prosecutions is not a convincing approach.

As Sadat argues, in effect, Judge Kaul reinserted the link to war,[821] which requires a correction. If the historical argument, as put forward by Judge Kaul, has merit – and it can be argued that it does – it must be concluded that the historical context provides a different notion of the concept. If a normative argument is drawn from the history of crimes against humanity, it must entail that crimes against humanity were initially designed as an independent provision, a novel and unique type of crime. It evolved from the laws of war as a distinct category.[822] There is sufficient reason to doubt that the war *nexus* aimed at describing the rationale of crimes against humanity *strictu sensu*. Quite the opposite, it rather constituted a legal and political compromise whilst leaving the full potential of the concept unfulfilled.

Although the criminal legal concept was only fully shaped and codified by the 1945 London Charter, the events pre-Nuremberg reveal a more nuanced history of legal thought. What was critically missing following Armenia and the WWI trials, such as those in Leipzig, was the recognition of crimes against a state's *own* citizens because sovereignty remained the most rigorously defended concept. This is reflected in the Allies' concern related to the principle of non-interference.[823] However, as shown, the large-scale, especially when murder-type crimes are committed, could have sufficed to remedy the doubt and justified intervention.

[821] Sadat, 'Crimes Against Humanity in the Modern Age' (n 2) 370-371
[822] See *supra* 3.1.
[823] Ibid.

The historical connection to slavery supports this argument. Although forced labour accompanied almost every war,[824] the trading of slaves and slave labour around the world was predominantly disconnected from war or conflict.[825] The inhumanity of viewing humans as products, as well as their treatment during enslavement, had a significant impact on the notion of crimes against humanity. Today, Article 7 (1)(c) of the Rome Statute criminalises enslavement, including forced labour, human trafficking, and other 'practices that deny a person's self-ownership'.[826] Prosecuting the systematic deprivation of liberty in order to exploit labour force does not require a connection to armed conflict or other forms of direct, physical violence.[827] This interpretation has been accepted in contemporary cases. In *Ongwen*, the Court held that enslavement was 'satisfied without any additional ill-treatment',[828] as the denial of self-ownership and deprivation is sufficient. Moreover, the Court held that forced marriage as an imposition of a conjugal union against one's will by force or coercion, satisfied the residual clause (Article 7 (1)(k)).[829] Although an armed conflict existed, the crimes must be viewed in isolation. The *Ongwen* ruling advanced the application of crimes against humanity and thereby accepts that crimes of exclusion and deprivation, such as freedom from external domination, may require new interpretations. Similarly, at the time of the abolitionist movement, slavery represented the most inhumane

[824] For instance, extensively during WWII, which was then explicitly codified in Article 6 (b) of the London Charter, referencing Article 52 of the Hague Convention, see IMT Judgment (n 730) para 460.
[825] Such as Belgian King Leopold II's atrocities in the Congo Free State, see *supra* 3.1.
[826] Bassiouni, *Crimes Against Humanity* (2011) (n 28) 378.
[827] Ibid. For human trafficking as an international crime, see Tom Obokata, 'Trafficking of Human Beings as a Crime against Humanity: Some Implications for the International Legal System', 54 The International and Comparative Law Quarterly 2 (2005) 445-457. The ICC adopted a wide definition of enslavement: *Katanga* (Judgment) (n 28) para 975; *Prosecutor v. Bosco Ntaganda* (Decision Pursuant to article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda) PTC II, ICC-01/04-02/06-309 (9 June 2014) 78, fn. 209 confirming *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (Decision on the confirmation of charges) PTC I, ICC-01/04-01/07-717 (30 September 2008) paras 430-432.
[828] *Ongwen* (Judgment) (n 145) paras 2713.
[829] Ibid, paras 2741-2753.

international wrong and advanced the legal notion of crimes against humanity. Moreover, the movement against slavery challenged state sovereignty.[830]

In 1945, state sovereignty had to be pierced by the new law. It was necessary to create a norm covering a state's *own* citizens. Especially their exclusion from participation and entitlement to fundamental rights, described by Luban as political crimes against a state's citizens, as mentioned above.[831] In contemporary cases, especially migration-related abuses, the concept's rationale arguably allows for the inclusion of *foreign* citizens *under the jurisdiction* or *control* of a state, as proposed by Mann in his theory on the crimes' cosmopolitical nature.[832] The history of the concept shows that crimes against humanity have the exceptional potential for responding to changing circumstances, without compromising legal precision or violating the principle of legality.[833] The early normative idea, the *lex desiderata*, fulfilled the purpose of covering crimes against any population. In the following chapters, the theoretical underpinnings of crimes against the (cosmo)political nature are underscored by examining the 'migration crisis' as a social and political conflict according to PCS. The approach developed in this thesis further revisits the notion that crimes against humanity may be understood as crimes by a state maintaining itself through 'systematic inversion'.[834] Drawing from PCS, Chapter V demonstrates that the state's deliberate fuelling of the crisis narrative to justify its restrictive migration policies creates a conflict scenario which is designed to maintain the state's system of exclusion from participation, upheld by the use of impunity.[835] However, it makes a case for understanding

[830] Martinez, *The Slave Trade* (n 578) 139.
[831] *Supra* (n 506).
[832] *Supra* (n 507).
[833] Comprehensively, MacNeil, *Legality Matters* (n 14) 96.
[834] *Supra* (n 545).
[835] Chapter V at 2.2.

the state's behaviour in legal terms, as criminal conduct under Article 7, instead of representing state crimes.

In summary, this chapter provided several sources for the original understanding of the *lex desiderata* of crimes against humanity, which indicated the desire to create a universal moral code.[836] Consequently, it would be misleading to refer to the historical argument to *restrict* crimes against humanity. The historical argument should be made, but it should be made teleologically,[837] i.e. *in favour* of the wider application aimed at protecting *any* civilian population at *any* time. The argument would thus serve an essential purpose, unveiling the deeper and underlying *raison d'être* of crimes against humanity. In parallel, it would render the norm applicable in several scenarios that are excluded in modern times. The counterargument that a fundamentally wide application would dilute the purpose of ICL more broadly is important and requires a nuanced understanding of crimes against humanity in peacetime. Chapter V proposes an interpretation for peacetime crimes against humanity, including a qualifier to avoid overstretching the concept. During armed conflict, IHL (war crimes) protects civilians more extensively than IHRL (crimes against humanity and genocide), which risks that without a wide application of crimes against humanity beyond the applicability of IHL, the protection of civilians is overly limited in peacetime. Concerning the historical argument and its value for Article 7's rationale, if put forward, it should lead to the opposite conclusion. Since the application of Article 7 to contemporary cases is crucially dependent on its interpretation, influenced by the historical development, the following section discusses the ramifications of the (mis)conceptions about crimes against humanity before the ICC.

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[836] *Supra* 3.2.1.

[837] For a critique of the 'endless teleological and triumphant literature' pursuing the fulfilment of ICL as atrocity punishment, see Moyn, 'From Aggression to Atrocity' (n 574) 343, fn 4.

4.2. (Mis)Conceptions About Crimes Against Humanity

This section briefly outlines how the historical development presented in this chapter influences conceptions about crimes against humanity. Based on the findings of this chapter, it also provides a roadmap for the remaining research. The section concludes by formulating additional hypotheses arising from the historical development, which are investigated in Chapter IV.

Given the war-*nexus* legacy, it has always been debatable whether an inherent connection between armed conflict and crimes against humanity exists. The historical analysis suggests that the interpretation of crimes against humanity as intrinsically and substantially linked to armed conflict is much less supported than the idea that they constitute independent crimes – understood as crimes committed by powerful states or entities against a population, often minorities. The *perception* of an inherent connection, however, persists. Although this is comprehensible and finds several compelling arguments in the period between 1945 and 1998, the ICC Statute's definition arguably intended to clarify the issue. The wording of the text is clear, yet the Prosecutor, as well as the (Pre) Trial Chambers, may have never fully abandoned the war *nexus* in practice, despite its non-existence in the Rome Statute's text. Instead, they may continue requiring a link to some form of conflict or conflict-like outbursts of extreme physical violence, disregarding systems of institutionalised oppression and deprivation.

The next chapter turns to that question in more detail by analysing the prosecution practice before the ICC, in particular, the OTP's case considerations. The cases that the Office considers critically depend on the OTP's evidentiary standard for opening PE, which is assessed to identify which circumstances are primarily considered and result in

examinations by the OTP. As previously mentioned, the OTP has not opened PE exclusively dealing with migration-related crimes. Thus, the hypothesis arises that they are not considered due to a lack of connection to armed conflict, which explains why migrant abuses are considered in the Libyan case. Highlighted in Chapter II, the Libyan case may have been considered because of its connection to conflict and an assumed severity.

As illustrated earlier, following the impact of the 'internationalising element' on questions of gravity and severity, these elements appear to be convoluted. The uncertainty about the nature of the war link, which transitioned into the state policy, may cause an erroneous attribution of a lower degree of severity to crimes committed in peacetime. In reverso, it is hypothesised that the OTP associates conflict-related crimes with a higher degree of severity. The Libyan case is peculiar, but an important source for further exploration. Sadat's 2013 empirical analysis of crimes against humanity before the ICTY, ICTR, and the ICC,[838] the most comprehensive analysis of peacetime crimes against humanity, revealed compelling arguments for the ICC's disregard of crimes beyond armed conflict.[839] Already examined above, the Kenya dissenting opinion implied this tendency. Sadat further lists Libya and Côte d'Ivoire as two cases without a connection to conflict before the ICC.[840] Notably, the Libyan case was referred to by the UN SC *before* the outbreak of the armed conflict, i.e. in peacetime, and aimed at investigating Muammar Gaddafi and others for murder and persecution.[841] This would support the idea that conflict is not a necessary requirement, especially because the alleged acts are perceived as the most severe crimes.[842] However, Sadat makes an important observation related to the arrest warrants, namely that there was 'criticism of the prosecutor's action based upon an alleged lack of

[838] Sadat, 'Crimes Against Humanity in the Modern Age' (n 2).
[839] Ibid, 357.
[840] Ibid, 363.
[841] Ibid, 366.
[842] See also Chapter IV at 2.2.2.1.

"gravity" of the harm'.[843] This underscores that without a connection to conflict, doubt remains whether crimes against humanity amount to the necessary level of gravity. However, Sadat further equates the Libyan case (lack of gravity) with Kaul's dissent (lack of substantial severity).[844] Having argued that the boundaries between gravity and severity in crimes against humanity cannot be drawn sharply, the cases beyond conflict show that uncertainty remains about the threshold.

In the current Libya investigation, the OTP may consider the crimes against migrants due to the armed conflict. Viewed in isolation, the alleged unlawful acts related to Libya are not substantially more severe than, for instance, imprisonment under inhumane conditions related to Australia.[845] If the assumption proves valid more broadly, three preliminary conclusions can be inferred. First, peacetime crimes against humanity, although not legally justified, are largely disregarded by the ICC, due to the historical war connection. Second, based on confusion about the nature of the link, crimes in armed conflict are seen as more severe. And third, the alleged crimes against migrants are disregarded *because* they occur in peacetime, including being viewed as insufficiently severe.

Disregarding crimes against humanity beyond conflict bears the risk of inadequately perpetuating and even amplifying these assumptions. Sadat, for instance, labels the ICC as a 'crimes against humanity court',[846] because, compared to the *ad hoc* tribunals, the crimes are charged significantly more often.[847] However, genuine peacetime crimes largely remain outside the ambit of the Court. The exceptional case of the Philippines is examined thoroughly in the subsequent chapters. Yet the ICC's focus further creates an unbalanced

[843] Sadat, 'Crimes Against Humanity in the Modern Age' (n 2) 366.
[844] Ibid.
[845] See Chapter II at 4.2.1.
[846] Ibid, 377, reiterating in Sadat, 'The Forgotten Crime' (n 2) 532.
[847] Sadat, 'The Forgotten Crime' (n 2) 532.

research output as scholarship relies on the results generated by adjudication before criminal tribunals. Since these factors are mutually reinforcing, crimes against humanity in peacetime become both less often prosecuted and under-researched. If it were true that crimes against humanity occurred less often in peacetime than during armed conflict, the unbalanced attention would be appropriate. The next chapter explores whether this reflects reality by analysing the cases before the ICC, revealing that potentially relevant crimes in peacetime do not occur considerably less often than crimes in armed conflict.

Moreover, as demonstrated in Chapter II, the policy of toleration assumes a key role in the context of migration. In particular, the OTP's rejection of opening PE into the situation in Australia casts doubt on its adequate consideration.[848] This may be because this version of a policy has not received sufficient attention in the course of the legal development of the policy requirement. As shown in this chapter, it was frequently mentioned, yet neither relevant at the IMT nor received much attention by the ILC.[849] The next chapters illustrate its relevance for peacetime crimes against humanity, especially migration-related ill-treatment.

In summary, from the findings of this chapter and the evaluation of the history of crimes against humanity and cases before the ICC, additional hypotheses concerning crimes in peacetime can be drawn: 1) The ICC bodies, in particular the OTP, continue to assume that crimes against humanity and armed conflict are intrinsically connected, leading to a higher likelihood of opening PE in conflict-related situations, 2) crimes in conflict-like scenarios, which are more often considered even if they fall short of an armed conflict under the strict rules of IHL/ICL, are associated with a higher degree of severity, and 3) the policy of

[848] See Chapter II at 4.3.2.
[849] 1954 Draft Code, commentary to Article 2, para 11; 1996 Draft Code (n 19) Commentary to Article 18, paras 4-5; *Tadić* (Judgment) (n 1) para 654 ('to commit, or to refrain from preventing').

toleration, having received limited scholarly and judicial scrutiny, holds significant importance in peacetime and requires interpretation. These hypotheses are tested in the following chapters.

5. Conclusion

This chapter explored underlying causes of impunity in the context of migration beyond the reasons provided in scholarship, directly addressing the primary research question. It identified the historical development of the concept of crimes against humanity and the unclear legacy of the war *nexus* as a key component influencing the rationale of crimes against humanity.

The main findings are the following. Article 7 of the ICC Statute does not explicitly require a link to war. However, it must be interpreted in light of its underlying rationale. The rationale has never been uncontroversial, and its historical interpretation continues to shape its understanding. Existing research and case law largely centre their analysis on the IMT Charter, which contained the war *nexus*, and the post-Nuremberg developments. Despite disagreement in scholarship and in case law as well as ambiguous sources, there is a tendency to understand crimes against humanity as inherently conflict-related, determining the *nexus* as a material element. However, the same sources and convincing arguments support the contrary view, i.e. that the war *nexus* was jurisdictional in character and therefore has limited impact on the rationale of crimes against humanity. Additionally, restricting the analysis of the historical evolution to Nuremberg and beyond misses acknowledging the creator's intention, the *lex desiderata*, and the then-rising *lex ferenda*.

The *lex desiderata* of crimes against humanity in the pre-Nuremberg period indicated a universally applicable code aiming to protect civilian populations from malevolent states at all times. Crimes against humanity were designed to protect minorities of any characteristic from states turning against them. The suggested theories in scholarship, such as those of Luban, Mann, and Sadat, who understand crimes against humanity as political crimes, find support in this early version. As a newly emerging concept, it limited state sovereignty and allowed intervening in domestic affairs when a state mistreated its own or any other population, excluding them from participation. The definition in the Rome Statute reflects this idea most adequately, not requiring a connection to conflict but state or organisational policies enabling the crimes. When interpreted in light of the *lex desiderata*, Article 7 has far-reaching potential to prosecute these crimes – including the crimes against migrants. They can be interpreted as crimes against a vulnerable population based on a political agenda of deterrence and defence aimed at exclusion and full control over migration. The state thereby misuses its power and excludes migrants from protection and participation, seeking to uphold its authority. This interpretation further aligns with Ambos' notion of a systematic inversion to maintain a state's existence. Chapter V offers additional arguments, drawn from PCS, for the 'migration crisis' as a form of conflict, namely a structural conflict,[850] in which the state aims to maintain itself through a system of exclusion and deprivation against a group or population.

The suggested understanding of the concept of crimes against humanity is supported by the analysis in this chapter, which shows that slavery, colonial atrocities, and the Armenian massacres depicted early versions of the crimes. Although Armenians were exterminated under the pretext of the war, the massacres preceded decades of discrimination,

[850] Rubenstein, *Resolving Structural Conflicts* (n 65).

mistreatment, and exclusion. Similar to the Holocaust, a limited view on only acts connected to the war fails to recognise the extent of the crimes and the factors contributing to a fuller understanding of the underlying rationale of crimes against humanity. The treatment of Armenians, as well as the Jewish population *before* the war, could normatively qualify as persecution as crimes against humanity. At Nuremberg, they could not be independently prosecuted due to the war *nexus*. Excluding these crimes, however, did not serve to adequately describe the rationale but to mitigate the Allies' concerns. The principle of legality, non-intervention, and fear of repercussions in their home countries, as systematic exclusion and racial policies were also practised outside of Axis territory, determined the insertion of a link to war. The *nexus* served as a legal and political compromise and left the desired law unfulfilled. Excluding the pre-war policies *de facto* resulted in impunity for peacetime crimes against humanity. The perception stemming from the Nuremberg prosecutions arguably contributes to the prevailing impunity for discriminatory and systematic violations of migrants' fundamental rights, as they lack the historical precedent. As shown in Chapter II, the crime of persecution, especially the cumulative effect of several measures, should be considered in the context of migration.

Despite a persuasive conception of crimes against humanity independent of war, the perception of an inherent relation took root in legal thinking and practice. Until and beyond the adoption of the Rome Statute, uncertainty continues to accompany deliberations on the crimes' rationale. Concerns about a broad category of crimes resulted in explicitly adopting the policy requirement in the Rome Statute. The question of whether the element constituted customary international law, was superfluous, or how it should be interpreted remained equally contentious. Although further improvement is necessary, the policy is understood as providing the context and representing the internationalising element in crimes against humanity. Based on the function the war *nexus* and the policy meant to

serve, a transition from one to the other element can be identified. The meaning of the *nexus* was therefore – to an extent – maintained by the policy. However, this chapter further highlighted that the discussion about the legal nature of the war link was not only transferred onto the policy, but can further be understood as a controversy about the gravity versus the severity of the crimes. The unresolved legacy of the war connection arguably caused uncertainty about these two thresholds, which are often conflated. Since a strong position supports that the link was material, a conflict or conflict-like scenario may currently result in the attribution of a sufficient degree of severity to crimes against humanity, as indicated by the influential dissenting opinion of Judge Kaul and critiqued by Sadat.

The concern to overstretch the concept of crimes against humanity is justified, and not all human rights violations amount to crimes against humanity. However, it is not automatically justified that crimes against humanity committed in relation to armed conflict receive more attention from the ICC. Although it is settled law that a *nexus* to armed conflict is not explicitly necessary, the ICC might implicitly still follow such an approach. As the Preparatory Committee suggested that 'some form' of conflict may be necessary, it appears that conflict-like scenarios attract the attention of the Court.

Since peacetime contexts have been of little significance in ICL jurisprudence and, thereby, also in (legal) scholarship, assumptions about an intrinsic connection with armed conflict are more likely to be perpetuated. In addition to an unbalanced prosecution of peacetime crimes, it results in limited research on the topic. If peacetime crimes, in fact, occur less often than crimes in armed conflict, such a focus is reasonable. The next chapter assesses this question to explore whether crimes against humanity occur less frequently in times of peace than in armed conflict.

The present chapter concluded with two additional hypotheses contributing to impunity for crimes against migrants. First, since the ICC's mandate is limited to crimes of sufficient severity but primarily focuses on conflict-related crimes, the ICC bodies appear to assume a higher degree of severity to crimes against humanity committed in conflict-like settings. As a result, the alleged crimes against migrants may be viewed as insufficiently severe because they occur in peacetime, not because the violations and the manner in which they are committed do not exceed the threshold. As explored in this chapter, this may be connected to the unresolved legacy of the link to war and the transition to the policy element in Article 7. However, the degree of state power abuse should then determine the severity instead of the context of conflict. Unlike suggested, for example by Heller, this element would not pertain to the gravity of the crimes, but to the substantial rationale and the severity it indicates.

Second, beyond the context of conflict, the policy of toleration, i.e. a state's passive behaviour that consciously encourages the crimes, as exceptionally foreseen in the Elements of Crimes, becomes a key aspect in light of the persistent impunity for crimes against migrants, as concluded in Chapter II. The lack of focus on this form of policy in the historical development may have contributed to the limited attention. In Chapter V, an interpretation is proposed for peacetime contexts using the example of migration-related policies, in particular the deliberate and systematic use of impunity for maintaining the system of deterrence, defence, and prevention from the exercise of fundamental rights.

The following chapters assess the validity of the hypotheses raised. Based on the findings, the second research question is addressed. It develops strategies to overcome existing barriers to investigations into the alleged migrant abuses to confront the prevailing impunity.

Chapter IV: Impunity for Crimes against Humanity in Peacetime

1. Introduction

Despite growing recognition of widespread and systematic violations against migrants, criminal accountability for these abuses remains elusive. While ICL is premised on the idea that impunity at the domestic level justifies intervention at the international level, this chapter argues that such intervention has not materialised in the context of peacetime crimes against migrants. The chapter addresses this accountability gap, examining the persistence of impunity even when the legal framework appears to allow for prosecution.

Drawing on the hypotheses developed in previous chapters – particularly the historically narrow understanding of crimes against humanity (Chapter I), the normative and evidentiary structure of Article 7 (Chapter II), and the conceptual constraints surrounding severity and conflict (Chapter III) – this chapter explores why crimes against humanity in peacetime continue to be overlooked in practice. It focuses specifically on the case of crimes committed against migrants outside of armed conflict, arguing that these crimes are not only legally cognisable but also systematically excluded from prosecutorial attention.

The chapter is structured in three parts. Section 2 assesses the prosecution practice of the ICC, particularly the OTP, to show how peacetime crimes are deprioritised in both preliminary examinations and case selections. This includes a detailed look at evidentiary thresholds, situational referrals, and perceptions of gravity/severity. A specific focus is placed on the Philippines investigation as an illustrative example of how conflict-like narratives (e.g., the 'war on drugs') may influence prosecutorial decisions. Section 3 revisits the substantive legal potential of crimes against humanity to address structural violence, arguing that Article 7 is equipped to capture systematic abuses embedded in law and policy – such as those targeting migrants – even when committed outside a conflict setting. This section also considers the concept of 'structural impunity' as a feature of such peacetime violence. Structural impunity is characterised by the systematic use of impunity on the domestic level embedded into the state's policies, deliberately used to maintain or encourage fundamental rights violations. It is further consolidated by the systemic impunity for peacetime crimes on the international level. The conclusion synthesises these findings and sets the stage for Chapter V, which explores potential legal responses to such impunity.

By interrogating the evidentiary practices and conceptual frameworks that perpetuate impunity, this chapter makes the case for a broader and more principled application of ICL to peacetime contexts – particularly where structural violence and state policies play a central role in sustained attacks against vulnerable civilians.

2. Peacetime Crimes Before the ICC

As shown in literature, the absence of consequences for alleged crimes by state actors on the domestic level justifies the turn to the international arena,[851] where, however, impunity also prevails. This section explores the prosecutorial practice before the ICC to evaluate to what degree peacetime crimes against humanity have been considered in the international fora and the reasons why they do not receive sufficient attention.

Literature on crimes against humanity in peacetime regularly addresses the 'civilian' element that characterises the targeted population.[852] This element serves to distinguish civilians from combatants in times of conflict where IHL applies.[853] In IHL terms, the distinction is strictly necessary because combatants are legitimate targets. In crimes against humanity, there is no such alternative. The crimes can only be committed against civilians.[854] When civilians are targeted in a systematic or widespread attack during armed conflict, the crime against humanity becomes a relevant provision next to potential war crimes charges. As shown in literature, international criminal tribunals have primarily charged crimes against humanity in these circumstances, including the ICC.[855] The majority of cases involving crimes against humanity are connected to war crimes charges. As shown by Sadat, in 2013, only three cases were disconnected from an armed conflict.[856]

[851] In detail, Chapter II at 4.3.2.
[852] Leila Nadya Sadat, 'Putting Peacetime First: Crimes against Humanity and the Civilian Population Requirement', 31 Emory Int'l L. Rev. 197 (2017) 197-269; Dubler and Kalyk, *Crimes against humanity in the 21st century* (n 143) 182; Rosa Ana Alija Fernandez and Jaume Saura Estapa, 'Towards a Single and Comprehensive Notion of Civilian Population in Crimes against Humanity', 17 International Criminal Law Review 1 (2017) 47-77; van den Herik, 'Using Custom to Reconceptualize Crimes Against Humanity' (n 18) 93-96.
[853] Ibid, 263-264.
[854] See case law in Chapter II at 2.
[855] Sadat, 'Crimes Against Humanity in the Modern Age' (n 2) 334-377; see also Caroline Fournet and Clotilde Pégorier, ''Only One Step Away From Genocide': The Crime of Persecution in International Criminal Law', 10 ICLR 5 (2010) 719.
[856] Ibid, 363, Libya, Kenya, Côte d'Ivoire.

It is thus important to reassess the ICC's focus and provide an update on the current prosecution practice related to crimes against humanity in peacetime.

The following sections explore the evidentiary threshold to open PE into a situation, briefly discuss state referrals, and the influence of perceptions of gravity/severity on case considerations, particularly by the OTP. By drawing from the findings of the previous chapters, the impact of the conflict-connection on the prosecutorial attention are outlined, illustrating that crimes against humanity outside warzones are only considered when the circumstances resemble a conflict-scenario, such as the 'war on drugs' in the Philippines.

2.1. Evidentiary Standard for Preliminary Examinations

According to the OTP Policy Paper on Preliminary Examinations (PPPE), initiating preliminary examinations requires certain criteria. These include the gravity of the crimes, the complementarity principle, and the question of whether an investigation is in the interest of justice.[857] The OTP 'filters'[858] available information on alleged crimes before assessing these standard criteria. Available information is regularly provided by Article 15 communications, for instance, by NGOs, such as those examined in the migratory context in Chapter II. The OTP depends on external information and primarily assesses the reliability of the sources and the credibility of the information before clustering potential situations or cases.[859]

The OTP engages in one additional step before deciding on PE, namely a pre-preliminary examination phase.[860] As previously examined, the Australian case was rejected in this

[857] OTP, PPPE (n 123) paras 8-12.
[858] Ibid, para 75.
[859] Ibid, paras 30-33.
[860] Khojasteh, 'The OTP Policy Paper on Preliminary Examinations' (n 478) 230.

early evaluation phase. The OTP follows a four-phase procedure to determine whether a case moves forward.[861] In Phase 1, the OTP evaluates communications and dismisses those that are 1) manifestly outside the jurisdiction of the Court, 2) relate to a situation already under preliminary examination, or 3) a situation already under investigation or forming the basis of a prosecution, or the Office admits those that 4) warrant further analysis (WFA).[862] These stages are of particular importance to the field of migration since the communications submitted urge the Office to accept the cases in this process and commence investigations based on its *proprio motu* powers.[863] Communications are always assessed in light of other open-source information to corroborate the presented allegations.[864] Moreover, as mentioned previously, the evidentiary threshold for opening PE is that the case '*appears* to fall within the jurisdiction of the Court'.[865] The OTP's PE threshold is not a statutory standard. The lowest evidentiary standard in the Rome Statute requires a 'reasonable basis to proceed' to full investigations (Article 15 (3) and 53 (1) ICC Statute).[866] The OTP thus follows a significantly lower threshold for PE. Refusing to open PE means that the alleged crimes do not even 'appear' to fall within the ambit of the Statute, i.e. the OTP finds that the alleged conduct or the information does not suffice to *prima facie* amount to a crime within the ICC's jurisdiction. As shown in Chapter II, legal opinion on migrant abuses supports that the cases *prima facie* qualify. The Office has thus far not accepted this position.

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[861] OTP, PPPE (n 123) paras 78-83: 'Phase 1: filter out information on crimes that are outside the jurisdiction of the Court and identify those that appear to fall within the jurisdiction of the Court; Phase 2: analysis entails a thorough factual and legal assessment of the crimes allegedly committed in the situation at hand with a view to identifying the potential cases falling within the jurisdiction of the Court; Phase 3: focusses on the admissibility of potential cases in terms of complementarity and gravity pursuant to article 17; Phase 4: examines the interests of justice'.

[862] OTP, PPPE (n 123) para 78. 'Warrant further analysis' is defined as 'neither manifestly outside the jurisdiction of the Court nor related to situations already under preliminary examination or investigation or forming the basis of a prosecution'.

[863] See Chapter II at 1.

[864] Khojasteh, 'The OTP Policy Paper on Preliminary Examinations' (n 478) 234.

[865] Article 15 (4) ICC Statute (emphasis added).

[866] Khojasteh, 'The OTP Policy Paper on Preliminary Examinations' (n 478) 230.

Moreover, Article 12 (3) declarations accepting jurisdiction by Non-State Parties may directly result in PE (but not the automatic opening of an investigation).[867] UN SC referrals[868] and State Party referrals are further considered 'triggers' for jurisdiction and admissibility.[869] Unlike *proprio motu* investigations, those referred by a State Party do not require authorisation by the PTC.[870] Several states have referred situations on their territory to the ICC, requesting investigations (self-referrals).[871] In other situations, states have referred a situation on the territory of another state (third-party referrals).[872] Initially designed as a complaint mechanism for an injured State,[873] the neutral language which was adopted following negotiations allows for all State Parties to refer any 'situation' provided that the crimes 'appear' to be committed within the Court's jurisdiction. Ideally, the referral is supplemented by supporting material.[874]

Contrary to initial expectations, State Party referrals became the rule rather than the exception and, thus, a powerful tool to urge the Prosecutor to investigate.[875] The requirements were debated in the preparatory works for the ICC, in particular, whether a direct 'interest' of the referring state should be necessary.[876] Based on the argument that all

[867] OTP, PPPE (n 123) para 76. In detail: Schabas and Pecorella, 'Article 12' in Ambos, *Rome Statute: 2022 Commentary* (n 1) paras 30-34. For instance, Côte d'Ivoire (2003), Uganda (2004), Ukraine (2014), and Palestine (2015) filed Article 12(3) declarations requesting the Court's intervention.
[868] Article 13 (b) ICC Statute. Referred were Darfur, Sudan, and Libya.
[869] Article 13 (a) and 14 (1) ICC Statute; Fabricio Guariglia and Emeric Rogier, 'Selection of Situations and Cases by the OTP of the ICC' in Stahn (ed), *The Law and Practice of the International Criminal Court* (n 115) 357.
[870] Article 15 (3) ICC Statute.
[871] For instance, Uganda, Democratic Republic of Congo, Central African Republic I and II and Mali, leading to full investigations. By 2022, eleven Situations were referred, see Chaitidou, 'Article 14' in Ambos, *Rome Statute: 2022 Commentary* (n 1) para 12. The referral by Gabon was unrelated to conflict and concerned post-election violence, but the Office refused to open an investigation.
[872] This category can be divided into single State Party or group State Party referrals. In 2018, six State Parties referred the Situation in Venezuela and, most prominently, 39 State Parties referred the Situation in Ukraine to the OTP on 2 March 2022.
[873] Article 25 ('Complaint') of the 1994 Draft Statute, see ILC, 'Draft Statute for an International Criminal Court' in *Yearbook of the International Law Commission* (Vol II, Part Two) Report of the ICL to the UN GA (1994).
[874] Article 14 (2) ICC Statute. See also 1996 PrepCom report (n 79) para 146, changing the wording from 'complaint' to 'situations' to avoid politicisation.
[875] For a critical view on the term self-referral and the drafting history, see Darryl Robinson, 'The Controversy over Territorial State Referrals and Reflections on ICL Discourse', 9 JICJ 2 (2011) 355–384.
[876] 1996 PrepCom report (n 79) para 147; Chaitidou, 'Article 14' in Ambos, *Rome Statute: 2022 Commentary* (n 1) para 9.

core crimes are inherently in the interest of all states of the international community,[877] it was not pursued. Convincingly, the crimes' nature underscores the universal imperative to uphold global peace and security, and to end impunity.[878] This shared value ('concern') among states renders any additional formal 'interest' requirement superfluous.[879] Concurrently, the ICC's mandate remains significantly influenced by state interests due to its reliance on consent.[880] The entire international law system is predominantly based on consent, and states naturally act in self-interest to improve or preserve their power position and protect their sovereignty.[881] Although a profoundly controversial matter,[882] the consensual nature of international (criminal) law embeds self-interest into the process of state referrals.

Referring migration-related cases to the ICC does not appear to be in the interest of any state. The interplay between several (geo)political, economic, and legal reasons may contribute to marginalising migrants,[883] leaving them outside the protective framework of any state.[884] In particular, third states are disinclined to challenge state sovereignty, above

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[877] Ibid; Chaitidou, 'Article 14' in Ambos, *Rome Statute: 2022 Commentary* (n 1) para 4; William A. Schabas, *An Introduction to the International Criminal Court* (4th ed CUP 2011) 90.

[878] Ibid; Preamble of the ICC Statute.

[879] See the ICJ case law on *erga omnes* obligations and common interest of the international community, e.g., *Barcelona Traction, Light and Power Company, Limited* (*Belgium v. Spain*) (Judgment) ICJ, Reports 1970 (5 February 1970) para 33; *Questions relating to the Obligation to Prosecute or Extradite* (*Belgium v. Senegal*) (Judgment) ICJ, Report 2012 (20 July 2012) para 50-55; also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*The Gambia v. Myanmar*) (Judgment on Preliminary Objections) ICJ, Reports 2022 (22 July 2022) para 107.

[880] Yaël Ronen, 'The International Criminal Court and Nationals of Non-Party States' in Gerhard Werle and Moritz Vormbaum (eds), *The International Criminal Court in Turbulent Times* (International Criminal Justice Series Vol 23) (Asser Press Springer 2019) 84.

[881] Robert Frau, 'The International Criminal Court and the Security Council – The International Criminal Court as a Political Tool?' in ibid, 122, using SC referrals as a reference. Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (OUP 2005) 13, arguing that international law itself is 'a product of state self-interest'.

.[882] Inter alia: Cherif M. Bassiouni, 'The Permanent International Criminal Court' in Mark Lattimer and Phillipe Sands (eds), *Justice for Crimes Against Humanity* (Hart Publishing 2003) 173-210; Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (OUP 2004) ; Robert Cryer, 'International Criminal Law vs State Sovereignty: Another Round?', 16 EJIL 5 (2006) 979–1000. Schabas, *An Introduction to the International Criminal Court* (n 877). The fundamental doctrinal debate lies outside the scope of this thesis.

[883] Broomhall, *International Justice* (n 882) 4.

[884] Hodgson, 'Resisting the State Crimes' (n 5) 151-186; Kalpouzos, 'Violence against Migrants' (n 5) 584; Mann, *Humanity at Sea* (n 128); Patricia Mallia (Vella de Fremeaux) and Jean-Pierre Gauci, 'Irregular migration and the international obligation of non-refoulement: the case of the MV Salamis from a Maltese

all, that of the most powerful states. The tension between state sovereignty and international law remains a contested issue[885] but illustrates why migration-related cases are not referred even by states that are not immediate destinations or otherwise involved. This raises significant concerns since ICL is inherently designed to qualify state sovereignty by criminalising circumstances under which internal affairs are lifted to the concern of other states and thus warrant interference.[886] Especially crimes against humanity should address such situations, as their historical development highlights.

Given that state referrals are not a suitable mechanism for addressing crimes against migrants, currently, *proprio motu* investigations remain the sole viable pathway. While a state referral is an indicator of a 'reasonable basis to proceed,' civil society submissions do not trigger such an assumption.[887] As shown in Chapter II, there is sufficient material supporting the view that crimes against migrants at least fall within this low evidentiary standard and require deeper engagement with the claims. However, as hypothesised in Chapter III, and as Judge Kaul's influential dissenting opinion suggests, the ICC system has not yet identified a clear position on the context and the degree of direct, physical violence necessary in peacetime. It tends to be still influenced by the perception that crimes against humanity are crimes committed during conflicts or in conflict-like scenarios, which may be associated with a higher degree of severity. In order to

perspective', The Journal of International Maritime Law 20 (2014) 50, addressing the 'responsibility vacuum' at 61.

[885] *Inter alia*: Cryer, 'International Criminal Law vs State Sovereignty' (n 882); Markus Benzing, 'The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity', Max Planck Yearbook of United Nations Law 7 (2003) 591-632; Morten Bergsmo and LING Yan (eds), *State Sovereignty and International Criminal Law* (TOAPE 2012).

[886] Jackson's Report (n 635) 333; MacNeil, *Legality Matters* (n 14) 89. Also, in terms of qualifying immunities, see Brigitte Stern, 'Immunities for Heads of State: Where Do We Stand?' in Lattimer and Sands, *Justice for Crimes Against Humanity* (n 882) 102.

[887] Karel De Meester, 'ICC Commentary (CLICC): Commentary Rome Statute: Part 5, Article 53', CILRAP, Case Matrix Network (30 June 2016).

substantiate this claim, an analysis of the consideration practice of ICC bodies, in particular the OTP, is presented in the next section.

2.2. Case Considerations

One should not, however, confuse what happens most of the time (quod plerumque accidit) with the strict requirements of law.[888]

It is now settled case law and clearly codified in the Rome Statute that only the crime of persecution requires discriminatory intent, as opposed to all other acts that constitute crimes against humanity. During the appeals phase of the trial against *Duško Tadić*, the ICTY Appeal Chamber had to clarify that Article 5 of the ICTY Statute (codifying crimes against humanity) should not be interpreted as requiring discrimination for all acts.[889] The Appeal Chamber recognised that hateful motivations, which were prevalent in Yugoslavia, 'frequently accompany such crimes',[890] but a general experience does not equal the law.[891] Although certain elements may often or always be present, the maxim of *id quod plerumque accidit* serves as a reminder not to fall into interpretative automatism. This section explores what possible 'automatisms' relate to the concept of crimes against humanity, impeding their investigations outside of armed conflict.

In relation to peacetime crimes against humanity, there are two ways the quote from the *Tadić* Appeal judgment can inform further discernment. The first interpretation is to argue that peacetime crimes, as a matter of fact, *do not* occur as frequently as crimes in times of

[888] *Tadić* (Appeal Judgment) (n 647) para 302.
[889] Ibid, para 300.
[890] Ibid, para 301.
[891] Ibid, para 302.

conflict. If this is the case, it should nonetheless not distract from the fact that they may satisfy the strict requirements of the law. This perspective demands that crimes that may not occur as often, yet are still relevant as crimes against humanity, be considered. It requires applying the existing legal framework to cases that were, thus far, excluded because of a lower frequency of their commission.

The second, less evident approach to interpreting this maxim is that crimes against humanity *do* occur as often as crimes in conflict, but they are disregarded. This perspective demands a shift in attention. It requires drawing attention to peacetime violence that is wrongly *not* considered a crime against humanity because it manifests itself outside of conflict. The gap in considering peacetime crimes against humanity may thus result from either 1) that the violence qualifies but occurs rarely, which is why it is not sufficiently considered, or 2) that it occurs equally often but is not considered to qualify because of the very fact that it occurs outside of armed conflict. The sections below interrogate whether the data available from the ICC supports or disproves these assumptions.

2.2.1. Conflict-Related Crimes Before the ICC

Cases before the ICC, either following the OTP's prosecution practice or the Chambers' interpretative methods, such as Judge Kaul's dissenting opinion, reveal relevant insights into such perceptions about crimes against humanity.

By 2024, the ICC has publicly listed seventeen investigations. Eleven are connected to an armed conflict (Uganda, DRC, Darfur (Sudan), CAR I and II, Libya, Mali, Georgia, Afghanistan, the State of Palestine, and Ukraine).[892] Six are unrelated to an armed conflict

[892] ICC, Situations and Cases, Investigations (August 2024).

(Kenya (post-election violence), Côte d'Ivoire (post-election violence), Burundi (post-election violence), Bangladesh/Myanmar (internal attack, jurisdiction over the crime of deportation/forcible transfer to Bangladesh), Philippines ('war on drugs'), and Venezuela I (detention)).[893] The OTP has further opened preliminary examinations into the situations in CAR II (armed conflict), Nigeria (armed conflict), Venezuela II (unilateral coercive measures by the US), and most recently, Lithuania (deportation, persecution and other inhumane acts against civilians by the Republic of Belarus).[894] Pre-opening preliminary examinations that were closed after a decision not to proceed concerned situations in Bolivia (Covid-19 pandemic),[895] Colombia (armed conflict),[896] Greece/Comoros/Cambodia (violent interception of ships),[897] Gabon (post-election violence),[898] Guinea (atrocities committed during political crisis),[899] Honduras (post-election violence),[900] Iraq/UK (armed conflict),[901] and South Korea (armed conflict).[902]

This brief review shows that conflict-related cases are more often considered, but considerations are not entirely out of balance. Post-election violence, not constituting conflict, often results in investigations. The systematic detention in Venezuela I recently resulted in the resumption of investigations and could yield an interesting reasoning related

[893] Ibid, see also Situation in the Bolivarian Republic of Venezuela I (Judgment on the appeal of the Bolivarian Republic of Venezuela against Pre-Trial Chamber I's "Decision authorising the resumption of the investigation pursuant to article 18(2) of the Statute") ICC-02/18 OA (1 March 2024).
[894] ICC, Situations and Cases, Preliminary Examinations (August 2024).
[895] ICC-OTP, 'Situation in the Plurinational State of Bolivia – Final Report' (14 February 2022) para 149.
[896] ICC, 'ICC Prosecutor, Mr Karim A. A. Khan QC, concludes the preliminary examination of the Situation in Colombia with a Cooperation Agreement with the Government charting the next stage in support of domestic efforts to advance transitional justice', Press Release (28 October 2021). The PE was closed whilst signing an MOU aiming to support national proceedings.
[897] ICC, 'Preliminary examination - Registered Vessels of Comoros, Greece and Cambodia', ICC-01/13 (2019).
[898] ICC-OTP, 'Situation in the Gabonese Republic, Article 5 Report' (21 September 2018) para 205.
[899] ICC, 'Statement by ICC Prosecutor Karim A.A. Khan KC regarding the opening of the trial related to events of 28 September 2009 in Guinea, signature of Agreement with Transitional Government on complementarity and closure of the Preliminary Examination', Press Release (29 September 2022). The PE was closed whilst signing an MOU aiming to support national proceedings.
[900] ICC-OTP, 'Report on Preliminary Examination Activities (2015)' (12 November 2015) paras 288-289.
[901] ICC-OTP, 'Situation in Iraq/UK – Final Report' (9 December 2020) para 503.
[902] ICC-OTP, 'Situation in the Republic of Korea, Article 5 Report' (June 2014) para 82.

to crimes against humanity in peacetime. It can thus not be concluded that crimes against humanity do *not* occur in peacetime. Concurrently, the cases before the ICC include extreme violence, often at the edge of internal conflict, as indicated by outbursts of violence following elections and political unrest.[903] Taking into account that post-election violence, which is below the threshold of an internal conflict under IHL/ICL, receives attention by the OTP, it follows that the Office focuses on cases of armed conflict and those very close to exceeding the threshold to an internal conflict or civil war. This also accounts for the three peacetime cases mentioned by Sadat in 2013, Libya, Kenya, and Côte d'Ivoire, which all concerned political unrest that had not yet descended into civil war.[904] The Libyan case highlights that the armed conflict erupted shortly after.[905] As will be shown below, the situation in Côte d'Ivoire *could have been* determined as an armed conflict, but the Prosecutor chose not to charge war crimes.[906]

Indeed, it is acknowledged that the ICC's mandate is to address the most serious crimes, yet the evaluation of when this threshold is met is not always precise. As the ICC's mandate covers crimes against humanity in peacetime, solely focusing on crimes that are committed in or slide into conflict-like scenarios would not satisfy the mandate's scope. Nonetheless, the critical moment when outbursts of violence amount to an armed conflict under international law is a decisive question and is examined in Chapter V.[907] It serves as a useful perspective on crimes against humanity in the context of migration, understanding it as a conflict-like scenario.

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[903] For instance, the situation in Honduras, considered as a 'borderline case', ICC-OTP, 'Report on Preliminary Examination Activities (2015)' (12 November 2015) paras 288-289, see *infra* for Sadat's proposal of an 'atrocity cascade' placing crimes against humanity in peacetime before the outbreak of armed conflict, at 3.4.
[904] Sadat, 'Crimes Against Humanity in the Modern Age' (n 2) 363.
[905] Ibid.
[906] See *infra* (n 913).
[907] See Chapter V at 2.2.1.

What is further notable is that cases, i.e. the crystallisation from an investigation into the prosecution of specific crimes and alleged perpetrators, were built from only nine situations until the end of 2024 (Darfur, DRC, CAR I and II, Libya, Mali, Uganda, Kenya, and Côte d'Ivoire),[908] of which only two were concerned with situations outside of conflict. As already highlighted, the Kenya decision remains particularly controversial due to the dissenting opinion of Judge Kaul and its case history. It comprises five cases. Charges against *Kosgey* were not confirmed, charges against *Ruto and Sang* were vacated, charges against *Kenyatta* were withdrawn, the suspects *Barasa and Bett* remain at large and charges against *Gicheru* were confirmed, but the case closed in 2022 due to his passing.[909] Moreover, in the situation in Côte d'Ivoire, three arrest warrants were issued. The charges against *Simone Gbagbo* were vacated in 2021. The highly controversial trial against *Charles Blé Goudé and Laurent Gbagbo* resulted in acquittals of both defendants due to weak evidence provided by the Prosecution.[910] The majority held that the prosecutor failed to prove 'a common plan', i.e. that the alleged crimes were committed pursuant to or in furtherance of a policy.[911] Moreover, the Prosecutor was unable to establish the individual responsibility of the two defendants.[912] Most notably, the Chamber criticised the Prosecution for ignoring the internal (and later international) armed conflict that the Defence had explicitly raised.[913] One of the few cases unrelated to conflict should have, in

[908] In early 2025, a case was built from the investigation into the Philippines. An arrest warrant for Mr. Duterte was issued in March 2025, and he was transferred to the Hague, ICC, 'Situation in the Philippines: Rodrigo Roa Duterte in ICC custody', Press Release (12 March 2025) <https://www.icc-cpi.int/news/situation-philippines-rodrigo-roa-duterte-icc-custody>.
[909] ICC, The Situation in Kenya, Cases <https://www.icc-cpi.int/cases?f%5B0%5D=situation_name_colloquial_cases%3A678>.
[910] *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC-TC I (ICC-02/11-01/15), 'Reasons for oral decision of 15 January 2019 on the Requête de la Défense de Laurent Gbagbo afin qu'un jugement d'acquittement portant sur toutes les charges soit prononcé en faveur de Laurent Gbagbo et que sa mise en liberté immédiate soit ordonnée, and on the Blé Goudé Defence no case to answer motion' (16 July 2019) [*Gbagbo and Blé Goudé* oral decision]; Opinion of Judge Cuno Tarfusser, ICC-02/11-01/15-1263-AnxA (16 July 2019) para 3.
[911] Ibid, para 28.
[912] Ibid, para 28.
[913] Bartels, 'The Classification of Armed Conflicts' (n 91) 636-637.

fact, been a case linked to conflict. Quite paradoxically, war crimes charges may have resulted in a conviction.[914] Overall, this review nonetheless conveys that crimes committed outside conflict scenarios are disproportionately not prosecuted. Even if prosecuted, thus far, they have never resulted in a conviction.[915]

The reasons for this may be manifold, and several explanations may exist simultaneously.[916] Yet, what can be observed is that the OTP is the first organ to filter and exclude cases concerning peacetime crimes against humanity narrowly. It is submitted that this strategy is connected to the fact that the OTP – to some extent – assumes the severity of crimes when connected to conflict.[917] This, in turn, contributes to the misconception that crimes sufficiently severe also rather occur in times of conflict. The analysis above, however, has demonstrated that this does not hold true since peacetime crimes occur similarly often. Overall, this perception seems to result in the decision not to proceed. The next section goes into further detail on the implied severity for conflict-related crimes to ascertain whether the hypothesis proves valid in cases before the ICC.

2.2.2. Implied Severity in Conflict-Like Settings

The cases, exceptionally considered for investigation by the OTP, which moved forward to the authorisation/investigation stage are again filtered by the (Pre) Trial Chamber as a

[914] Ibid, 637.
[915] *Gbagbo* (Judgment) (n 33) para 275 (decision confirmed by the AC on 31 March 2021). See for a critique of the judgment and the interpretation of the policy as to requiring proof of official adoption, Chapter II at 4.3.1. For a general analysis of the ICC's failures to convict, see Douglas Guilfoyle, 'Lacking Conviction: Is the International Criminal Court Broken? An Organisational Failure Analysis', Melbourne Journal of International Law 20 (2019) 1-52.
[916] For a detailed analysis of several other reasons and strategic decisions, see Lovisa Bådagård and Mark Klamberg, 'The Gatekeeper of the ICC - Prosecutorial Strategies for Selecting Situations and Cases at the International Criminal Court', Georgetown Journal of International Law 48 (2016) 639-733.
[917] See Chapter III at 4.

matter of procedure.[918] The PTC authorised investigations into Kenya, Côte d'Ivoire, Georgia, Myanmar, and the Philippines.[919] Notably, most cases unrelated to conflict did not even proceed to the Chambers.[920] It is thus difficult to draw reliable conclusions from the Chamber's decisions on peacetime crimes against humanity due to their limited number.

However, as examined above, these cases are critically contingent on whether the necessary threshold postulated by the *chapeau* of crimes against humanity is met.[921] Doubt about this threshold may likewise relate to the perception that crimes against humanity are, more often than not, conflict-related.[922] This would indicate a concerning conflation of the required contextual elements necessary for all core crimes.[923] The existence of an armed conflict is the context for war crimes (Article 8 ICC Statute). For crimes against humanity, the *chapeau*, i.e. the attack against civilians, including the policy element, forms the context (Article 7 (1) and (2)(a) ICC Statute). The contextual elements of crimes against humanity should not be conflated or too far intertwined with the contextual elements of war crimes.

A notable exception is the investigation into the situation in the Philippines. The systematic murder of drug suspects kept on public watch lists,[924] following harrowing public

[918] Ibid, 663: *Proprio motu* investigations require authorisation by the pre-trial chamber, unlike state or SC referrals, see Article 15 (3) ICC Statute. For a SC referral and charges outside of conflict, see the arrest warrants for the Libyan leadership, e.g., *Situation in the Libyan Arab Jamahiriya* (Decision on the "Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah AL-SENUSSI") PTC I, ICC-01/11 (27 June 2011).

[919] Authorisation Decision Philippines (n 46); see *supra* (n 856) for Kenya and Côte d'Ivoire, supra (n 298) for Myanmar. See also Bådagård and Klamberg, 'The Gatekeeper of the ICC' (n 916) 663.

[920] See the list of cases closed before opening PE above, such as Burundi.

[921] Most prominently, the discussion surrounding Judge Kaul's dissenting opinion in the situation in Kenya. See also the OTP's decision not to proceed in the situation in Gabon not exceeding the *chapeau* threshold: ICC-OTP, 'Situation in the Gabonese Republic: Article 5 Report' (21 September 2018) para 98.

[922] Arguing that also for crimes against humanity during armed conflict, the PTC took a restrictive approach in the *Katanga*, *Bemba*, and *Mbarushimana* confirmation decisions, risking the fragmentation of ICL: Sadat, 'Crimes Against Humanity in the Modern Age' (n 2) 375-376.

[923] Genocide requires a specific intent to destroy, i.e. a subjective element instead of an objective contextual element.

[924] Authorisation Decision Philippines (n 46) para 43.

encouragement to assassinate them,[925] and the failure to investigate and prosecute[926] constitutes a rare example of a state-led campaign against an unwanted group of citizens embedded in a non-conflict scenario before the ICC. It may thus generate an important judicial reasoning and advancement regarding peacetime crimes against humanity. The PTC authorised the investigation due to the killings encouraged by the so-called 'war on drugs' campaign by the government.[927] It recognised that the contextual elements are met, even without a connection to an armed conflict or intense outburst of violence. The sufficient severity in the Philippines is thus established otherwise. Two aspects may be highlighted as to why this situation may have moved forward. First, the acts allegedly committed – predominantly murder, or second, the narrative that the government was waging a 'war' against drug users, could imply the severity. Both factors are briefly examined.

2.2.2.1 Sufficiently Severe Acts

In its application to commence an investigation in the Philippines, the OTP predominantly relied on systematic killings, which are acts generally referred to as the most severe crimes in most legal systems.[928] According to the authorisation decision, the OTP argued that it focused only on murder as the 'more prominent' crime due to the page limit of the submission.[929] Yet, the Prosecutor submitted evidence that severe mistreatment took place before the killings, as well as that relatives were forced to watch the killings and argued

[925] Ibid, para 94, citing Rodrigo Duterte: 'If you're still into drugs, I will kill you, don't take this as a joke. I'm not trying to make you laugh, son of a bitch, I will really kill you'.
[926] Ibid, para 101.
[927] Ibid, 5.
[928] Bassiouni, *Crimes Against Humanity* (2011) (n 28) 373, 377, referring to all 'murder-type acts'.
[929] Authorisation Decision Philippines (n 46) para 114.

that these acts amounted to crimes under Article 7 (1)(f) and (k).[930] In defining the scope, the Chamber authorised the 'investigation in relation to *any crime* within the jurisdiction of the Court committed within the parameters of the authorised investigation circumscribed in time, place and, in some cases, also by reference to factual parameters'.[931] The Chamber also acknowledged that victims' representations presented additional evidence indicating deprivation of liberty, enforced disappearance, and sexual violence.[932]

The reliance on murder to proceed with the investigation sparks the question of whether the OTP follows a hierarchy of crimes. Murder is perceived as the most severe act against a person. When the ICC Statute was drafted, the act did not require further explanation or much interpretation.[933] There is consensus that systematic murder is severe and surmounts the substantive threshold required in the Statute. However, the PTC also held that several statements made before or during the so-called 'war on drugs' campaign by officials appeared to 'form a coherent progression'.[934] This indicated that acts existed previously that intensified and culminated in the killings. In Chapter II, this incremental aggravation was considered. It was argued that such measures should be accounted for against their cumulative effect relevant to the crime of persecution in the context of migration.[935] This finds a precedent in the increasingly restricted measures imposed on women and girls in Afghanistan, leading to the application of arrest warrants.[936] In particular, these cases suggest that the acts preceding murder may already fall within the necessary level of severity.

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[930] Ibid.
[931] Ibid, para 116.
[932] Ibid, para 115.
[933] 1996 Draft Code (n 19) Commentary to Article 18, para 8 ('it is clearly understood'), for causes of death determined by the *mens rea* in domestic legislation, see Ambos and Wirth, 'The Current Law of Crimes Against Humanity' (n 19) 46-59.
[934] Authorisation Decision Philippines (n 46) para 104.
[935] Chapter II at 4.2.2.1.
[936] Ibid.

One could further raise the question of whether the OTP would have also initiated the investigation in the Philippines without the killings. What if drug users had remained on watch lists, were systematically imprisoned without due process and access to effective remedy, held under inhumane conditions, or would they have tried to seek first aid in hospitals, they would have been left untreated and to die, but active killing would have not or not yet taken place?

The progression from a hostile campaign into systematic murder seems more apparent in hindsight. Yet could the OTP have considered the practices before the killings took place as crimes against humanity? It could have investigated the severe deprivation of physical liberty, torture, and inhumane and degrading treatment. The systematic murder appears as the escalation of previous violence and hostility, which could have invoked preliminary examinations but was possibly not deemed severe enough. The ICC Statute, and crimes against humanity in particular, do not contain a normative, hierarchical structure of the enlisted crimes or acts.[937] Murder or extermination is not necessary for an attack to amount to crimes against humanity.[938]

The OTP's filtering and selection practice, however, appears to contribute to such interpretation and may have resulted in the attention on the Philippines because acts of murder more clearly satisfy this approach. The substantive severity of the acts enlisted must, however, be treated disparately from the question of gravity during the admissibility assessment. Although in its later policy on PE, the OTP did not explicitly refer to a

[937] Similarly challenging a hierarchical structure, see: Kalpouzos and Mann, 'Banal crimes against humanity' (n 5) 2 and 25; Schmid, *Taking ESC Rights Seriously* (n 26) 32; questioning a hierarchy of organised crimes by states and opportunistic crimes by private actors: Jaya Ramji-Nogales, 'Questioning Hierarchies of Harm: Women, Forced Migration, and International Criminal Law', 11 International Criminal Law Review (2011) 463-476.

[938] For those arguing that a hierarchy exists, an approach to satisfy different levels of severity is via sentencing, see, for instance, Frulli, 'Are Crimes against Humanity More Serious than War Crimes?' (n 167) 329-350, comparing murder as a war crime and murder as a crime against humanity, but also suggesting to follow a hierarchy along the respective *mens rea*, in particular, general and specific intent crimes as the more severe crimes. For the comparison between persecution and genocide, see Chapter VI at 2.3.

hierarchy of crimes but considered Sexual and Gender Based Violence (SGBV) crimes or crimes against children particularly grave,[939] it previously classified crimes resulting in death, i.e. murder, and the crime of rape, at the highest level of gravity.[940]

As already mentioned in the previous chapter, the gravity and severity tests often overlap as similar criteria support or disprove the conclusions. Similar to the policy element, which may be used to prove the organised nature substantively, it may also indicate gravity, yet the threshold may be conflated. The decision regarding the situation in the Philippines is an important record of the OTP's possibility of proceeding to investigations based on the severity of the alleged acts, not the context in which they occur. However, it also shows that outside of conflict, only acts perceived as the most severe are considered.

This differentiation is crucial in the context of migration. As the crimes occur beyond a conflict setting, a first 'trigger' for the OTP's attention cannot be established. Moreover, the acts committed do not amount to active killings, although murder by omission has been submitted.[941] As argued, it would not be convincing if the OTP only pursued murder as a sufficient connection in peacetime. The situation in the Philippines, however, indicates this perception. A second reason for this investigation could be the use of a 'war' narrative that led to a heightened vigilance by the ICC bodies, examined below.

2.2.2.2 The 'War' Narrative

The Prosecutor estimated that 12,000-30,000 civilians were killed between 2016-2019, following the Duterte government's declaration of a 'war on drugs'.[942] The Prosecutor

[939] OTP, PPPE (n 123) 35-41, considering 'scale, nature, manner of commission, and impact of the crimes'.
[940] Cited in Heller, 'Situational Gravity Under the Rome Statute' (n 802) 2, fn 14.
[941] Chapter II at 4.3.2.
[942] Authorisation Decision Philippines (n 46) para 24.

adopted the language in its 2019 report on PE, cautiously referring to the 'so-called "war on drugs".'[943] In the authorisation decision, the PTC also uses the terminology of a 'so-called "war on drugs".'[944] The language was introduced by the Philippine authorities, describing the campaign to eliminate drug use and dealing, the ICC bodies echo the government's own label. On a website created by the ICC to promote an exhibition raising awareness and calling for support for the victims, the situation in the Philippines is referred to as '[a] so-called war',[945] omitting the drug characteristic. By using the 'war' narrative, the ICC bodies adopt the language, which may have an impact on the perception of the situation as a conflict-like scenario.[946]

The Cambridge Dictionary defines war as 'armed fighting between two or more countries or groups'.[947] In IHL terms, war is described as 'a phenomenon of organized collective violence that affects either the relations between two or more societies or the power relations within a society'.[948] Yet, international law no longer refers to war but to armed conflict, i.e. international armed conflict (IAC) and non-international armed conflict (NIAC, referring to internal conflict or civil war).[949] Using the term 'war' for an internal attack against drug users in the Philippines is misleading with respect to international law, as it creates a false impression that drug users constitute a party to a conflict. In that case, it carries a notion that they might be armed and engage in fighting, to which the government may be entitled to react in defence. In fact, the Philippine government consistently raised

[943] ICC-OTP, 'Report on Preliminary Examination Activities (2019)', (5 December 2019) para 241.
[944] Authorisation Decision Philippines (n 46) para 20.
[945] ICC-CPI, 'Common Bonds', 'A so-called war – Philippines' <https://www.icc-cpi.int/common-bonds/>.
[946] For a linguistic analysis of the discourse on 'war on terror', see Anna Podvornaia, 'The Discursive Battlefield of the "War on Terror": Enabling Strategies for Garnering Public Support in the Rhetoric of George W. Bush and Osama bin Laden', in Adam Hodges (ed), *Discourses of War and Peace* (OUP 2013) 69-94.
[947] Cambridge Dictionary: Meaning of 'war' in English <https://dictionary.cambridge.org/dictionary/english/war>.
[948] MSF, 'The Practical Guide to Humanitarian Law' <https://guide-humanitarian-law.org/content/article/3/war/>.
[949] Ibid.

self-defence to justify the deaths, arguing that the officers faced threats.[950] The Prosecutor rejected that the deaths were justified, but argued that the claim must be investigated at the investigation/trial stage, to which the PTC agreed.[951]

Although the narrative may not invoke the rules of IHL, it may have strengthened the OTP's perception of the severity of the situation. As argued earlier, if situations involving some form of conflict are associated with a higher degree of severity, the OTP may have taken action because the situation in the Philippines is framed in such a scenario. Reframing a situation concerning civilians in terms of IHL could be a valuable avenue to urge the Prosecutor to take seriously an attack against unarmed groups. The previous section has shown a tendency to deprioritise non-conflict situations. This explains why peacetime crimes, more generally, are disproportionately often not prosecuted. The only genuine peacetime investigation is the Philippine situation, in which the narrative of war is used, resulting in action by the OTP. This finding sets the basis to reframe the 'migration crisis' as a conflict like scenario in Chapter V. It demonstrates that the states that enact restrictive migration policies also use language (threat narrative) and employ means (NATO forces, defence policies) that resemble conflict-like circumstances.

2.3. Concluding Remarks

This section explored the prosecution practice before the ICC, focusing on peacetime crimes. It demonstrated that the context and the degree of direct, physical violence are two factors taken into consideration. The context of an armed conflict, although crimes in peacetime do not occur disproportionally less often, has received more attention. So far, a

[950] Authorisation Decision Philippines (n 46) para 34.
[951] Ibid, 54-60.

limited number of investigations concerned crimes disconnected from armed conflict, and have not resulted in a conviction. The section further illustrated that peacetime situations often moved at the edge of civil war, such as in Côte d'Ivoire, which, in fact, could have been classified as an NIAC. Similarly, the Libyan case started as a peacetime situation and escalated into an armed conflict.

The analysis of the ICC practice has further shown that contexts involving an armed conflict or a conflict-like setting, as hypothesised in Chapter II, carry the perception of a higher degree of severity. This perception seems to convince the OTP to proceed. The Philippine investigation, the only genuine peacetime situation, was examined to exemplify this perception. The use of the 'war on drugs' narrative, echoed by the ICC bodies, may have invoked the alertness to the severity of the situation. The framing of an attack against civilians in conflict terms serves to formulate the first approach in Chapter V for understanding the migration crisis as a dimension of conflict.

Moreover, in the Philippines, the dominant acts committed pertain to the crime of murder, which is often considered the most severe act. Although the enlisted acts in Article do not stipulate a hierarchy of crimes, the OTP may have taken action because of the systematic killing of drug users. It raises the question of how situations beyond conflict are treated that do not involve conduct resulting in death. If peacetime violence appears as less severe, it creates an impunity gap for acts enlisted in Article 7 falling short of murder or extermination. The severe deprivation of liberty or inhumane detention conditions, which are equally recognised as crimes against humanity, may be disregarded when committed outside warzones. In this section, it was argued that the incremental progression of violent acts, such as inhumane treatment, was recognised in the Philippines, which should also alert the OTP to the ill-treatment faced by migrants. As argued in Chapter II, in particular

the cumulative effect of acts of persecution may amount to the necessary degree of severity, even if no active killing takes place.

The decisive question remains when the threshold to criminally relevant acts is crossed. At which earlier stage of the violent campaign against drug users could the OTP have considered it necessary to commence investigations? This question has a critical influence on the OTP's decision-making process and could have far-reaching implications in the migration context. Explored in Chapter II, it pertains to the question of when structural violence, defined as systemic, non-criminal violence embedded in or imposed by institutions, exceeds the threshold to criminality relevant under ICL. The section below investigates the relevance of structural violence in the context of migration and the potential of Article 7 to respond to it.

3. Crimes Against Humanity and Structural Violence

Acts in peacetime may vary considerably from the more common conduct during armed conflict, like the killing of civilians in the midst of a military attack. Violence, lacking direct, physical violent action, affecting a large number of persons, is considered structural violence.[952] It is embedded in the institutional system, often invisible, and not considered to amount to criminally relevant violence.[953] In peacetime, violence may more often appear as structural and non-criminal because it is imposed by functioning institutional systems and entrenched into laws and policies.

[952] Galtung, 'Violence, Peace, and Peace Research' (n 6) 170-171. Detailed *infra* 3.2.
[953] Ibid.

It is therefore paramount to study whether crimes against humanity cover this form of violence, as suggested by scholars, like Itamar Mann, and explore its relevance in the context of migratory flows.[954] The following section makes a case for the potential of Article 7 to respond to this dimension of violence. It first highlights that the migration-related abuses have been discussed as structural violence. It then illustrates how Article 7 may be understood as the norm covering such violence when the necessary threshold to criminality is met. It concludes by showing that structural impunity persists for the ill-treatment of migrants. It uses the example of the war *nexus* explored in Chapter II to show how pre-WWII policies were excluded from prosecution, yet relate to structurally embedded violence and acts of persecution in peacetime.

3.1. Migration-Related Crimes as Structural Violence

Peacetime violence, especially systematic fundamental rights abuses and structurally induced crimes, seems to pose a challenge to international criminal law, both in theory and practice. While anthropology, social sciences, and anti-discrimination studies have less difficulty labelling various forms of violence as crimes,[955] criminal legal studies are constrained by basic principles such as strict construction and the prohibition of analogy (*lex stricta*).[956] The ensuing fundamental question is how to translate certain relevant notions from other disciplines into legal, clearly defined concepts applicable in the realm

[954] In detail, Chapter II at 4.5.
[955] Albahari, *Crimes of Peace* (n 66); Nancy Scheper-Hughes, 'Specificities: Peace-Time Crimes', 3 Social Identities 3 (1997) 471-498; Mechtild Gomolla, 'Direkte und indirekte, institutionelle und strukturelle Diskriminierung', in Scherr *et al.* (Hrsg), *Handbuch Diskriminierung* (2016) 18 (referring to individual crimes of violence induced by structural and institutional discrimination).
[956] Caroline Davidson, 'How to Read International Criminal Law: Strict Construction and the Rome Statute of the International Criminal Court', 91 St. John's Law Review 1 (2017) 42; Kai Ambos, 'General Principles of Criminal Law in The Rome Statute', Criminal Law Forum 10 (1999) 4.

of (international) criminal law.[957] In addition, the question of whether it is desirable to revert to such concepts must be answered. Considering that outside of criminal law, severe consequences for the individual, i.e. criminal punishment for the perpetrator, must not be taken into account, it is important to set boundaries.

Anthropologist Maurizio Albahari collected compelling empirical evidence revealing the deaths along the Mediterranean migration route, classifying them as crimes of peace.[958] He uses the concept to describe 'empirical offenses of structural injustice'.[959] He further argues that the concept is not designed to reveal guilt; the 'crimes of peace do not need intentionality: they may bank on the variable interest of unequally distributed ''tragedies.''.'[960] Itamar Mann, comparing works of Albahari and other scientists, notes that 'the criminal law framing articulated by social scientists is not intended as a formal legal argument, and is more of a metaphor invoked for primarily expressive purposes'.[961] Bringing attention to the potential crimes by clear labelling may be a necessary and salient avenue to their recognition in other disciplines. In parallel, from a criminal law perspective, Albahari's conceptualisation contravenes the minimum requirements for a crime to exist.

In the conventional sense, a crime consists precisely of unlawful conduct, requiring a material and a *mental* element, and the harmful consequence which must be causal to the

[957] For the cross-referencing of criminology and ICL, see Camilo Umaña, 'A Genealogy of State Crime in International Law: Contrasting Criminological Perspectives', 10 State Crime Journal 2 (2021) 305; similarly, Hodgson, 'Resisting the State Crimes' (n 5) 1-18, of ICL and International Refugee Law, see Yao Li, 'Persecution in International Criminal Law and International Refugee Law', Zeitschrift für Internationale Strafrechtsdogmatik 6 (2020) 301; of structural racism in social studies and anti-discrimination law, see Nora Markard, 'Struktureller und institutioneller Rassismus' in Judith Froese and Daniel Thym, *Grundgesetz und Rassismus* (Mohr Siebeck 2022) 161; advocating for interdisciplinary considerations, Kuschnik, 'Humaneness, Humankind and Crimes Against Humanity' (n 13) 505.
[958] Albahari, *Crimes of Peace* (n 66).
[959] Ibid, 22.
[960] Ibid, 22. See also Mann, 'Border Violence as Crime' (n 5) 701.
[961] Mann, 'Border Violence as Crime' (n 5) 702.

conduct.[962] The mental element, the *mens rea*, which translates to guilty mind, is a prerequisite.[963] Crimes against humanity require knowledge of the broader circumstances of the attack and intent for the unlawful act.[964] Criminal law also knows grounds for excluding responsibility[965] and defences, such as self-defence and duress,[966] which result in objectively satisfied criminal conduct that is then considered justified or excused.[967] The perpetrator nonetheless acted with intent and knowledge that his or her act constitutes unlawful conduct resulting in harm (for instance, with *dolus eventualis*).[968] The legal system allows for such defences since the reaction to a threat is necessary or reasonable.[969] The conduct is justified or excused, yet the harm is done.

Albahari's 'crimes' seem to have no perpetrators. Mann highlights that '[l]ike the "state crime" paradigm, Albahari moves between notions borrowed from criminal law and an analysis of structural violence'.[970] The concept of state crime is a highly debated issue,[971] which Hodgson also brought forward in the context of migration.[972] In addition, it is another reminder of the origins of crimes against humanity, which served as the main counter-argument to the state's criminal responsibility.[973] At a time when the state was omnipotent, the exiled jurists of the UNWCC deconstructed the state as an abstract entity

[962] Ambos, 'General Principles' (n 956) 32, highlighting that rules of attribution differ in international and domestic criminal law.
[963] Stefanie Bock, 'The Prerequisite of Personal Guilt and the Duty to Know the Law in the Light of Article 32 ICC Statute', 9 Utrecht Law Review 4 (2013) 185; see critical: Itamar Mann, 'Eichmann's Mistake: The Problem of Thoughtlessness in International Criminal Law', 33 Canadian Journal of Law and Jurisprudence 1 (2020) 145-181; from a criminological perspective, Green and Grewcock, 'The War against Illegal Immigration' (n 189) 87-101.
[964] Article 30 ICC Statute.
[965] Article 31 (a) and (b) ICC Statute (mental disease or defect, intoxication).
[966] Article 31 (c) and (d) ICC Statute.
[967] Ambos, 'General Principles' (n 956) 26-28.
[968] See for duress: 'not intending to cause greater harm than the one sought to be avoided,' Article 31 (1)(d).
[969] And out of the person's control, see Ambos, 'General Principles' (n 956) 28.
[970] Mann, 'Border Violence as Crime' (n 5) 702.
[971] For the discourse, see, for instance, Penny J. Green and Tony Ward, 'State Crime, Human Rights, And the Limits of Criminology', 27 Social Justice 1 (79) (2000) 101–115; Aditi Bagchi, 'Intention, Torture, and the Concept of State Crime', 114 Penn State Law Review 1 (2009) 1-48; Umaña, 'A Genealogy of State Crime in International Law' (n 957).
[972] Hodgson, 'Resisting the State Crimes' (n 5) 1-18, using ICL as a counter-hegemonic tool.
[973] Umaña, 'A Genealogy of State Crime in International Law' (n 957) 313.

that individuals govern. Individual criminal responsibility is a consequence of the critiqued system of states as (criminally) inviolable. The impunity that resulted from crimes by the state (agents) was deemed so intolerable that individual criminal responsibility emerged.[974] The new culpability concept was intended to remedy the protection gap resulting from human rights abuses committed by (individuals forming) the state.[975] Currently, there seems to be a process of slowly regressing to violence without perpetrators. The more structural violence appears to be, i.e. embedded in the system and with perpetrators that are often invisible,[976] the further individual responsibility recedes into the distance. The state crime debate aims to cover this presumably distant violence, suggesting that it qualifies as criminal conduct by the state, while proponents do not necessarily demand criminal punishment as a consequence.[977]

At the very basis of this debate lies the question of what structural violence, or more broadly, violence, is and how to define it. Several typologies of violence have been proposed in different disciplines and differentiate by motive, by targeted group, by consequence, or by its perpetration.[978] In PCS, Johan Galtung, studying violence from several perspectives, developed a framework focusing on violence from the perspective of

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[974] See Chapter III at 3.2.1.

[975] One major issue was that states could not have intent. See, critically, Bagchi, 'Intention, Torture, and the Concept of State Crime' (n 971) 28, suggesting that states could have 'objective intent'.

[976] For a different view on the invisibility of structural violence, see Dilts *et al.*, 'Revisiting Johan Galtung' (n 7) 193. For more details, see *infra* (n 986).

[977] Umaña, 'A Genealogy of State Crime in International Law' (n 957) 313; Hodgson, 'Resisting the State Crimes' (n 5) 18 using the language ICL as an act of resistance against state crime; against 'fetishizing an international punitive approach,' Kalpouzos, 'Violence against Migrants' (n 5) 579-580.

[978] Arendt, *The Origins of Totalitarianism* (n 13); Hannah Arendt, *On Violence* (Harvest Book 1969), Arendt considers violence as the antidote to power whereas power is the essence of the state and violence inherently instrumental; Walter Benjamin, *Zur Kritik der Gewalt* (1921), in Rolf Tiedemann und Hermann Schweppenhäuser (Hrsg.), *Walter Benjamin: Gesammelte Schriften*: Vol. II.1 (Suhrkamp 1999) 179-204; Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (University of Chicago Press 1985), (originally published as *Politische Theologie: Vier Kapitel zur Lehre von der Souveranitat*, 1922); Agamben, *Homo Sacer* (n 13); Galtung, 'Violence, Peace, and Peace Research' (n 6) 167–191; Galtung, 'Cultural Violence' (n 6) 291-305; John W. Burton, *Violence explained: The sources of conflict, violence and crime and their prevention* (Manchester University Press 1997); Etiene G. Krug *et al.*, 'The world report on violence and health' (WHO 2002); Randall Collins, *Violence: A Micro-Sociological Theory* (Princeton University Press 2008); Alison Rutherford *et al.*, 'Violence: a glossary', 61 J Epidemiol Community Health 8 (2007) 676-680; Lester R. Kurtz (ed), *Encyclopedia of Violence, Peace, and Conflict* (Academic Press 2008); on state violence and security: Snider, *Bloodlands* (n 13).

its perpetration. For the purpose of this thesis and its objective to assess individual criminal responsibility in ICL, Galtung's perspective is the most useful link between other disciplines and ICL,[979] although Galtung refrains from classifying violence as criminal or non-criminal.[980]

Galtung identifies three dimensions of violence via triangulation, a method aiming to add nuance and highlight interconnections between the components of the studied phenomenon.[981] His 'triangle model' suggests that violence is a non-linear and dynamic process and describes its complexity as a phenomenon, emphasising the different forms of appearance.[982] According to Galtung, there is direct, structural, and cultural violence.[983] Direct violence is an event, such as a beating or killing, and 'can be traced back to concrete persons as actors', i.e. perpetrators.[984] Structural violence is violence 'built into the structure and shows up as unequal power and consequently as unequal life chances'.[985] The violence appears normal and thus invisible because it is systemic and cannot be traced back to a responsible individual;[986] the system is the 'perpetrator.' Cultural violence – the third dimension – is violence engrained into the cultural and symbolic sphere of a society's existence, beliefs, and attitudes, legitimising direct and structural violence.[987] Galtung

[979] For a thorough analysis of the relationship between international law and PCS whilst advocating for deeper engagement of international lawyers with peacebuilding practices, see Grech, *The International Law of Peacebuilding* (n 52); see for Galtung's types of violence in the context of migration and ICL, Mann, 'Border Crimes as Crimes against Humanity' (n 5) 1184-1186.
[980] Galtung refers to intended and unintended violence and poses the question of guilt, yet not in criminal law terms, see Galtung, 'Violence, Peace, and Peace Research' (n 6) 171-172.
[981] Galtung describes direct/personal and structural violence in Galtung, 'Violence, Peace, and Peace Research' (n 6) 167–191, and adds cultural violence in Galtung, 'Cultural Violence' (n 6) 294, creating a '(vicious) *violence triangle* as an image'.
[982] Galtung, 'Cultural Violence' (n 6) 294-295.
[983] Ibid. Hannah Arendt is considered the first to have described structural violence, although not using the terminology in Arendt, *Eichmann in Jerusalem* (n 13); Mann, 'Border Violence as Crime' (n 5) 723-730.
[984] Galtung, 'Violence, Peace, and Peace Research' (n 6) 170-171.
[985] Ibid, 171.
[986] Ibid; see also critical of the invisibility, Rubenstein, *Resolving Structural Conflicts* (n 65) 94; Richard E. Rubenstein, 'Responsibility for Peacemaking in the Context of Structural Violence', 1 International Journal on Responsibility 1.2 (2018) 7; Mann, 'Border Crimes as Crimes against Humanity' (n 5) 1185 ('Structural violence remains far removed from criminal accountability.').
[987] Galtung, 'Cultural Violence' (n 6) 291.

famously wrote that cultural violence can change 'the moral color of an act from a red/wrong to green/right (…)'.[988] The vicious cycle of violence emerges because the three forms of violence inform and mutually reinforce each other.

Structural violence can occur as racism within institutions, resulting in a higher number of arrests of racialised people – which in turn triggers cultural legitimisation such as the (mis-)belief that they are more likely to engage in criminal behaviour.[989] This may further enable direct acts of violence such as beatings or even killings.[990] The self-amplifying nature of the cycle is evident. It is further widely accepted that racism qualifies as structural violence.[991] Galtung's concept of structural violence thus captures the above-mentioned 'distant violence' as built into the state's institutions. However, institutional racism as such is not criminally punishable. The state crime debate presents arguments for when it should be considered criminal conduct. The common feature is that both frameworks explain and rely on the inherent nature of the given violence as structural and systemic, not individual or personal.

In summary, since penal laws require individual perpetrators, criminal law, including ICL, does not seem to be an adequate response to structural violence, as argued by Mann.[992] However, in the domestic sphere, criminal norms deal with individual criminality, not systemic violence. Crimes against humanity, essentially involving a systematic (or widespread) attack and the policy element that requires an organised structure, may be equipped to respond to structurally induced criminality. It may provide the necessary framework to address this interplay between direct and structural violence. The next

[988] Ibid, 292.
[989] Ojeaku Nwabuzo, 'The Sharp Edge of Violence: Police brutality and community', European Network Against Racism (ENAR) (2021) 5. Such as through racial profiling.
[990] Ibid, 54.
[991] Winter, 'Violence and Visibility' (n 7) 191-227.
[992] Mann, 'Border Violence as Crime' (n 5) 724.

section investigates how Article 7 may be understood to adequately respond to structural violence that has exceeded the threshold to criminality.

3.2. Crimes Against Humanity as a Response to Structural Violence

Crimes against humanity are characterised by high-level, systematic organisation that follows a method or pattern, operating in reciprocity with individuals carrying out the orchestrated violence. This indicates that crimes against humanity combine a high-level of structural violence with conduct by individual agents executing the plan. This collaboration represents the interrelation between macro- and micro-criminality.[993] Crimes against humanity are designed to capture an interplay of individual, physical violence, and structural, systemic violence – clearly aimed at establishing individual criminal responsibility.[994] Traditional structural violence is not considered criminally relevant, yet it can be argued that crimes against humanity provide the threshold for when it becomes.

The taxonomy of Article 7 is a useful reference. It suggests that the *chapeau* (Article 7 (1)) represents a structural dimension. It requires the systematic or widespread commission of acts forming an attack. The attack is further defined in Article 7 (2)(a), requiring the state or organisational policy, indicating that the attack must be organised, following a plan or pattern, and showing an institutional design. The *chapeau,* with its concretising sub-paragraph, reflects the scale and the orchestration, i.e. its systematic or structural scope. Neither the *chapeau* nor the definition of attack mentions the severity of this violence, leaving space for non-criminally relevant structural violence embedded into the state's

[993] Kuschnik, 'Humaneness, Humankind and Crimes Against Humanity' (n 13) 522.
[994] Tilman Rodenhäuser, 'Beyond state crimes: Non-state entities and crimes against humanity', 27 Leiden Journal of International Law 4 (2014) 913-928.

system. The severity of the violence stems from the enlisted acts because the acts are considered the most severe infringements on human dignity, life, and liberty.[995] In addition, the large scale, embedded in the *chapeau*, indicates the severity, however it requires the large-scale commission of enlisted acts, i.e. direct violence. The requirement 'as part of' connects the structural component of Article 7 with the commission of direct and severe acts of violence.

Article 7 thus mirrors the interplay between structural and direct violence, with both forms of the given violence operating in reciprocity. Structural violence as violence built into the system through policies, laws, and other systemic changes by the state (or organisation) becomes criminally relevant when it enables, promotes, or even orders direct violent acts that are criminalised under Article 7 (1)(a) – (k). Yet, the state does not have to explicitly order murder, torture, or imprisonment. It suffices when it creates the structure that enables the direct perpetration of such crimes. Article 7 is further sufficiently equipped to differentiate between everyday violence (that is no less harmful or worthy of attention yet not under ICL) and the most severe and profound attacks on life, liberty, and physical and mental integrity. Even when, or precisely when, the violence is embedded into the system, because this signifies the increased danger underlying Article 7. This system encourages the further perpetration of crimes by lowering the natural inhibition of perpetrators.[996] Crimes against humanity can thus be understood as the norm designed to penalise structural violence that has exceeded a certain threshold.[997] This threshold is reflected in the constitutive elements of the norm, *inter alia* in the *chapeau*, which requires a certain

[995] See in detail Chapter II at 2..
[996] Ambos, *Treatise, Volume II* (n 30) 56.
[997] Bassiouni and Schabas, *The Legislative History* (n 13) 169 ('threshold element').

magnitude and scale of violations as well as the level of severity manifested in the enlisted unlawful acts, informed by the comparability.

Based on this interpretation of crimes against humanity, crimes against migrants could qualify when structural violence, embedded into migration laws, policies, and practices, connects to direct acts of violence, i.e. severe violations of life, liberty, and physical or mental integrity and occurs on a large scale. As highlighted in Chapter II, several authors have proposed considering structural dynamics in the context of migration.[998] Mann proposes that crimes against migrants are an 'exceptional category'[999] that exists between the two types of violence, 'revealing the difficulty of clearly distinguishing them'.[1000] Mann recognises the interplay between structural and direct violence when concluding that '[c]rimes against asylum seekers and other unauthorized migrants are where personal violence visibly meets structural violence, delineating an overlap between the two'.[1001] While this may be the most sophisticated description of the violence against migrants as crimes under contemporary interpretations of ICL, it can be argued that it does not describe a specific category only. It describes the essence and structure of crimes against humanity in peacetime.

If one would accept that the *chapeau* of crimes against humanity is designed to cover the structural violence and the enlisted acts as direct violence, there is no need to distinguish them. The existence of both forms of violence, connected to each other and committed in pursuit of an overarching, joint objective, is what best describes and defines the crimes. It may thus not be classified as a specific category of crimes but as a specific context in which they occur. And this context must primarily be distinguished from the context of

[998] Chapter II at 4.5.
[999] Mann, 'Border Crimes as Crimes against Humanity' (n 5) 1185.
[1000] Ibid.
[1001] Ibid, 1186.

armed conflict. The peacetime context most suitably describes the circumstances when structural violence amounts to criminality since states have functioning institutions, deliberately adopt policies and laws, and have control over their agents. Unlike in armed conflict, when fighting or chaos paralyses institutional decision-making and oversight and impedes profound systemic changes.

In peacetime, Mann's proposed 'structural – direct violence overlap' can be viewed as the space where micro-criminality meets macro-criminality. It describes the moment when contextual elements and enlisted acts connect. Understanding crimes against humanity in peacetime along this interplay ensures that states cannot evade accountability by referring to non-criminal structural violence, blaming systemic deficiencies. Instead, it gives prosecutors the necessary instrument to distinguish more clearly when behaviour appears criminal and when it does not. The critical elements of laws, policies, and practices can be identified as non-criminal structural violence. However, it must subsequently be ascertained what objectives they follow, explicitly or implicitly. Prosecutors can investigate whether these systemically embedded decisions enable criminal activity by individual perpetrators. Instead of focusing predominantly on criminal acts, the structures enabling, promoting, or facilitating the crimes may serve as a more useful starting point to investigate the *chapeau* of crimes against humanity.

To adhere to the more rigorous standards in ICL, additional criteria may become necessary to restrict an over-excessive classification of structural violence as crimes against humanity. In the following sections and Chapter V, the policy of toleration and the quality of impunity are explored in detail. They show that in systems of structural violence, a previous endangering behaviour by a state may serve as a qualifying criterion. This also

assists in investigating the migration context as a system of criminality instead of merely being relevant in the realm of human rights or unconnected and sporadic criminal acts.

The next section explores structurally embedded policies in the context of migration using the example of the criminalisation laws against migrants. It further reflects on the policies of persecution in the pre-WWII era, which offer an additional perspective on the impunity for structural violence. It highlights that the connection to war, which excluded these policies from prosecution before the IMT, continues to influence the classification of relevant structural violence as (non-)criminal.

3.3. Impunity for the Pre-WWII Policies of Persecution

The excessive criminalisation of private SAR and migrants is widely criticised as the misuse and abuse of criminal law.[1002] These practices may, in Article 7 terms, be part of a policy required to satisfy the article, in particular under Article 7 (1)(h), the crime of persecution. A policy resulting in the severe deprivation of fundamental rights based on discriminatory grounds through criminalisation laws could qualify. The question arises why these policies, as well as several other policies adopted in the migration context, have thus far not been considered. On the one hand, they may be considered non-criminal structural violence. On the other hand, they may lack a persuasive precedent. The persecutory policies from the pre-WWII era, which escaped accountability, offer a paradigmatic lens through which to understand the impunity, highlighting that a powerful precedent was erroneously not established.

[1002] Minetti, 'Uses and Abuses of the Anti-smuggling Law in Italy' (n 464); Costello, 'Victim or Perpetrator?' (n 465) 321, in detail Chapter II at 4.3.2.

Policies and laws that enable the criminalisation of migrants and SAR actors exhibit several elements of structural violence as outlined earlier. The legislator adopts laws at the highest level of political decision-making authority, embedding the laws into its legal system. The policies as such are not criminally relevant, as they do not directly incite or order the severe violation of the right to life or liberty. As argued in Chapter II, they may nonetheless amount to systematic and widespread violations of fundamental rights via the cumulative effect, raising them to the necessary severity level. However, viewed in isolation, the systemic changes evade accountability because of the presumably non-criminal character. The misuse of these policies, however, results in fundamental rights violations, rendering the policy relevant under Article 7 if a link and intent can be established.

Law amendments introducing rights deprivation or legalising existing violence are not new phenomena. The antisemitic legislation enacted from 1933 – 1939 severely deprived the Jewish citizens of fundamental rights and legalised, incited to, or directly ordered violence.[1003] The 1933 Law for the Restoration of the Professional Civil Service (*Gesetz zur Wiederherstellung des Berufsbeamtentums*) excluded Jewish citizens from civil service and led to the 'Boycott of Jewish Businesses'.[1004] The 1935 Nuremberg Race Laws (*Nürnberger Rassegesetze*) resulted in segregation among so-called ancestral lineage underpinned by the 19th-century racial ideology.[1005] It is well established that these laws were accompanied by physical violence, the destruction of property, and the 1938

[1003] Richard D. Heidman, 'Legalizing Hate: The Significance of the Nuremberg Laws and The Post-War Nuremberg Trials', 39 Loy. L.A. Int'l & Comp. L. Rev. 5 (2017) 5-24.
[1004] United States Holocaust Museum, 'Antisemitic Legislation 1933–1939' <https://encyclopedia.ushmm.org/content/en/article/antisemitic-legislation-1933-1939>; LEMO, '*Der "Geschäftsboykott" am 1. April 1933*', Deutsches Historisches Museum <https://www.dhm.de/lemo/kapitel/ns-regime/ausgrenzung-und-verfolgung/geschaeftsboykott-1933.html>.
[1005] United States Holocaust Museum, 'Nuremberg Race Laws' <https://encyclopedia.ushmm.org/content/en/article/nuremberg-laws>; Fournet and Pégorier, ''Only One Step Away From Genocide'' (n 855) 720.

November pogrom (*Reichskristallnacht*),[1006] laying the groundwork for the ensuing systematic deportation and extermination.

What is noteworthy is that it is uncontested that these laws were part and parcel of Nazi Germany's overall racial and imperialist *policies*, Germany's 'unique campaign of persecution and terror',[1007] and enabled the 'Final Solution'.[1008] There seems to be agreement that the brutality and the racial hatred underlying the laws constituted pre-genocidal preparatory acts.[1009] At Nuremberg, liability for these legal changes and the resulting offences was not scrutinised because the war *nexus* excluded them from the purview of the trials.[1010] The persecution before the outbreak of the war was not irrelevant under the newly created international criminal law. It was rather outside the jurisdiction of the IMT.[1011] It can be argued that these pre-war policies constituted the textbook example of persecution as crimes against humanity in peacetime. And yet, they could not be prosecuted due to the limitation imposed by the *nexus* requirement.

Indeed, these policies should not be compared to current criminalisation and migration control policies in terms of their content and consequences. Examining these policies, however, builds a bridge to understanding the methods and forms such practices can take and why looking at the IMT's legal basis and judgments does not capture the totality of attacks against civilians in the Nuremberg era. In particular, not only should political action that explicitly orders violence or otherwise openly encourages crimes be given

[1006] Heidman, 'Legalizing Hate' (n 1003) 12.
[1007] Ibid, 9.
[1008] Ibid, 6; Christopher R. Browning, *The Path to Genocide: Essays on Launching the Final Solution* (CUP 1992); Mary Fulbrook, 'Social Relations and Bystander Responses to Violence: Kristallnacht November 1938' in Wolf Gruner and Steven J. Ross (eds), *New Perspectives on Kristallnacht: After 80 Years, the Nazi Pogrom in Global Comparison* (West Lafayette: Purdue University Press 2019) 83; Fournet and Pégorier, ''Only One Step Away From Genocide'' (n 855) 722.
[1009] Anders Jerichow and Cecilie Felicia Stokholm Banke (eds), *Pre-Genocide Warnings and Readiness to Protect* (Humanity in Action Denmark 2019); Pocar, 'Persecution as a Crime' (n 310) 359.
[1010] In particular, also due to the racial policies in the Allies' home states, see Chapter III at 3.2.2.4.
[1011] Ibid; see also Pocar, 'Persecution as a Crime' (n 310) 357.

attention. In contemporary times, an outright ordering of killings may be the exception rather than the rule. One exception is certainly the horrific incitement to kill in the Philippines ('If you're still into drugs, I will kill you').[1012] However, focusing only on such policies risks widening the impunity for less explicit violence.

The exclusion of the pre-war policies in the Nuremberg era resulted in impunity for years of persecution and discrimination, and for crimes committed in peacetime more broadly. It may have further influenced the understanding that state action, which structurally induces crimes, is excluded from criminality. In modern times, however, they can take different forms. They may not be as direct and aggressive, but still harmful and enable criminal conduct. Case law by international tribunals also includes non-explicit, non-formalised policies that may be inferred from the circumstances.[1013] Yet, the information drawn from analysing the prosecution practice before the ICC suggests that a higher threshold is required in practice, which may be unnecessarily augmented.

In summary, policies, laws, and practices entrenched into the system can be considered structural violence. Several migration-related laws and control policies are viewed as non-criminal, structurally embedded violence. The exclusion of pre-WWII antisemitic violence reinforces the assumption that they are non-criminal. The *nexus* largely resulted in impunity for policies enacted in peacetime. Yet, it is not convincing that these policies were not sufficiently severe to amount to criminality. It is further accepted that the persecution practices in the pre-war era were acts of preparation for the ensuing Holocaust. The analysis further shows that structural violence was only recognised if a connection to the war could be established. As proposed above, structural violence may be better

[1012] Authorisation Decision Philippines (n 46) para 94.
[1013] In particular: *Tadić* (Judgment) (n 1) para 653; *Katanga* (Judgment) (n 28) para 1108. With the exception of the Gbagbo acquittal: *Gbagbo* (Judgment) (n 33) para 275, see Chapter III at 4.3.

understood as becoming criminal when it connects to severe infringements on life, liberty, and physical and mental integrity. Contemporary migration policies that result in the deprivation of fundamental rights may nonetheless be disregarded by the ICC because they are enacted unconnected to – or prior to – an armed conflict.

A legal system that aims to investigate and punish *all* wrongdoing criminally is not desirable.[1014] However, the alleged crimes against migrants remain entirely outside the ambit of criminal investigations. In the domestic system, ill-treatment of migrants is systematically excluded from accountability. Moreover, the restrictive migration policies are regarded as non-criminal structural violence. Galtung precisely aimed at making presumably invisible violence visible to underscore the extent of personal violence integrated into its structures – for which there is no accountability.[1015] The resulting impunity in the migration context is so prevalent that it amounts to structurally embedded impunity, deeply engrained in the domestic system. Moreover, the migrant-abuses occur in peacetime, a context with a higher likelihood of being disregarded by the ICC, resulting in impunity on the international level as well. The next section explores the function and quality of impunity, highlighting that 'structural impunity' serves states to maintain the violations.

3.4. Structural Impunity for Crimes Against Migrants

Instead of addressing failures and human rights abuses, claims for investigating existing violations may even result in the opposite effect. When violations increase, states often frame these circumstances as results of crisis settings, invoking emergencies that allow

[1014] See also, Drumbl, 'Impunities' (n 51); Lorca, 'Could We Live Together Without Punishment?' (n 111).
[1015] Galtung, 'Violence, Peace, and Peace Research' (n 6) 184.

(temporarily) legal exceptions to the respect for human rights law.[1016] In the context of migration, the use of emergency laws has dramatically increased, consolidating existing violence and, at times, creating prolonged legalisation of otherwise illegal action.[1017] Albahari, eloquently describing the circumstances in Lampedusa, notes:

> And all stays the same, emergency after emergency. Emergencies do not last two decades. The political priorities, active policies, and structured negligence that perpetuate them as such do.[1018]

What Albahari refers to as structural negligence indicates the structural dimension of impunity for systematic violence that purportedly emanates from a system, not simply from individual conduct. Former US immigration detention attorney Maunica Sthanki identified a culture of abuse in US immigration detention and a profound structural accountability gap.[1019] She highlights that 'the immigration detention system has reached a crisis point whereby it operates with entrenched structural impunity and offers no accountability for misconduct'.[1020] This aligns with the systematic commission of acts without consequences, as presented in Chapter II. Structural impunity, however, goes further. The term 'structural impunity' (*impunidad estructural*), used primarily for the prolonged withholding of justice in the Latin American context,[1021] suggests that it does not only fail to punish violence but contributes to an increase, as Luis Daniel Vázquez Valencia proposes. He notes that

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[1016] Moreno-Lax, 'The "Crisification" of Migration Law' (n 47), detailed in Chapter V.
[1017] Ibid; Espinoza Garrido *et al.*, 'Migrant Lives in a State of Exception (II): Sovereignty, Mobility and Agency in a Globalised World', 27 Parallax 3 (2022) 242.
[1018] Albahari, *Crimes of Peace* (n 66) 203.
[1019] Sthanki, 'Deconstructing Detention' (n 53) 452.
[1020] Ibid, 451.
[1021] For instance in Colombia: CAJAR, 'La impunidad estructural en Colombia necesita de la justicia internacional' (28 October 2021) <https://www.colectivodeabogados.org/wp-content/uploads/2021/10/La-impunidad-estructural-en-Colombia-necesita-de-la-justicia-internacional-1.pdf>.

[t]he idea of structural impunity is one of those that most interested us, since it generates patterns that make impunity a constant, which encourages, facilitates and maintains human rights violations.[1022]

Vázquez, intentionally or not, uses terminology reminiscent of the elements of crimes against humanity. A generated pattern that encourages or facilitates human rights violations virtually describes the overarching policy that enables the individual perpetrators to further the systematic attack under Article 7. Vázquez further proposes five versions of such impunity:

Structural impunity can be of at least five types: due to incapacity, organisational culture that normalises human rights violations, bureaucratisation of procedures, membership of a macro-criminal network, or political decision.[1023]

In the context of this thesis, the impunity arising from political decisions is the most relevant. As an essential constituent of the state's political decision-making, structural impunity would become a strong indicator for a deliberate 'policy of toleration'.[1024] This dimension was deemed an essential form of policy in the context of migration-related decision-making. Deliberations on structural impunity, as a political choice, should thus inform the OTP's interpretation of the passive version of a policy, going beyond complementarity criteria – especially in peacetime. The impunity used by states thus becomes a part of the commission of the crimes. It appears not as a result of the unaddressed violations, but a component of crimes against humanity.

[1022] Vázquez, *Impunidad y Derechos Humanos* (n 53) 261 (own translation). Original quote: *La idea de impunidad estructural es una de las que más nos interesó, ya que genera patrones que hacen de la impunidad una constante, lo que incentiva, facilita y mantiene las violaciones a los derechos humanos*.

[1023] Ibid, 261 (own translation). Original quote: *La impunidad estructural puede ser, al menos, de cinco tipos: por incapacidad, por cultura organizacional que normaliza las violaciones a derechos humanos, la burocratización de los procedimientos, por la pertenencia a una red de macrocriminalidad, o por decisión política*.

[1024] FRA, 'Guidance on Investigating Alleged Ill-Treatment at Borders' (n 47); Holvoet, 'The Prototype of Passively Encouraged Crimes' (n 262)

In the migration context, the normalisation and legalisation of human rights violations[1025] have become manifest because they are left unchallenged. Yet, they are also a result of the political decisions – as opposed to capacity or bureaucratisation problems[1026] – and used to maintain the systemic violence. The systematic nature of the conduct and the lack of accountability as a political choice form part of the policy element in functioning states and indicate the encouragement of further crimes. Understanding the use of impunity as a political instrument supports the theory of crimes against humanity as crimes against the political nature, as explored in the previous chapters. It highlights that the state chooses to maintain violations, although it has knowledge of the crimes and the capacity to stop them.[1027] As a political choice, impunity becomes a tool to uphold or even increase the violations against the population.

Unaddressed fundamental rights violations create a risk of aggravating further. As highlighted in Chapter III, Sadat visualises a process of escalating violence in the realm of ICL. She locates crimes against humanity sequentially *after* human rights violations as conduct existing in every country during peacetime.[1028] She then places war crimes and possibly genocide *following* crimes against humanity. What she terms the 'atrocity cascade' refers to 'human rights abuses deteriorate[ing] to the point of becoming criminal, and if not staunched, descend[ing] further into war, and even into genocide'.[1029] Sadat's cascade depicts a compelling visualisation of escalating violence and warrants this clarity. Yet, as mentioned related to the maxim *id quod plerumque accidit*,[1030] one must remain

[1025] For the exclusion from access to asylum procedures, see Violeta Moreno-Lax, 'Crisis as (Asylum) Governance: The Evolving Normalisation of Non-Access to Protection in the EU', Queen Mary Law Research Paper No. 423/2024 (February 2024).
[1026] For a critique of ICL missing to address bureaucracy functions as amplifiers of human rights violations, see Engle, 'Anti-Impunity' (n 442) 1120.
[1027] Holvoet, 'The Prototype of Passively Encouraged Crimes' (n 262).
[1028] Sadat, 'The Forgotten Crime' (n 2) 530.
[1029] Ibid.
[1030] See *supra* (n 888).

cautious about interpretative automatism. Although there is much knowledge to gain from past events, there is no linearity.[1031] Advocating for an international treaty on crimes against humanity, Sadat highlights its preventive character, for which such predictions are indeed essential. She points out that

> there is a frontier between human rights violations and criminality in peacetime, which is where the role of combating impunity for the commission of crimes against humanity becomes so important.[1032]

Sadat asks the fundamental question about the relationship between human rights violations and crimes against humanity. Identifying this frontier and when it is crossed remains the decisive question, which also lies at the heart of this thesis. This question is revisited in detail in the following chapters. First, the (mis)interpretation of the concept of crimes against humanity may play a pivotal role in an erroneous determination of the threshold, addressed in Chapter V. Second, answering this vital question is the substance of the reimagined concept of crimes against humanity, proposed in Chapter VI. It is further of timely relevance – as Sadat allegorically warns – because peacetime violations can 'eventually metastasize',[1033] and descend into more severe violence or even armed conflict.

In sum, this section explored the potential of crimes against humanity to cover structural violence. It was shown that traditional structural violence is not criminally relevant, but crimes against humanity may provide the threshold when such violence connects with severe direct acts of violence, amounting to criminality. The section also illustrated that the

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[1031] For the debate about 'history repeats itself', see for instance in political science, Ruth Berins Collier and Sebastián Mazzuca, 'Does History Repeat?' in Robert E. Goodin and Charles Tilly, *Oxford Handbook of Contextual Politics* (OUP 2006) 472-489. More fundamentally, Foucault, holding that there is no such thing as history. He critiqued historical reasoning and analysed the meaning of knowledge in his major works such as *History of Madness in the Classical Age* (1961); *The Birth of the Clinic* (1963); and *The Order of Things* (1966); see also Friedrich Nietzsche's 1874 essay *On the Uses and Disadvantages of History for Life* [original title: *Vom Nutzen und Nachtheil der Historie für das Leben*] and Karl Marx's extensively criticised 'historical materialism' predicting a linear progression, e.g. by Karl R. Popper, *The Open Society and its Enemies: Volume II: The High Tide of Prophecy: Hegel, Marx, and the Aftermath* (Routledge 1945) 193.

[1032] Sadat, 'The Forgotten Crime' (n 2) 531.

[1033] Ibid.

policies of persecution in the pre-WWII era represented structural violence, likely already crimes against humanity, but were largely excluded from accountability due to the war connection requirement. This precedent may contribute to the understanding that structural violence does not carry penal consequences. Moreover, this exclusion caused impunity for peacetime state action. The violence against migrants largely escapes accountability because of several mutually reinforcing factors. They occur in peacetime, restrictive measures are viewed as non-criminal, and the domestic system does not engage in prosecuting violent acts. The impunity in the context of migration is embedded in a system of institutionalised political decision-making, which indicates its structural dimension. Structural impunity based on political choice, aimed at maintaining or even increasing the violations, may thus be understood as a component of crimes against humanity, particularly as part of the policy of toleration. Based on this finding, the next chapter develops an interpretation of this form of policy to confront the prevailing impunity.

4. Conclusion

This chapter studied the reasons why migration-related abuses continue to be disregarded as crimes against humanity. By analysing the prosecution practice by the OTP, it was found that the context of peace and the existence of structural violence are factors contributing to impunity for the crimes.

Drawing from the hypothesis raised in Chapter III that crimes in peacetime are less often prosecuted and considered less severe, this chapter showed that both hypotheses are confirmed to an extent. First, it was found that potentially relevant peacetime crimes occur not disproportionately less frequently as crimes in armed conflict. However, they proceed

less often to the trial stage and have never resulted in a conviction. Second, the cases investigated as peacetime situations moved at the edge of or descended into civil war (Côte d'Ivoire and Libya). The only genuine peacetime case is the situation in the Philippines, which served as an important case study.

Two important insights were drawn from the Philippine authorisation decision relating to peacetime crimes against humanity. First, the language used for the state campaign against drug users ('war on drugs') implies a conflict setting. This narrative and framing may have persuaded the ICC bodies to accept the severity of the situation, as it carries the meaning of a scenario resembling an armed conflict. In the next chapter, this framing is applied to the 'migration crisis' to illustrate their similarities. Second, the dominating unlawful conduct in the Philippines is murder. The systematic killing of drug users thus pertains to acts commonly perceived as the most severe acts. Although the Statute does not contain a hierarchy, the OTP prioritises cases concerning the most serious crimes. This, however, creates an impunity gap for acts listed within Article 7 that do not result in death. Based on this examination, the chapter further inquired whether the violence against migrants predominantly emanating from laws, policies, and practices, which do not order or incite to violent acts, is not considered because it is understood as non-criminal structural violence.

The structural dimension of violence materialises as violence embedded into the system and without a defined perpetrator. It is implanted into the legal and political system and decision-making. The chapter highlighted that when this structural dimension connects to direct acts amounting to severe violations of life, liberty, and physical or mental integrity and occurs on a large scale, crimes against humanity become relevant. In this case, the *chapeau* represents the structural dimension – not criminally relevant in isolation – and the connected acts imply the severity necessary for the threshold to be met. When the

structural dimension is complemented by multiple enlisted acts carried out by multiple actors committed with systematicity, such violence falls *prima facie* within the definition of crimes against humanity under Article 7 of the ICC Statute. The chapter thus concluded that crimes against humanity can be understood as the norm that criminalises structural violence when it exceeds the threshold to criminality. It further argued that this form of violence is particularly relevant in peacetime since functioning states entrench the violence in institutional action, evading accountability.

The historical example of antisemitic legislation exemplified that such policies are relevant under ICL, particularly when they are discriminatory. However, at Nuremberg, they could not be prosecuted because the link to war requirement largely excluded them from the IMT's scope. These state practices may be considered as structural violence because they became a part of the legal system and the Nazi regime institutionalised the discrimination. Several migration-related policies, although not in extent and consequence, resemble such policies, for instance, the criminalisation of migrants and SAR actors. The impunity for the Nazi legislation may influence the current understanding of structural violence as non-criminal.

The chapter argued that impunity for crimes against migrants has several reasons. As highlighted in Chapter II, the mistreatment of migrants remains sanction-free on the domestic level. Individual actors who commit the alleged acts do not face accountability. Moreover, the actors at decision-making level evade consequences because the laws and policies are viewed as non-criminal structural violence. This interplay of macro- and micro-criminality not only makes crimes against humanity a relevant response. The lack of accountability on both levels also shows that impunity has a unique nature and quality in peacetime.

This chapter explored the degree of impunity and identified 'structural impunity' as a suitable concept for describing the deliberate state negligence of fundamental rights violations in the context of migration. Structural impunity refers to a lack of accountability based on political choice, which is used to maintain or even encourage further violations. Where structural impunity can be identified, it must be explored whether it is the result of a state's failure or a deliberate instrument to enable and encourage further crimes despite the state's duty to prosecute. In exceptional circumstances, it, therefore, appears as part of the state's attack against the civilian population.

Given the lack of experience and jurisprudence with this version of impunity/policy, the circumstances and possible ways to determine its character and parameters need to be developed. The next chapter addresses these issues and proposes two approaches to address the systematic violation of migrants' rights. It aims to make structural impunity visible and address it as a potential *component* of crimes against humanity, not only as a *result of* unaddressed human rights violations.

Chapter V: Confronting Impunity for Crimes Against Migrants

1. Introduction

Building on the previous analysis of structural impunity and its role in enabling crimes against humanity in peacetime, this chapter turns to the question of how to confront such impunity in practice. It proposes two complementary approaches to challenge the prevailing inaction in response to crimes against migrants, with the aim of both addressing specific violations and contributing to a more coherent and inclusive interpretation of crimes against humanity under ICL. The overarching objective is to advance legal arguments that could support the opening of investigations before the ICC, while simultaneously contributing to the development of the legal framework applicable to crimes committed in peacetime contexts.

The first approach departs from the finding, established in previous chapters, that the historical and normative trajectory of crimes against humanity does not necessitate a connection to armed conflict. Rather, it advocates for a more consistent application of crimes against humanity in peacetime and develops a framework for understanding structural impunity – particularly when rooted in deliberate state inaction – as a

manifestation of the policy element under Article 7 of the Rome Statute. This section places particular emphasis on the interpretation of the policy of toleration, drawing on the example of Australia's offshore detention regime, which remains the only situation in the migration context to have received a substantive response from the OTP. The example is used to examine how the OTP interprets the *chapeau* elements of Article 7 and to suggest an alternative reading that captures the multilayered forms of criminality often characteristic of peacetime settings. This approach further provides the link to crimes against humanity as a response to structural violence, examined in Chapter IV, highlighting that a state's previous endangering behaviour and ensuing deliberate impunity may provide the necessary threshold to criminality in systems involving structurally induced crimes.

The second approach offers a complementary perspective. Recognising the prosecutorial tendency to associate crimes against humanity with conflict-like scenarios, it argues that the so-called 'migration crisis' should be understood as a dimension of conflict. Drawing on key insights from PCS, it examines how structural and protracted forms of violence – such as those occurring at the borders of the so-called Global North – may amount to a form of conflict, even if not meeting the strict legal definition of armed conflict under IHL. This approach does not seek to redefine the legal thresholds under IHL but rather aims to inform the Prosecutor's assessment of the gravity and severity of alleged crimes in contexts that closely resemble conflict in form and function. The Situation in the Philippines, where the ICC authorised an investigation into crimes committed during the so-called 'war on drugs,' provides a useful comparative reference, demonstrating how conflict-like framing may influence prosecutorial discretion.

The two approaches are not mutually exclusive. On the contrary, they are designed to be synthesised. While the first approach may support the opening of a preliminary

examination by establishing that the legal threshold – namely, that the crimes 'appear to be' committed – is met, the second may strengthen the argument at the stage of requesting authorisation to investigate by helping to establish the requisite severity. Together, they offer a structured framework for understanding how ICL can more effectively engage with systemic, state-enabled violence in peacetime. At the same time, they contribute to a broader rethinking of the concept of crimes against humanity – one that is capable of capturing contemporary patterns of violence, particularly those directed at migrants and other marginalised groups.

This chapter proceeds in three stages. First, it develops a prosecutorial argument grounded in the ICC's existing statutory and evidentiary framework (first approach). Second, it reframes the context through a lens of structural conflict (second approach). Third, it synthesises these to argue for a re-conceptualisation of how the OTP could engage with migration-related crimes against humanity.

2. Confronting Impunity for Crimes against Migrants in Practice

The analysis in the previous chapter highlighted two main reasons for impunity for crimes against humanity in the context of migration: Impunity for migrant abuses as a specific category and the disregard for peacetime crimes against humanity more broadly. These factors are mutually reinforcing; impunity thus persists in multiple layers. This section intends to address and rectify the misconceptions highlighted in this thesis, which is crucial to leveraging the potential of Article 7 ICC Statute for prosecuting crimes against migrants.

The historical development is used to argue *in favour* of a broader application. It requires shifting attention from the context of war to the context of state authority abuse, aligning

with the normative standard of the ICC Statute. It builds on the critique developed in Chapter III, reinforcing the argument that crimes against humanity are not inherently conflict-related. Moreover, as examined in Chapter IV, the policy of toleration, indicated by structural impunity, requires engaging more deeply with the passive policy requirement in peacetime settings. To avoid overstretching the concept, this version of a policy requires additional qualifiers, as not all passive behaviour is criminally relevant under Article 7.

Correcting an erroneous interpretation of the historical link to war could be a fruitful avenue towards applying crimes against humanity in practice. As established in Chapters III and IV, the assumption that crimes in armed conflict are more severe lacks a normative basis. The historical development contributed to this perception and impedes the prosecution of peacetime crimes. Several aspects connected to the concept of crimes against humanity thus require rethinking and must be engaged with to address the challenges comprehensively. The following sections offer a dual strategy to overcome the obstacles in practice. The first approach establishes legal admissibility by defining the interpretative framework for the 'policy of toleration' in a way suitable for peacetime contexts. The second approach enhances the perceived severity attached to conflict-like scenarios, which is often treated as necessary for prosecutorial action. Together, they address legal and strategic barriers the OTP faces.

2.1. First Approach: Prosecuting Crimes Against Humanity in Peacetime

The limited prosecution of crimes against humanity in peacetime may be addressed by correcting erroneous narratives leading to a restrictive interpretation. Detaching the crimes as inherently connected to armed conflict and sustained physical violence can lead to a more adequate understanding of crimes against humanity in general. To achieve this, a

more nuanced interpretation of such crimes in peacetime could benefit from (1) revisiting historical arguments in light of the findings of Chapter III, and (2) examining structural impunity as a form of the policy of toleration – specifically, the passive and exceptional form outlined in the Elements of Crimes, as established in Chapters II and IV.

2.1.1. Detaching Crimes Against Humanity from Conflict in Practice

In search of a more accurate application of the law on crimes against humanity in practice, two arguments signal the necessity to reinterpret the norm. First, a teleological historical interpretation of the origins of the norm reveals that the connection to war was not intended to become part of the *raison d'être* in an explicit sense but instead, as explored in Chapter III, served to alleviate the concerns of the Allied powers and comply with other criminal law principles.[1034] The *nexus* became positive law in the context of the IMT. However, originally, crimes against humanity were not designed to be war-related but a universal code to protect civilians at all times.

Using the historical argument to revert to the original rationale should lead to an interpretation of crimes against humanity *in favour* of an independent and universal norm.[1035] In particular, the conception of crimes against humanity *shortly* before the adoption of the IMT Charter can be taken into account to refine the historical argument. The universality of the concept's protection purpose, the *lex desiderata*, although it failed to reach its full potential in 1945, should be favoured when deliberations on its rationale are made. The drafters at Nuremberg were specifically dealing with questions of legality

[1034] See Chapter III at 3.2.2.
[1035] For the issue of contested historical understanding in ICL, see Barrie Sander, 'The Method is the Message: Law, Narrative Authority and Historical Contestation in International Criminal Courts', 19 Melbourne Journal of International Law 1 (2018) 299-334.

and the principle of non-interference. A link to this war was adopted to internationalise the crimes and justify foreign prosecution, specifically justifying the trying of only Axis crimes.

However, this moment of creating written law (the *lex lata*) was the culmination of a process following other proposals, then *lex desiderata,* already crystallising into *lex ferenda*. A process which was interrupted by inserting the *nexus*. Arguably, already at Nuremberg, crimes against humanity were understood as reflecting the abuse of state authority, as it was originally aspired by its creators. The crimes were not designed to reflect crimes in armed conflict *stricto sensu*. The insertion of the *nexus* delayed normatively recognising this scope, but the later transition from the *nexus* to the policy requirement can be viewed as reverting to the original idea. The thorough and intensive engagement by courts, the ILC, and scholarship with this question after Nuremberg suggests that moving beyond the limitations from 1945 was intentional. Reverting to this limitation would, therefore, no longer be justifiable.

Explicitly inserting the policy requirement into the ICC Statute's text in 1998 thus served two purposes. First, to ensure that only certain actors, i.e. those sufficiently powerful to turn their power against the population, primarily the state but also organisations, are covered.[1036] Second, to mitigate the risk of an overly broad application of the norm by excluding ordinary and isolated crimes such as terrorist acts by individuals or sporadic violent conduct by state agents, such as police officers.[1037] The policy requirement should thus guarantee both limitations to meet the concerns of broadness and vagueness.[1038] Proving its existence is an effective tool to exclude crimes not intended to satisfy the norm.

[1036] Sadat, 'Crimes Against Humanity in the Modern Age' (n 2) 354.
[1037] See Chapter III at 3.2.3.4; Chapter II at 4.3.
[1038] Sadat, 'The Forgotten Crime' (n 2) 529.

As examined in Chapter III related to Judge Kaul's dissenting opinion, he was concerned with 'watering down the requirement'.[1039] However, the policy requirement should not be interpreted overly restrictively, since its very existence serves the purpose of restricting the application of the norm.[1040] The focus should thus be on the policy requirement's original meaning and function instead of relying heavily on the context of armed conflict or extreme physical and visible violence falling just short of civil war, such as the post-election violence in Kenya – circumstances which the policy element does not necessarily dictate.[1041]

Interpreting the policy requirement has indeed been controversial. In this context, several points derived from the analysis of impunity offered above are noteworthy. On the one hand, the active policy replacing the war *nexus* aims to underpin the power, pattern, and orchestrated violence underlying the attack, thus internationalising the crimes.[1042] It seeks to distinguish crimes against humanity from ordinary crimes. The widespread or systematic element further enhances this distinction by reference to the scale and magnitude of the crimes.[1043] The policy element should not be conflated with the other components of the *chapeau* since it contributes to the context of crimes against humanity rather than the scale or severity of the acts.[1044] The policy ensures that the systematic or widespread commission of the acts (micro-criminal context) is *embedded in* the plan or method of a powerful entity (macro-criminal context) that enables or promotes the pattern of violence.

[1039] *Kenya* Decision 2010 (n 33) Dissenting Opinion of Judge Hans-Peter Kaul para 55. See the critique in Chapter III at 4.1.
[1040] Ambos, 'Article 7' in Ambos, *Rome Statute: 2022 Commentary* (n 1) para 5, referring to the function of the policy element.
[1041] For instance, the crime of apartheid, a crime not requiring direct and physical violence, but institutionalised racial domination, see Carola Lingaas, *The Concept of Race* (n 233) 171.
[1042] Ambos, 'Article 7' in Ambos, *Rome Statute: 2022 Commentary* (n 1) para 13.
[1043] 1996 PrepCom report (n 79) para 85.
[1044] For comparison, Article 5 of the ICTY Statute still required the context of an armed conflict for crimes against humanity, but the Prosecutor nonetheless elaborated on the policy of a state or organisation, see *Tadić* (Judgment) (n 1) para 654.

On the other hand, as established in Chapter IV, structural impunity should be considered a strong indicator of the passive policy, i.e. the policy of toleration as described in the Elements of Crimes. Recalling the rejection of the OTP to investigate the Australian situation,[1045] it is particularly relevant to migration policies. One major difficulty in interpreting the passive policy is the lack of case law and relevant literature on this form of policy.[1046] Chapter II provided a preliminary interpretation based on the limited existing case law dealing with the toleration of crimes mainly in conflict settings.[1047] However, for the purpose of this thesis, a more adequate interpretation needs to be developed. The OTP's rejection in the Australian case serves as a suitable case study.[1048]

The sections below provide an interpretation of the passive policy as a third layer to the recognised micro-macro-criminality, resulting in a multilayered system of criminality. It examines the use of structural impunity as the third layer within the meaning of the deliberate failure to act. Since this version of a state policy is exceptional, and to avoid overstretching the concept, the section proposes considering a state's previous endangering behaviour, which may invoke the duty to act, especially when the initial action was unlawful or highly controversial. As this represents a novel interpretation of a qualifying condition suitable to describe peacetime criminal state-neglect, it is examined in particular detail.

[1045] ICC-OTP, Report on Preliminary Examinations (n 50) 44-55; Mann, 'Attack by Design' (n 5) 310.
[1046] See limited but referring to a policy by omission, Ambos, *Treatise, Volume II* (n 30) 70.
[1047] Chapter II at 4.3.2.2; *Kupreškić et al.* (Judgment) (n 150) para 552.
[1048] Holvoet, 'The Prototype of Passively Encouraged Crimes' (n 262).

2.1.2. The Deliberate Failure to Act

Having provided a preliminary interpretation of the policy of toleration in Chapter II, this section provides a more nuanced analysis of the elements describing this version of a policy. It particularly considers structural impunity, as highlighted in Chapter IV, as a strong indicator. The Elements of Crimes require the 'deliberate failure to take action, which is consciously aimed at encouraging such attack'.[1049] The Elements further explicitly clarify that the 'existence of such a policy cannot be inferred solely from the absence of governmental or organizational action'.[1050] Yet, they implicitly recognise that the absence of action may indeed be considered; it is simply insufficient if it is the *only* indicator ('solely').[1051] Recognising that structural impunity may result from political decisions, it must be proven that this decision was also made 1) deliberately and 2) consciously aimed at encouraging the attack.

The term deliberately is not legally defined and appears only once in the ICC Statute. Article 6 (c), the crime of genocide, criminalises acts 'deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part'.[1052] Jurisprudence predominantly interpreted the term 'calculated' and ruled on acts that qualify under this alternative.[1053] As held by the ICTR in *Akayesu*, 'calculated' describes the imposition of conditions that do not have to kill the members immediately but ultimately seek physical destruction.[1054] Claus Kreß adds that this term goes 'beyond

[1049] Article 7, Introduction, para 3, fn. 6, Elements of Crimes.
[1050] Ibid.
[1051] Ambos, *Treatise, Volume II* (n 30) 71.
[1052] Article 6 (c) ICC Statute; excluding the term when used as 'deliberations' and the 'deliberate refusal to comply' according to Article 71.
[1053] Claus Kreß, 'The Crime of Genocide Under International Law', International Criminal Law Review 6 (2006) 481.
[1054] *Akayesu* (Judgment) (n 26) paras 505-506.

measures of slow death to measures *capable* of bringing about serious bodily or mental harm'.[1055] Contrary to a subjective approach requiring intent, Kreß argues that an objective interpretation is preferable, which the OTP also applied in the Darfur case against *Al-Bashir*.[1056] The term deliberately is not further refined in relevant case law concerning Article 6 (c).[1057]

In the *Čelebići* Case before the ICTY, a landmark ruling on torture and inhumane treatment, 'deliberately' is used as a synonym for 'intentional' and 'wilful' and an antonym of 'accidental'.[1058] The Chamber found that wilfully causing suffering referred to 'an act or omission that is intentional, being an act which, judged objectively, is deliberate and not accidental'.[1059] Drawing from the Commentary to the Fourth Geneva Convention, the Chamber further referred to 'wilfully' as inflicting great suffering 'as a punishment, in revenge or for some other motive, perhaps out of pure sadism'.[1060] In *Katanga*, the ICC held that the perpetrator must have 'deliberately intended his or her act to form part of the attack'[1061] as part of the *chapeau*'s *mens rea*. It remains unclear what 'deliberately' adds to the term 'intended' as a mental element. While a similar interpretation to intentional seems warranted, in *Čelebići*, the Chamber emphasised the objective nature. Hence, it can be argued that the passive policy, i.e. the deliberate failure to act, must show a combination of

[1055] Kreß, 'The Crime of Genocide Under International Law' (n 1053) 482 (emphasis added) including inhuman detention conditions; see also Claus Kreß, 'The ICC's First Encounter with the Crime of Genocide: The Case against Al Bashir' in Stahn (ed), *The Law and Practice of the International Criminal Court* (n 115) at 687-690. See also MacNeil, *Legality Matters* (n 14) 182.
[1056] Ibid, 481; Situation in Darfur (Public Redacted Version of the Prosecutor's Application under Article 58), OTP- ICC-02/05-157-AnxA (12 September 2008) para 10.
[1057] See for the interpretation of all acts of genocide: William A. Schabas, 'Article 6' in Ambos, *Rome Statute: 2022 Commentary* (n 1) paras 22-29; *Prosecutor v. Omar Hassan Ahmad Al Bashir* (Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir) PTC I, ICC-02/05-01/09-3 (4 March 2009) para 102.
[1058] *Čelebići* Case (Judgment) (n 166) para 511.
[1059] Ibid.
[1060] Ibid, para 507.
[1061] *Katanga* (Judgment) (n 28) para 1125; citing *Kunarac et al.* (Appeal Judgment) (n 27) para 103; *Blaškić* (Appeal Judgment) (n 226) para 124 and *Prosecutor v. Dario Kordić and Mario Čerkez* (Appeal Judgment) AC, ICTY IT-95-14/2 (17 December 2002) para 99.

objectively existing elements and a degree of intentionality.[1062] This seems appropriate since a high threshold for this exceptional form of policy applies.

Applying this standard to the Australian case may yield new insights. The OTP rejected further engagement because the harm was not a 'deliberate, or purposefully designed, aspect of this policy'.[1063] Itamar Mann, for instance, argues that the OTP erroneously interpreted the concept of 'attack.' He describes how the attack was 'designed' in the offshore centres and proposes that the OTP reconsider its narrow interpretation of 'attack'.[1064] Drawing from the powerful account of former Manus prisoner Behrouz Boochani, *No Friend but the Mountains,* Mann demonstrates that the detention centres were purposefully designed to inflict pain and argues that a deliberate policy as part of the attack could be proven.[1065] Although the entire attack may be re-conceptualised along the lines proposed by Mann, Mathias Holvoet suggests that the OTP disregarded the passive policy requirements.[1066] Holvoet's reference is more convincing since it accounts for the specific language used by the OTP, namely the failure of Australia and the deliberate policy.[1067] Hence, in the same vein as Holvoet with a focus on the policy of toleration, the OTP's reasoning is being revisited, and the arguments expanded since Holvoet's blog post is compelling, yet requires further interpretative analysis. Below, it is argued that contrary to the OTP's conclusion, the exceptional form of policy appears to be satisfied in the Australian case, assessing Holvoet's brief examination against the parameters outlined above.

[1062] For the question of liability, in particular, omission and command responsibility, see Ambos, *Treatise, Volume I* (n 24) 180-232; Jérôme de Hemptinne, Robert Roth, Elies van Sliedregt (eds), *Modes of Liability in International Criminal Law* (CUP 2019).
[1063] ICC-OTP, Report on Preliminary Examinations (n 50) para 54.
[1064] Mann, 'Attack by Design' (n 5) 309–326.
[1065] Ibid. See also Behrouz Boochani, *No Friend but the Mountains: Writing from Manus Prison* (ANANSI INTL 2019).
[1066] Holvoet, 'The Prototype of Passively Encouraged Crimes' (n 262).
[1067] ICC-OTP, Report on Preliminary Examinations (n 50) para 54.

Considering that the harm in the offshore centres was 'not accidental', the constitutive threshold for 'deliberate' as postulated in *Čelebići* may be met. The systematic imprisonment and inhumane conditions are directly related to legal and policy choices, as asylum-seekers would not be transferred to Manus and Nauru without Australia's conscious decision. The consequences appear as a form of punishment for attempting to enter Australia irregularly and exercising one's right to seek asylum, including Australia's strong motivation to deter.[1068] Moreover, if a *purposefully designed* policy is required (and it is debatable that it is),[1069] the closest interpretative guidance should be drawn from the term 'calculated' as explored above. Hence, the *Akayesu* case and the OTP's own submissions in the *Al Bashir* case[1070] could inform the Prosecutor's reasoning in migration-related cases involving these exceptional circumstances. However, the Office failed to substantiate its interpretation of a purposeful policy and prematurely dismissed its existence. Holvoet also argued that the OTP failed to consider that the policy did not have to purposefully design the underlying acts but deliberately fail to stop them.[1071] Given the case law on genocide and the similarity with the term 'calculated,' a purposeful policy within the meaning of the Elements of Crimes for Article 7 could nonetheless be interpreted as purposefully designed in the Australian case.

Article 7 would *not* require that its purpose is the ultimate destruction as in Article 6 (c), but the ultimate deterrence and punishment for exercising fundamental rights. In the Australian context, the OTP acknowledged that the offshore practice satisfied the crime of imprisonment, constituting cruel, inhuman, or degrading treatment.[1072] Consequently, it

[1068] Margherita Matera, Tamara Tubakovic, and Philomena Murray, 'Is Australia a Model for the UK? A Critical Assessment of Parallels of Cruelty in Refugee Externalization Policies', 36 Journal of Refugee Studies 2 (2023) 280; generally: Stumpf, 'Crimmigration' (n 463); see also the 'Zero Chance Campaign' aiming to deter boat migration by the Australian government <https://zerochance.lk/en/#page12>.
[1069] Mann, 'Attack by Design' (n 5) 310.
[1070] Situation in Darfur (Prosecutor's Application) (n 1056) para 10.
[1071] Holvoet, 'The Prototype of Passively Encouraged Crimes' (n 262).
[1072] ICC-OTP, Report on Preliminary Examinations (n 50) paras 47, 53.

can be argued that the ultimate deprivation of liberty was the purpose of Australia's policy.[1073] The OTP could have further considered the degree of *calculation* and acknowledged that the failure to act, i.e. the failure to prosecute crimes and terminate the condition,[1074] was calculated to bring about the ultimate deterrence. In combination, the policy can be understood as a policy deliberately designed to reach ultimate deterrence by indefinite, arbitrary detention in inhumane conditions.

The second requirement for this form of policy is that the failure must consciously aim to encourage the attack.[1075] This consists of the failure, i.e. an objectively present inaction, and a conscious element, i.e. a subjective element. The latter resembles the knowledge requirement of the individual perpetrator of the *chapeau*. It refers to the perpetrator's knowledge of the broader context of the attack (not every detail of it) and awareness that their acts are a part of it.[1076] The failure must not be an inaction due to incapacity. Holvoet also argues that in the Australian case, the state 'had the knowledge and the capacity to respond to the crimes'.[1077] An example of a policy that would not qualify would be the sudden outburst of violence by a state-like organisation against a civilian group. The state would be obliged to stop the violence, *inter alia*, by intervening and initiating criminal prosecutions. If the state fails to conduct the investigations due to incapacity or lack of resources, it cannot be considered as behaviour *consciously* encouraging further crimes or deliberately failing to act.[1078] The inaction may nevertheless incidentally encourage further

[1073] For the purpose of moral disengagement through the conditions in detention, see Barnes, 'Suffering to Save Lives' (n 438) 1508–1529.
[1074] Ambos, *Treatise, Volume II* (n 30) 73.
[1075] The OTP required the crimes to have 'deliberately aimed at encouraging an 'attack'', ICC-OTP, Report on Preliminary Examinations (n 50) para 54.
[1076] *Kunarac et al.* (Appeal Judgment) (n 27) para 81, *Katanga* (Judgment) (n 28) para 1125; *Ongwen* (Judgment) (n 145) para 2693.
[1077] Holvoet, 'The Prototype of Passively Encouraged Crimes' (n 262).
[1078] In terms of responsibility, this element corresponds to the question of whether countermeasures are within the power of the superior, see Ambos, *Treatise, Volume I* (n 24) 217; also referred to as the 'ability to act' following the principle *ultra posse nemo tenetur*, see detailed: Robert Roth, 'Improper Omission' in de Hemptinne *et al.*, *Modes of Liability in International Criminal Law* (n 1062) 77.

crimes due to the lack of consequences for the perpetrators. However, this would not comply with the policy's exceptionality.

In relation to physical and structural border violence, the failure appears as deliberate and conscious, not only in the case of Australia. In all circumstances described in this thesis, the state is not only aware of the violence which exists for a prolonged time, but in several instances, it created or promoted it.[1079] The violent acts are further committed by state agents as opposed to non-state actors;[1080] the state has thus (effective) control over the agents.[1081] In response to Australia's suggestion to consider only cases of full control when extraterritoriality is involved, Holvoet convincingly defends that *de facto* control must suffice, as proposed by the ILC.[1082] In addition, the relevant states have the authority and resources to stop the violence and prevent further crimes, particularly in states at peace with functioning institutions. It is further critical that the state is aware or must be aware, i.e. conscious, that the inaction *furthers* the violence.[1083] The plain language of the Elements of Crimes does not suggest that intent by the tolerating state is required. First-degree intent postulates that the state means to engage in the conduct (*dolus directus*). The elements, however, require deliberate and conscious behaviour, not intentional.[1084] Requiring intent would unnecessarily increase the threshold of mental engagement. As argued above, the threshold should be interpreted similarly to 'calculated,' which requires objective and subjective elements, from which the policy can be inferred.

[1079] See Chapter II. See for an analysis of case law on liability when a commander has created an environment where crimes are permissible, Roth, 'Improper Omission' (n 1062) 67.
[1080] High political decision-makers appear responsible for the policies, and law enforcement personnel, such as border guards, appear to commit the unlawful acts.
[1081] Ambos, *Treatise, Volume II* (n 30) 71.
[1082] Holvoet, 'The Prototype of Passively Encouraged Crimes' (n 262).
[1083] In the words of the OTP in the Australian case: 'purposefully intended to inflict abuse'.
[1084] The Statute defines the degrees of intent in Article 30 (2)(a) and (b).

In the migration context, it could nevertheless be argued that a degree of intent applies, namely the second-degree (*dolus indirectus*) or conditional intent (*dolus eventualis*). They require that the state does not desire but foresees the consequence with certainty or, although not desired, the state considers the consequence as a possibility and acts (fails to act) nonetheless.[1085] The states would thus have to be aware that their inaction will lead to the consequences in the ordinary course of events and the furtherance of the crimes.[1086] In the Central Mediterranean Article 15 submission by Shatz and Branco, the arguments for the criminality of failure to rescue are based on the conditional degree of intent.[1087] The lawyers argue that without the inaction of the states, the drownings would not have occurred – a consequence of which the actors were aware and failed to act nonetheless – and conclude that the *active* policy threshold is met by omission.[1088]

The notion of omission is often divided into proper (criminalising the failure to act) and improper omission (criminalising the action which can also be carried out by omission) in domestic law.[1089] The latter requires a duty to act, for instance, by having a guarantor status, such as parents towards their children.[1090] In ICL, proper omission crimes do not exist, i.e. there are no crimes codified that explicitly require commission through the failure to act, such as a crime against humanity through failure to provide assistance. However, improper omission, i.e. commission by omission, is a relevant concept that describes a mode of liability as brought forward by Shatz and Branco for the failure to

[1085] Van der Vyver, 'Concept of Mens Rea' (n 175) 62-66.
[1086] Ibid.
[1087] Shatz and Branco, 'Communication: Central Med' (n 5) para 583.
[1088] Ibid, paras 584-631.
[1089] For instance, in Spanish criminal law (*Artículo 195 del Código Penal español*), in German criminal law (Section 323c Failure to render assistance; Section 13 Commission by omission German Criminal Code), in Canadian criminal law (s. 252: Failure to stop and render assistance after accident Criminal Code of Canada).
[1090] In ICL, see *Ambos, Treatise, Volume I* (n 24) 183.

rescue.[1091] Improper omission, however, lacks adjudication and state responsibility by omission is a complex and controversial concept.[1092]

While this is one way to interpret passive behaviour, this particular aspect of the policy may better be described as a decisive element of the *passive* policy, a policy by toleration. This is important because the crimes may generally be committed by commission or omission. However, the policy of toleration sets forth that crimes are committed (through either mode), and *subsequently* fails to act. The acts, such as failure to rescue, therefore relate to the micro-criminal context; the policy of toleration implies a macro-criminal context. The widespread impunity, identified as structural impunity in the context of migration, may thus establish the passive policy.

In summary, the exceptional policy as described in the Elements of Crimes appears to be present in all relevant states, which is indicated by the persistent impunity. As proposed by Holvoet in the Australian case, the OTP may have falsely rejected the existence of such policy. This section shared the critique and built upon Holvoet's brief examination since this version of a policy necessitated a more accurate interpretation. By drawing from jurisprudence on the crime of genocide, it suggested that the degree of calculation informs the element of 'deliberate failure' and may be understood as purposeful and non-accidental refraining from stopping and prosecuting crimes despite having the capacity. Moreover, conscious encouragement may entail the degree of knowledge of a state that the crimes are being committed as well as knowledge (not intent) that the inaction furthers the crimes,

[1091] Ibid, 180-232; van Sliedregt, *Individual Criminal Responsibility* (n 633) 89-156; Roth, 'Improper Omission' (n 1062).

[1092] Lars C. Berster, "Duty to Act' and 'Commission by Omission' in International Criminal Law', 10 International Criminal Law Review 5 (2010) 619-646; Ana Srovin Coralli, 'A Word on Criminal Omission and its Prominence in International Criminal Law', OpinioJuris (26 July 2022) <http://opiniojuris.org/2022/07/26/a-word-on-criminal-omission-and-its-prominence-in-international-criminal-law/>; *Prosecutor v. Mrksic et al.* (Judgment), ICTY-TC II, IT-95-13/1-T (27 September 2007), e.g. omission as aiding and abetting, at para 553; van Sliedregt, *Individual Criminal Responsibility* (n 633) 89-156.

and the control over the actors. Even in cases involving extraterritorial crimes, *de facto* control must suffice. Because of the exceptionality of this policy, it may nonetheless be necessary to develop additional objective criteria that limit a state's responsibility for such action. To avoid overly broadening the application of crimes against humanity and underscore the multi-layered criminality, the next section introduces the concept of previous endangering behaviour as a qualifying criterion.

2.1.3. Previous Endangering Behaviour

The Elements of Crimes stipulate that inaction *alone* does not suffice.[1093] In the Australian case, the OTP may not have accepted that the 'mere' inaction of Australia in terminating the conditions in the offshore detention amounts to this version of a policy. Although it can convincingly be argued that the policy is fulfilled, as described above, complying with this version's exceptionality may require an additional criterion. Such an objective qualifier could be a previous contribution by the state to creating the circumstances. It would apply when a state fails to act, not simply when violence occurs, but when violence occurs as *a result of* circumstances that the state has created or contributed to. A strong indicator of such causality may be unlawful previous behaviour. However, even lawful previous behaviour may create an endangering circumstance and trigger a duty to prevent further harm.[1094] Most importantly, when does the failure to prevent further harm amount to criminality?

[1093] Article 7, Introduction, para 3, fn. 6, Elements of Crimes.

[1094] In regional case law: Vladislava Stoyanova, 'Framing Positive Obligations under the European Convention on Human Rights Law: Mediating between the Abstract and the Concrete', 23 Human Rights Law Review (2023) 1-34; Marcela Barón Soto and Alejandro Gómez Velásquez, 'An approach to the state responsibility by an omission in The Inter- American Court of Human Rights Jurisprudence', 6 Revista CES Derecho 1 (2015); Ambos, *Treatise, Volume II* (n 30) 72.

A useful notion can be derived from the domestic criminal law concept that previous actions creating dangerous circumstances, even if justified, might invoke a legal duty.[1095] For example, a driver who hits a pedestrian, though not at fault, is still obliged to provide first aid. Similarly, a person acting in self-defence may be justified in their actions. However, if the attacker is seriously injured and dies without further assistance, the defender may still have a duty to prevent death, provided their own life is no longer at risk.[1096] These cases invoke the question of whether these individuals could face criminal charges (for omitting to act); although the initial act creating the circumstances was justified. Essentially, because the act created a new, dangerous setting. This issue connects to how previous endangering behaviour that leads to harm should be accounted for.[1097]

Translating this notion to the state level – to high decision-makers – there may be room for an exceptional responsibility for tolerating crimes. Acknowledging that general human rights violations do not carry penal consequences for state actors, it needs to be examined which circumstances would lift such violations to criminally relevant behaviour. Provided that the state creates circumstances that ultimately result in serious harm, even if they were initially legal, responsibility may arise. For instance, the state adopts a law or policy that individual actors subsequently abuse. Although unintended, the state created a platform for violence.[1098] The state could either repeal the law or policy to prevent further crimes based

[1095] Roth, 'Improper Omission' (n 1062) 62.
[1096] A classical legal issue in German criminal law: the so-called *Garantenpflicht aus Ingerenz*: BGH 5 StR 80/23 - Urteil vom 2. August 2023 (LG Hamburg).
[1097] In German law, one view argues that only unlawful previous behaviour should qualify (*Pflichtwidriges Vorverhalten*), the dominant view is that it depends on the circumstances, also lawful behaviour could qualify. See also R. A. Duff, 'Criminalizing Endangerment', 65 La. L. Rev. (2005) 941-965, making the distinction between attacks and endangerment, yet not referring to the concept of the 'attack' within the meaning of the ICC Statute, but conceptualising crimes that consist of endangerment. For a comparison of German and English law, Antony Duff and Tatjana Hörnle, 'Crimes of Endangerment' in Kai Ambos *et al.* (eds), *Core Concepts in Criminal Law and Criminal Justice* (Vol 2 CUP 2022) 132-166.
[1098] See the pending preliminary referral for allegedly 'unintended' criminalisation of SAR following the 'Facilitator Package' adopted by the European Commission before the CJEU: CJEU, C-460/23 – Kinsa.

on its abuse or retain the law but genuinely engage in countermeasures or prosecutions against the individuals if the threshold to criminality is crossed.

The question is how the state's ignorance of such a situation should be judged. The parameters that are present in the migration context, as outlined above, provide that the state is aware that the violence occurs, has knowledge of the specific actors over which it has *de facto* control, and has the capacity to prosecute and prevent further commission. In such a case, responsibility may arise because (1) the state creates certain circumstances, even if they are lawfully created; (2) civilians' life, liberty, or physical integrity is endangered as a consequence of this decision, and (3) the state is aware of these consequences, but deliberately fails to prevent or repress them. When fulfilled, these parameters may serve as an objective indication that a policy of toleration applies.

The relevance of such state omission under ICL needs to be further refined as it has significant implications for accountability in cases where inaction contributes to crimes against humanity. Recalling the proposed importance of structural impunity for this thesis, the impunity may represent this form of state inaction, when it becomes protracted and systematic, and is used to maintain the violations. It could qualify as a form of policy within the meaning of Article 7. To support this argument and underpin the policy's exceptionality, previously endangering behaviour may not meet the standard in ICL if the policy is uncontroversially lawful, i.e. no conflict with international law arises. However, if the law or policy appears highly controversial or partly unlawful, this should invoke comprehensive scrutiny.[1099] The state may then have deliberately created dangerous circumstances that enabled violence by individual perpetrators. Above all, scrutiny is warranted when actors are state agents, such as law enforcement personnel, because their

[1099] Similar in command responsibility, see Ambos, *Treatise, Volume I* (n 24) 201 ('past criminal practice can be qualified as 'alarming information' demanding the superior's inquiry').

acts are generally attributable to the state.[1100] The creation of dangerous circumstances combined with the systematic and conscious use of impunity may amount to the deliberate failure to act.

In the migratory context, this unlawful conduct/impunity combination appears particularly relevant for testing whether the factual circumstances imply the existence of a passive policy. Several laws and policies restricting, controlling, and outsourcing migration have been either partly unlawful or legally controversial.[1101] For instance, the Italian and Maltese policies of port closures and the Maltese mandatory detention policy were in conflict with international law.[1102] In addition, the US 'zero-tolerance' policy ordering the separation of children from their families violates the prohibition of torture or inhuman and degrading treatment.[1103] The Australian 'Stop the Boats', 'Pacific Solution', and 'Operation Sovereign Border' policies and agreements with PNG and Nauru Republic, leading to offshore processing and detention, were highly controversial and partly unlawful.[1104] The adoption of these laws and policies could be considered a first layer

[1100] See ILC, 'The International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts' (2001), annex to General Assembly resolution 56/83 of 12 December 2001, corrected by document A/56/49(Vol. I)/Corr.4 (UN 2005): Article 8 requires 'instruction, direction, or control.' Case law on the control of a state over acts of individuals, in particular extraterritorially, includes: *Nicaragua v. United States of America*, Military and Paramilitary Activities in and against Nicaragua (Merits, Judgment of 27 June 1986) ICJ Reports (1986) paras 109-115 (effective control); *Loizidou v Turkey* (Merits, Judgment) ECtHR Appl. No 15318/89 (18 December 1996), para 49 (effective overall control test); *Tadić* (Appeal Judgment) (n 647) para 131 (overall control test/degree of control). For further analysis, see Antonio Cassese, 'The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia', 18 EJIL 4 (2007) 649−668; Cryer *et al.*, *An Introduction to International Criminal Law and Procedure* (n 9) 584. On imputation, see Ambos, *Treatise, Volume I* (n 24) 83-84.

[1101] See the section on the 'active policy' in Chapter II at 4.3.1.

[1102] Eugenio Cusumano and Kristof Gombeer, 'In Deep Waters: The Legal, Humanitarian and Political Implications of Closing Italian Ports to Migrant Rescuers', 25 Mediterranean Politics 2 (2018) 247; Omar Grech, 'Migration and the COVID-19 pandemic' in Richard E. Rubenstein and Solon Simmons (eds), *Conflict Resolution after the Pandemic: Building Peace, Pursuing Justice* (Routledge 2021) 45.

[1103] Condon, 'When Cruelty Is the Point' (n 183) 62-65; Van Schaack, 'The Torture of Forcibly Separating Children' (n 183); Van Schaack, 'Father-Son Separation at US Border' (n 183).

[1104] *Inter alia:* Mann, 'Attack by Design' (n 5); Barnes, 'Suffering to Save Lives' (n 438) 1512; Henderson, 'Australia's Treatment of Asylum Seekers' (n 5) 1163-1165; see also *Namah v Pato* (Judgment) [2016] Papua New Guinea Supreme Court (PGSC) 13; SC1497 (26 April 2016) para 72.

(macro-criminal context),[1105] an active policy at the highest decision-making authority within the meaning of Article 7.

Viewed in isolation, the threshold to crimes against humanity does not appear to be met. And yet, the authorities created an environment that enabled individual perpetrators to commit violent acts; whether these consequences were intended may not be decisive at this point. One compelling example is the development of illegal pushbacks at the borders as (unintended) consequences of deterrence policies. This represents a second layer: the acts committed by border guards and law enforcement (micro-criminal context).[1106] Systematic conduct that *prima facie* qualifies as unlawful acts according to Article 7.[1107] Although the state authorities are aware that these acts are being committed and have control over the agents, they do not address them. This furthers the commission of the crimes since the perpetrators feel encouraged. Moreover, these sanction-free acts do not appear to result from the state's incapacity but from the deliberate creation of structural impunity by political choice, as examined in Chapters II and IV.[1108] The systematic impunity thus indicates the passive policy and constitutes a third layer (an exceptional form of macro-criminality), namely the deliberate failure to end the commission of systematic crimes. Fuelled by the toleration and a joint purpose of deterrence and defence, the interplay between the macro- and the micro-criminal context results in further reciprocal encouragement. Hence, a state's previous endangering behaviour should be a sign for

[1105] Kuschnik, 'Humaneness, Humankind and Crimes Against Humanity' (n 13) 522; in the Authorisation Decision Philippines (n 46), the Chamber also recognised the active policy, at paras 93-100, and a passive aspect at para 101, see *infra* (n 468).
[1106] Ibid, 522.
[1107] In the Article 15 submissions, pushbacks are examined as violations of Article 7(1)(d) (deportation and forcible transfer), see Chapter II at 4.2.1.
[1108] See also FRA, 'Guidance on Investigating Alleged Ill-Treatment at Borders' (n 47) 37/47. de Coninck and Raimondo, 'Understanding European Border Management' (n 53), speaking of 'orchestrated impunity'.

increased attention and be taken into account when analysing passive policies within the meaning of Article 7.

At Nuremberg, the crime against peace, i.e. the unlawful invasion of another state, could describe the previous endangering behaviour and the creation of a macro-criminal context.[1109] In this case, an apparent and aggressive illegality. This context enabled the active commission of war crimes and crimes against humanity. As analysed in Chapter II, the Armenian atrocities and the Holocaust were carried out under the pretext of WWI and WWII. The circumstances thus already endangered the lives of civilians. In peacetime and in the context of migration, previous endangering behaviour, especially unlawful, such as mandatory or indefinite detention or non-response to SAR requests,[1110] ultimately creates a context in which violence occurs and crimes against humanity become possible. Bernhard Kuschnik, describing the macro-micro-criminal context as interdependent, informing the *nexus* between the unlawful acts and the attack, notes that

> [t]he notion "part of" within the phrase "when committed *as part of* […] the attack" demonstrates, that both levels of criminality are dependent upon each other, and in fact, the micro-criminal participation of the perpetrator is embodied into, and thus – part of – the macro-criminal context. If read together with the notion "when committed", it can be concluded that both levels are arranged in equal hierarchy.[1111]

The migration-related policies, the individual acts by state agents, and the ensuing structural impunity are strong indicators of such an orchestrated interplay. This level of impunity implies the state's passive role despite a duty to act: its failure to prevent further crimes which occur in an environment it has deliberately and purposefully created.[1112]

[1109] Similarly, the Armenian genocide occurred in the midst of WWI, which was deliberately used by the Ottoman Empire to attack the Armenian population internally, see detailed Chapter III at 3.1.
[1110] Callamard, 'Unlawful death of refugees and migrants' (n 359) paras 56-64.
[1111] Kuschnik, 'Humaneness, Humankind and Crimes Against Humanity' (n 13) 522.
[1112] For the question of attribution, see Soto and Velásquez, 'An approach to the state responsibility by an omission' (n 1094); see also in Malta, aditus, 'Malta's Institutional Neglect of migrants' (2025) <https://aditus.org.mt/publications/institutional-neglect/>.

Structural impunity thus indicates a pattern similar to the active policy, yet by methodically refraining from preventing the crimes, whether 'implicit or explicit'.[1113] If the function of the policy is to internationalise crimes against humanity, structural and deliberate impunity, especially in peacetime when a state is not paralysed by fighting and destruction, may lift ordinary crimes to crimes against humanity.

Moreover, Chapter IV developed an interpretation of crimes against humanity as a response to structural violence. The policies relevant to this approach in the first layer may be considered as the structural dimension of violence since they embed rights deprivations into the political and legal system, yet are viewed as non-criminal. Considering the unlawful acts enabled by the structural violence and the ensuing encouragement by the deliberate upholding of impunity, a setting as explored in this section, may provide the criminal threshold for structural violence.

In light of these deliberations, the OTP should reconsider the Australian policies against the question of which other policies and unlawful acts are connected to them. Viewing one legal aspect of this multilayered system of reciprocal macro and micro violence in isolation leads to flawed interpretations.[1114] Moreover, it would be of value if the Prosecutor reevaluated the interpretation of crimes against humanity in peacetime since this context of crimes lacks in-depth engagement. In particular, it would be beneficial if the OTP reviewed its assessment of a deliberate and 'purposefully designed'[1115] policy. In that regard, it would be favourable if the assessment aligned with interpretations of deliberate as 'not accidental' (*Čelebići* Case) and purposeful as 'calculated', i.e. capable of creating conditions (*Akayesu*). In this context, the previous endangering behaviour of a state should

[1113] Ambos, *Treatise, Volume II* (n 30) 72.
[1114] Soto and Velásquez, 'An approach to the state responsibility by an omission' (n 1094) 522.
[1115] ICC-OTP, Report on Preliminary Examinations (n 50) para 54.

be scrutinised against the parameters derived from the notion of commission by omission. In addition, recognising structural impunity by political choice as a strong indicator of the passive policy would capture the multilayered system of criminality more adequately.

In sum, the policies enabling the alleged crimes against migrants serve as a fertile ground for understanding how peacetime crimes against humanity materialise, and thorough examinations should not be dismissed prematurely. Refining the understanding of the exceptional policy according to this interpretation may establish legal admissibility, as it would lead to the recognition of unlawful conduct which is connected to a purposefully designed policy. As argued in the previous chapters, the OTP may nonetheless reject investigating migrant abuses as peacetime crimes due to the continuous perception that conflict-related crimes are more severe. The next section, therefore, develops the second approach, which enhances the OTP's understanding of the 'migration crisis' as a sufficiently severe situation to commence a full investigation.

2.2. Second Approach: Reframing the 'Migration Crisis' as a Dimension of Conflict

The first approach aims to detach crimes against humanity coherently from conflict and provides an interpretation for multilayered systems of criminality in a peacetime setting. The second approach suggests that *even if* the OTP is convinced that at least a conflict-like scenario is required as a contextual background, the so-called 'migration crisis' can be considered a dimension of conflict according to PCS and be reframed as a conflict relevant for the OTP to take action.

As established in Chapters III and IV, the assumption that crimes in armed conflict are inherently more severe is normatively unsupported. This approach builds on that critique

and seeks to inform the ICC's severity assessment by correcting the *perception* that peacetime crimes are less severe. To develop this approach, it is essential to examine the definition of conflict under IHL/ICL, the dimensions of conflict in conflict analysis, and how the 'migration crisis' fits within these frameworks. It proposes that state responses to migration can trigger a form of conflict which can escalate into further direct violence and/or manifest existing patterns.

2.2.1. Conflict According to International (Criminal) Law

Whether an armed conflict exists is primarily important to establish the applicability of IHL.[1116] It determines whether the unique set of rules governing the parties to the conflict is activated. Grave breaches of IHL may lead to the applicability of ICL (war crimes).[1117] IHL traditionally differentiates between IACs and NIACs since some crimes can only be committed in IACs. Essentially, for both categories of conflict under international law, courts must prove a certain threshold of violence to ascertain its existence.[1118] In a NIAC, the armed violence must be protracted to exclude short-term internal turmoil.[1119] Exceeding the critical threshold in length and severity of violence lifts tensions, riots, and disturbances to a relevant conflict dimension, invoking the rules of IHL/ICL.[1120] In the judgment against *Tadić*, the ICTY held that 'banditry, unorganized and short-lived insurrections, or terrorist activities' do not qualify.[1121] Rogier Bartels notes that an armed conflict is generally tested against 'objective indicative factors of intensity of the fighting

[1116] Bartels, 'The Classification of Armed Conflicts' (n 91) 595-668.
[1117] Article 8 (2) (a) ICC Statute.
[1118] Bartels, 'The Classification of Armed Conflicts' (n 91) 626.
[1119] ICRC, 'How is the Term "Armed Conflict" Defined in International Humanitarian Law?', Opinion Paper (March 2008) 4.
[1120] Article 1 (2) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (8 June 1977) [AP II].
[1121] *Tadić* (Judgment) (n 1) para 562.

and the organisation of the armed group(s)',[1122] as previously held by the ICTY in *Limaj et al.* and confirmed by the ICC.[1123]

Similar to crimes against humanity, the crimes' internationalisation is guaranteed by parameters that exclude isolated and sporadic acts of violence.[1124] For NIACs, the intensity may be reached when the government is compelled to use military force against insurgents' armed resistance; mere police force does not suffice.[1125] The confrontation between the state and organised groups must go beyond internal security operations.[1126] Insurgents who form a sufficiently organised group and follow a degree of command structure qualify as a party to the conflict.[1127] Furthermore, the only relevant conflict situation that does not require armed resistance by a party is military occupation, provided that the conflict is international (IAC).[1128]

An equivalent for a situation without armed resistance in internal conflicts (NIAC) was developed in jurisprudence following the destruction of cultural sites in Timbuktu in Mali. The ICC considered the conduct a war crime, although no active fighting took place because the dominating armed group did not face confrontation. The Trial Chamber held:

> With respect to the requirement that the armed violence must meet a certain minimum level of intensity to be distinguished from mere internal disturbances and tensions, the Chamber notes that the fact that these groups exercised control over such a large part of Mali for such a protracted period – with the resulting effect on the civilian population concerned – clearly demonstrates a sufficient degree of intensity of the conflict.[1129]

[1122] Bartels, 'The Classification of Armed Conflicts' (n 91) 607.
[1123] Ibid; *Limaj et al.* (Judgment) (n 33) para 84.
[1124] Article 8 (2)(d) and (f) ICC Statute, Article 1 (2) AP II.
[1125] ICRC, 'How is the Term "Armed Conflict" Defined' (n 1119) 3.
[1126] William H. Boothby, *The Law of Targeting* (OUP 2012) 455–471, referring to 'security situations' at 456; William H. Boothby, *Conflict Law* (T.M.C. Asser Press 2014) 17–63.
[1127] Ibid; 'How is the Term "Armed Conflict" Defined' (n 1119) 5.
[1128] Boothby, *Conflict Law* (n 1126) 37; Common Article 2 1949 Geneva Convention.
[1129] *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC TC VIII Case No 01/12-01/15 (Judgment and Sentence) (27 September 2016) para 49.

Following further analysis, Bartels explains that the Chamber's ruling was novel and departed from previous, more restrictive rulings.[1130] The ICC confirmed this view in *Ntaganda*, and added that the absence of fighting in a controlled area may result from one group's unchallenged power.[1131] Notably, the controversial acquittals of *Gbagbo* and *Blé Goudé* were critiqued given the fact that the Prosecution did *not* consider an armed conflict in Ivory Coast, although the intensity of the clashes may have exceeded the ICC's standards.[1132] It is precisely this grey area where internal tensions (are about to) escalate, and a state's use of force against an (organised) opposing group may not easily be classified.[1133] This dynamic process regularly leads to controversy about whether the state conducted security operations bound by human rights law or whether the violence has already risen to an internal conflict governed by IHL.[1134] Decisively, the Chambers proved flexibility within the permitted scope of interpretation and accounted for the specifics in the given case. Vague legal terms such as 'intensity' can thus be concretised by the ICC when contemporary forms of conflict arise. Above all, the ICC carefully weighs the evidence at hand to determine whether the threshold to an armed conflict is crossed. Where tensions are uncontroversially given, and the state engages in some use of force, in-depth scrutiny is warranted to determine the degree of violence employed.

From an IHL perspective, classifying violence as part of an armed conflict aims to foster protection, particularly of civilians, Prisoners of War (POWs), and other protected

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[1130] Bartels, 'The Classification of Armed Conflicts' (n 91) 630.
[1131] *Ntaganda* (Judgment) (n 144) paras 721-725.
[1132] See Chapter IV at 2.2.1.
[1133] For instance, the difficulty of ascertaining the threshold in Northern Ireland during the 'troubles' is discussed by Grech, *Human Rights and the Northern Ireland Conflict* (n 166) 129-130.
[1134] For the difficulty of establishing clear lines between HRL and IHL, see the landmark rulings by the ECtHR on the lethal use of force by state agents as violations of the ECHR: *Case of McCann and Others v. the United Kingdom*, ECtHR (Judgment) Application Nos 18984/91 (27 September 1995) for failing to adequately plan the operation leading to the necessity of killing the terrorist suspect, and *Case of Isayeva, Yusupova and Bazayeva v. Russia*, ECtHR GC (Judgment) Application Nos 57947/00, 57948/00, 57949/00 (24 February 2005) for failing to protect the life of civilians by security forces in a military operation with an inaccessible 'humanitarian corridor'.

persons.[1135] Targeting protected persons is a grave breach of IHL and the basis for prosecuting such conduct as war crimes. In parallel, 'without the existence of an armed conflict (international or non-international), there can be no serious violation of IHL',[1136] as Bartels concludes. For the purpose of this thesis, such classification translates to a substantial probability that, without a conflict-like scenario, the OTP does not accept the existence of severe violations of fundamental rights. The intensity of violence present in the context of an armed conflict to establish whether an armed conflict under IHL exists, should not be equated with the context of crimes against humanity, which require a widespread and systematic attack following a policy. Grave breaches of IHL are only possible within the confines of an armed conflict; severe rights violations are also possible in peacetime.

Overall, the analysis of IHL highlighted that an armed conflict is briefly characterised by the clashes' intensity and the parties' organisation. It further demonstrated that armed conflict may still exist outside of active hostilities but only under exceptional circumstances, particularly when power and control rest unchallenged. It becomes evident that the concept of armed conflict under international law focuses on the actions carried out by specific entities.

In contrast, PCS view conflict holistically.[1137] For instance, several peace and conflict scholars have paid special attention to the root causes of conflict to define it, which are irrelevant in IHL/ICL.[1138] To refine the understanding of conflict as a concept, the next

[1135] Boothby, *Conflict Law* (n 1126) 45.
[1136] Bartels, 'The Classification of Armed Conflicts' (n 91) 658.
[1137] To define, resolve, and prevent conflict, see detailed Grech, *The International Law of Peacebuilding* (n 52) 39-42.
[1138] Oliver Ramsbotham, Tom Woodhouse, and Hugh Miall (eds), *Contemporary Conflict Resolution* (3rd edn Polity Press 2011) 9.

section turns to PCS before asking how both disciplines may inform the interpretation of the 'migration crisis' as a conflict dimension.

2.2.2. Conflict According to Peace and Conflict Studies

Pioneering the work on conflict analysis and resolution starting in the 1960s, John W. Burton developed new approaches to theorising the causes, nature, and possible pathways to resolving conflicts.[1139] For Burton, one of the main causes of conflict is unmet needs, which resulted in the *Human Needs Theory*, proposing that a stable society cannot be achieved if the basic needs of its individuals or certain groups remain unfulfilled.[1140] In finding a language for conflict resolution more broadly, he defined conflicts as 'struggles between opposing forces',[1141] including over 'resources, ideas, values, wishes, and deep-seated needs'.[1142] Around the same time, Johan Galtung proposed the famous triangle models of conflict, violence, and peace, as examined in Chapter IV.[1143] The triangle model of conflict, Galtung suggested, considers three components: interest clashes (contradiction), perceptions of each other, possibly including hatred and stereotyping (attitude), and actions such as coercion, threats or attacks (behaviour).[1144] In many aspects, both theorists' ideas overlap or complement each other and set the groundwork for further development in the field.

[1139] Among others: Burton, *Conflict & communication* (n 65); Burton, *World Society* (n 65).
[1140] John W. Burton, *Conflict: Human Needs Theory* (Palgrave Macmillan 1990) acknowledging the work of Paul Sites as the basis for his theory, see Richard Rubenstein, 'Basic Human Needs: The Next Steps in Theory Development', 6 The International Journal of Peace Studies 1 (2001). See also: Terry Beitzel, 'Puzzles, Problems and Provention: Burton and Beyond', 21 International Journal of Peace Studies 1 (2019) 46.
[1141] John W. Burton, *Conflict Resolution: Its Languages and Processes* (Scarecrow Press 1996) 21.
[1142] Ibid, 21.
[1143] Galtung, 'Violence, Peace, and Peace Research' (n 6) 191 footnote 35: 'To me, conflict is incompatibility of goals, but how these goals are established is a quite different matter'.
[1144] Johan Galtung, *Peace by Peaceful Means: Peace and Conflict, Development and Civilization* (SAGE Publications Ltd 1996) 71-72.

As such, Christopher Mitchell's acclaimed 1981 book *The Structure of International Conflict* refined Galtung's previously articulated conception by outlining classical models of conflicts and their sources.[1145] Mitchell, focusing on circumstances constituting conflict, defined them as '[a]ny situation in which two or more social entities or "parties" (however defined or structured) perceive that they possess mutually incompatible goals'.[1146] Incompatible goals, he continued, root in 'a mis-match between social values and social structure'.[1147] Mitchell added an important dimension, namely that the opposing goals can be engrained deeply into the social structure.[1148]

Notably, these definitions of conflict do not require violence or armed fighting. However, as dynamic processes, the theories acknowledge the changing nature, especially the escalation of non-violent conflict into violent or armed conflict defined by the use of force.[1149] For the purpose of resolving such conflicts when they arise, Ramsbotham *et al.* emphasise the need to consider 'any political conflict whether pursued with peaceful means or by the use of force' in 'the pursuit of incompatible goals by different groups'.[1150] Ramsbotham *et al.* differentiate violent or deadly conflict from armed conflict by the parties who engage in the use of force, referring to armed conflict only when both parties engage in fighting. One-sided conflict, they note, includes physical violence against a group, such as genocides.[1151] Highlighting the influential work of Galtung on the triangle model of violence, the authors use the term structural violence when 'exploitative social relations that cause unnecessary suffering'[1152] are created. Evidently, conflict and violence

[1145] Christopher R. Mitchell, *The Structure of International Conflict* (Macmillan 1981).
[1146] Ibid, 17.
[1147] Ibid, 18. See also Louis Kriesberg, 'Social Conflict Theories and Conflict Resolution', 8 Peace and Change 2/3 (1982) 3-17.
[1148] See *infra* (n 1158) for the analysis of Rubenstein's concept of structural conflict.
[1149] See also the definition by the Uppsala Conflict Data Program: Uppsala Conflict Data Program (UCDP), 'Definitions, sources and methods for Uppsala Conflict Data Program Battle-Death estimates' (2006) 3.
[1150] Ramsbotham *et al.*, *Contemporary Conflict Resolution* (n 1138) 30.
[1151] Ibid, 31.
[1152] Ibid.

are intrinsically interconnected, with each often serving as both a cause and consequence of the other. It underscores their complex and mutually reinforcing relationship, often engrained into social structures.

As presented in Chapter IV, according to Galtung, structural violence describes how violence is built into the structure and becomes systemic, and no individuals appear responsible, as the violence emanates from the system.[1153] Galtung's concept of structural violence significantly impacted the understanding of violence and conflict, and the interdependency between the forms of violence.[1154] Since then, several scholars have built upon this and other models and developed prevention, de-escalation, and peaceful resolution strategies.[1155]

Richard E. Rubenstein, another pioneer in PCS, recapitulated the development of defining conflict and violence in the field. He concluded that the discipline's focus first moved from an interest to an identity-based understanding and finally to a structure-based conception of conflict.[1156] Rubenstein labels this development the 'structural turn'[1157] and introduces the concept of structural conflict. This form of conflict emerges from violent social systems and generates violence, for instance, based on structural inequality and the unsatisfied needs of the individuals.[1158] Rubenstein further highlights that systems producing violence are *designed* to maintain themselves, often based on preserving power, control, and

[1153] Galtung, 'Violence, Peace, and Peace Research' (n 6) 170-171.
[1154] Ibid, 171; Galtung, 'Cultural Violence' (n 6) 291-305.
[1155] Among others: Louis Kriesberg, 'Social theory and the de-escalation of international conflict', 32 Sociological Review 3 (1984) 471-491; Rubenstein, 'Responsibility for Peacemaking' (n 986) 6-26; Kalevi Holsti, *Peace and War: Armed Conflicts and International Order 1648-1989* (CUP 1991); Dilts *et al.*, 'Revisiting Johan Galtung' (n 7) 191-227; David Dunn, *From Power Politics to Conflict Resolution* (Palgrave-Macmillan 2004); Oliver Ramsbotham, *When Conflict Resolution Fails: An Alternative to Negotiation and Dialogue: Engaging Radical Disagreement in Intractable Conflicts* (Polity Press 2016); related to the Covid-19 pandemic: Rubenstein and Simmons, *Conflict Resolution after the Pandemic* (n 1102).
[1156] Rubenstein, *Resolving Structural Conflicts* (n 65) 2; see also Rubenstein, 'Responsibility for Peacemaking' (n 986) 6-26.
[1157] Ibid.
[1158] Ibid, 57.

authority, such as prison systems.[1159] However, this violence occurs in a subsystem nested in larger structures (e.g., the prison system is nested in the criminal justice system).[1160] Conflict is thus a product of structures – structures designed to produce violent conflict, not unwanted consequences of failed systems – and can only be transformed by addressing the larger structure.[1161] Importantly, Rubenstein argues that most 'structural conflicts are not *either* socioeconomic *or* cultural *or* political but involve all these dimensions (…) simultaneously'.[1162] The root causes thus intersect, which 'means that social conflicts need to be defined by reference to the *whole* system rather than by reference to their immediate parties'.[1163]

The importance of overlapping causes has also been articulated by Edward Azar, who developed the theory of 'Protracted Social Conflict'[1164] (PSC) over two decades. Based on a mixture of protracted conflict and social-ethnic conflict, according to Azar, a PSC is a 'prolonged and often violent struggle by communal groups for such basic needs as security, recognition and acceptance, fair access to political institutions and economic participation'.[1165] In conflicts of this type, deficiencies in the provision of human needs can often be identified, which can be attributed to the deprivation of 'security needs, development needs, political access needs and identity needs'[1166] for which the government may be held responsible.

[1159] Ibid, 10; 73.
[1160] Ibid, 10; 57.
[1161] Ibid, 67-71.
[1162] Ibid, 114.
[1163] Ibid, 96. Rubenstein calls the division and reciprocal demonisation 'partisan moralism' that can be resolved by system thinking, detailed at 7-29.
[1164] Developed in several pieces, among others: Edward E. Azar, Paul Jureidini and Ronald McLaurin, 'Protracted Social Conflict; Theory and Practice in the Middle East', 8 Journal of Palestine Studies 1 (1978) 41–60 [PSC]; Edward E. Azar, 'Protracted International Conflicts: Ten Propositions', 12 International Interactions 1 (1985) 59–70; Azar, *The Management of Protracted Social Conflict* (n 65).
[1165] Edward Azar, 'The Analysis and Management of Protracted Social Conflict' in Vamik D. Volkan *et al.* (eds), *The Psychodynamics of International Relationships* (Lexington Books Vol 2 1991) 93; see also Burton, *Conflict: Human Needs Theory* (n 1140); Kevin Avruch and Christopher Mitchell (eds), *Conflict Resolution and Human Needs: Linking Theory and Practice* (Routledge 2013).
[1166] Ramsbotham *et al.*, *Contemporary Conflict Resolution* (n 1138) 101.

This type of conflict also shows a high degree of structural violence embedded in political decision-making, negatively affecting certain groups of society. The deprivation of basic human needs, which 'are "ontological" and non-negotiable',[1167] often results, according to PSC theory, from incompetence or fragility of states prone to dependency in international economic and military relations.[1168] Those states often resort to repression and exclusion of the group entitled but deprived of these needs.[1169] Azar's theory, although initially designed to describe prolonged conflicts with intervals of high intensity of armed fighting, such as in Cyprus,[1170] the Middle East,[1171] or Northern Ireland,[1172] reveals how systems of protracted structural violence against minority groups deprived of their fundamental rights constitute contemporary forms of conflict. Fluctuating direct violence erupting from the conflict may often occur, but according to PSC theory, it is not a prerequisite.[1173]

Further typologies of conflict have been proposed and refined, often distinguishing between inter-state and intra-state conflict.[1174] Considering the focus of this thesis, which deals with violence at borders and across states, yet not with interstate issues,[1175] and the structural dimension of violence,[1176] Edward Azar's PSC theory and Rubenstein's concept of structural conflict serve as salient approaches to concretising the dynamics of the 'migration crisis' as a conflict. Especially in light of the structural dimension proposed to

[1167] Ibid, 101.
[1168] Ibid, 101-104, referring to preconditions of 'governance' and 'international linkage'.
[1169] Ibid, 104.
[1170] Evagoras C. Leventis and Andreas Tsokkalides, 'Protracted Social Conflict Analysis and Cyprus: An Assessment', 19 The Cyprus Review 2 (2007) 31-56.
[1171] Azar *et al.*, 'Protracted Social Conflict; Theory and Practice in the Middle East' (n 1164).
[1172] Grech, *Human Rights and the Northern Ireland Conflict* (n 166).
[1173] Melissa M. C. Beaudoin, *'Protracted Social Conflict: A Theoretical Reconceptualization and Case Analysis'*, PhD Thesis, University of South Carolina (2013) 9-10.
[1174] For an overview and comparison, see Ramsbotham *et al.*, *Contemporary Conflict Resolution* (n 1138) 73-85. Intra-state conflicts may further be divided by causes (revolution/ideology – identity/secession – factional) at 77.
[1175] For an exception, see the 'hybrid war' narrative dealing with EU and third state relations, such as Belarus, *infra* (n 1190).
[1176] See Chapter IV, at 3.2. and 3.4., considering structural violence in the form of systematic violations embedded into laws, policies, and practices and structural impunity deliberately used to maintain the violation.

inform the rationale of crimes against humanity, combining elements of these theories highlights the complexity underlying the 'migration crisis' and the violence connected to it.

Given the preconditions for a PSC, it becomes evident that migrants may not be the traditional communal group, nor do the states of the Global North suffer from fragility or incompetence.[1177] On the contrary, the dominance of the states creates a strong asymmetry between the conflicting parties.[1178] This may provide grounds for developing a more appropriate understanding of the 'migration crisis', showing several PSC elements, while other elements need modification. This modification is informed by the additional components that define a structural conflict according to Rubenstein and seeks to remedy analytical gaps that may arise from the specific circumstances present in the 'migration crisis.' The concept of structural conflict diverges from the party-based and needs-based analysis and captures the conflict holistically and systemically.

Against this background, the parameters of conflict under international law and those characterising conflict according to PCS, particularly Azar's PSC theory and the concept of structural conflict, are tested in the next section against the factual situation at and within the borders of the so-called Global North.

2.2.3. The 'Migration Crisis' as a Dimension of Conflict

Several authors, as well as the press, have referred to war-like narratives describing the 'migration crisis' peaking in 2015 and the subsequent state responses. For instance, Italian

[1177] Note that in PSC, it is important but not an all-determining prerequisite, e.g., in the Northern Ireland conflict, no such fragility on the British side existed. See *infra* (n 1122).
[1178] For several essential aspects of asymmetric conflicts, see the Special Issue, 'Persuading Lions: Vicissitudes of Peacemaking in Asymmetric Conflict', 2 Dynamics of Asymmetric Conflict (DAC) 1 (2009).

philosopher Donatella Di Cesare argues that an undeclared war between European nation-states and migrants, divided upon 'us' versus 'them', exists.[1179] In an interview, she expressed concern that this *conflict* will aggravate because the states consider migrants as their enemies.[1180] Moreover, the Intercept frequently publishes articles on US immigration issues under the title 'The War on Immigrants'.[1181] One contribution refers to 'The World War on Asylum', claiming that the 'Greek strategy has become a signature model in the global war on asylum-seekers'.[1182] Green and Grewcock, describing the violence as state crimes from a criminological perspective, speak of a 'War against Illegal Immigration'.[1183] R. T. Howard expresses the view that 'not only does war continue to cause mass migration, it can itself become a cause of war'.[1184]

Moreover, anthropologist Nicholas De Genova, outlining the political discourse of an 'anti-immigrant fascism',[1185] proposes that the momentum of the far-right is derived from the rhetoric about immigrants as threats and enemies, constituting a 'border war'.[1186] He further argues that this border war narrative (against immigrants/non-citizens) is fuelling civil war practices (against civilians).[1187] The current discourse thus tends to shift from border violence, border struggles, and 'migration crisis' to a more conflict or war-like

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[1179] Donatella Di Cesare, *Resident Foreigners: A Philosophy of Migration* (Polity 2019); Tuğba Ayaz, '*Interview: «Unser Pass entscheidet über unser Schicksal»*', Neue Züricher Zeitung (30 December 2022) <https://www.nzz.ch/folio/unser-pass-entscheidet-ueber-unser-schicksal-ld.1718155> (*'Wir leben in einer Epoche, in der ein nicht erklärter Krieg zwischen den europäischen Nationalstaaten und den Migranten herrscht.'*).
[1180] Ibid, NZZ (emphasis added).
[1181] The Intercept, 'The War on Immigrants' <https://theintercept.com/collections/the-war-on-immigrants/>.
[1182] Malcolm Harris, 'The World War on Asylum', The Intercept (9 July 2024) <https://theintercept.com/2024/07/09/asylum-rights-greece/>.
[1183] Green and Grewcock, 'The War against Illegal Immigration' (n 189) 87-101.
[1184] R. T. Howard, 'Migration Will Drive the Next Wave of World Wars', The National Interest (21 December 2017) <https://nationalinterest.org/feature/migration-will-drive-the-next-wave-world-wars-23737>.
[1185] Nicholas De Genova, 'From Border War to Civil War: Populism | Fascism | Authoritarianism', Zentrum für interdisziplinäre Forschung: ZiF Border Talk Series (5 April 2024) available on YouTube <https://www.youtube.com/watch?v=pZ4PB9VKCyI>.
[1186] Ibid, also building upon the 'crisis' discourse, see: Nicholas De Genova, Glenda Garelli, and Martina Tazzioli, 'Autonomy of Asylum? The Autonomy of Migration: Undoing the Refugee Crisis Script', 117 The South Atlantic Quarterly 2 (2018) 239-265.
[1187] Ibid.

narrative. Overall, the discourse suggests an escalation from a political and humanitarian challenge towards further division among 'parties',[1188] showing increased tensions and violence.

Whereas these descriptions may be used expressively or symbolically in scholarship and the media, political institutions have likewise turned to war narratives. EU institutions such as the Commission have frequently used the 'hybrid war' and 'hybrid threat' narratives, gradually normalising dehumanising language.[1189] It considers states like Turkey and Belarus as belligerents instrumentalising migrants as weapons of warfare against whom only restrictive defence measures can maintain security.[1190] The enemy in these cases is the third state abusing the EU's 'vulnerability',[1191] which responds with extraordinary measures of militarisation, fencing, and increased resources allocated to police and border guards to counter the 'threat'.[1192] The threat being uncontrolled, irregular, 'mass' migration. Similarly, in the US and Australian context, the 'criminal invasion' rhetoric resulted in dehumanising labelling of migrants as attackers.[1193] Militarisation is not only visible as a response to third states but against migration *per se*. The perception of migrants as a security threat, fuelled by the crisis/conflict rhetoric, has led to a shift from immigration and border control to a militarisation of migration control overall.[1194] This turn includes the deployment of semi-military institutions and police forces, and military

[1188] See for claims of a global apartheid system among racial lines: Benedicto *et al*., 'A Walled World Towards a Global Apartheid' (n 190); Besteman, *Militarized Global Apartheid* (n 190).
[1189] EC, 'State of the European Union 2023 – Speech by President von der Leyen in ISL' (13 September 2023) available on YouTube (at minute 51:25) <https://www.youtube.com/watch?v=o4_eRV7r5QI&ab_channel=EuropeanCommission>.
[1190] Ibid; Mariana Gkliati, 'Let's Call It what It Is: Hybrid Threats and Instrumentalisation as the Evolution of Securitisation in Migration Management', 8 European Papers 2 (2023) 561-578.
[1191] Lucas Rasche, 'The instrumentalisation of migration – how should the EU respond?', Policy Paper: Visions for Europe, Hertie School (16 December 2022).
[1192] Moreno-Lax, 'The "Crisification" of Migration Law' (n 47) 23.
[1193] Anon, ''Illegal Criminals Invading': Securitising Asylum-Seekers in Australia and the US', E-International Relations (12 September 2020) 1-17 <https://www.e-ir.info/pdf/87528>; expressing doubt on the question what exactly poses a threat in the Mediterranean, Kinacioglu, 'Militarized governance' (n 72) 2431.
[1194] Lutterbeck, 'Policing Migration in the Mediterranean' (n 72) 59-82.

forces such as the navies and warships.[1195] Moreover, NATO's involvement in migration control in the EU indicates the degree of militarisation. NATO's mandate is to guarantee freedom and security by political and military means, i.e. to defend its members from outside threats.[1196] Its collaboration in border control thus casts doubt on the nature of these operations. As Müge Kinacioglu argues, the narratives and framing are used to legitimise the presence of NATO and other military forces.[1197] Labelling migrants as a threat enables militarisation.[1198]

The hybrid threat narrative and instrumentalisation of migrants by Belarus have invoked lively debates about the right of states to react. Scholar Juri Huttunen examined its implications and concluded that the Belarusian acts could, in fact, qualify as the use of force under the UN Charter.[1199] However, the gravity of the situation did not reach the level of an armed attack, possibly triggering self-defence mechanisms under international law.[1200] Putting the regional frameworks to the test, he suggests that states have the possibility to derogate from several human rights obligations according to Article 15 ECHR.[1201] He notes that

> [a] derogation under article 15 ECHR is not to be used lightly. The material condition is the existence of a "time of war" or a "public emergency threatening the life of a nation." While a situation of instrumentalised migration could arguably cross the threshold of an armed conflict under international humanitarian law, it is submitted here that such a situation per

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[1195] Ibid, 64-68; Alesia Ash, 'The Militarization of Mexico's Border and its Impacts on Human Rights', 51 International Journal of Legal Information 1 (2023) 58-68.
[1196] NATO, 'NATO's purpose' (29 May 2024) <https://www.nato.int/cps/en/natohq/topics_68144.htm>.
[1197] Kinacioglu, 'Militarized governance' (n 72) 2430–2433. See also the labelling of Frontex, suggesting that it has a paramilitary role: Daniel Woker, 'Not (yet?) a European Army', the interpreter – Lowy Institute (10 October 2018) <https://www.lowyinstitute.org/the-interpreter/not-yet-european-army>; Oliver Harry Gerson, 'Coast guard or paramilitary force?', D+C (3 February 2018) <https://www.dandc.eu/en/article/european-border-and-coast-guard-agency-frontex-controversial>. Similarly, due to its military structure and personnel, the Inter-American Commission on Human Rights (IACHR) questioned the civilian character of Mexico's National Guard, see Ash, 'The Militarization of Mexico's Border' (n 1195) 62.
[1198] Kinacioglu, 'Militarized governance' (n 72) 2425.
[1199] Juri Huttunen, 'Countering Instrumentalised Migration: The case for Border Closure Through a Derogation under the ECHR', EJIL: Talk! (2 January 2024) <https://www.ejiltalk.org/countering-instrumentalised-migration-the-case-for-border-closure-through-a-derogation-under-the-echr/>.
[1200] Ibid.
[1201] Ibid. Excluding absolute and non-derogable prohibitions such as torture and *non-refoulement*, Article 3 ECHR.

se would not give rise to the notion of a "time of war" under article 15 ECHR. The more appropriate avenue for a derogation would be through a public emergency threatening the life of a nation.[1202]

Huttunen views situations of instrumentalisation in isolation, i.e. situations of a certain intensity, including a narrow geographic frame and identifiable actors (receiving versus sending state), not the 'migration crisis' or the phenomenon of migration as a whole. When suggesting that the emergency clause be triggered, Huttunen expects such a situation to be exceptional and presumably rather short-lived. In the context of migration as a whole, the experience from the borders does not support this view. Quite the opposite, as Albahari's concern about protracted emergencies cited above, the state of exceptionality has become normalcy.

Violeta Moreno-Lax powerfully demonstrates how the recent developments should be interpreted. The groundwork for analysing these issues was previously set, among others, by Giorgio Agamben in his book *State of Exception*,[1203] who critiqued the emergency situation used to legalise violence, and Timothy Snider, warning of the abuse of security narratives to enable state violence, in *Bloodlands* and *On Tyranny*.[1204] In a similar vein, Moreno-Lax highlights that the 'crisis' narrative in the context of migration has evolved into a mode of governance, a tactical choice exploited to legitimise rights violations that prolongs and normalises exceptions.[1205] 'Crisification', according to Moreno-Lax

allows for the targeting of exceptionalism to address specific (unwanted) events. Differently from a state of emergency/exception, which generally applies on a blanket basis to the entire population, 'crisis' can be utilised to circumscribe restrictions and aim them at specific segments (like unauthorised migrants) for (in principle) a limited duration. 'Crisis' mobilises the resources of the state of emergency/exception, but in a selective,

[1202] Ibid.
[1203] Agamben, *Homo Sacer* (n 13); Agamben, *State of Exception* (n 218).
[1204] Snider, *Bloodlands* (n 13); Snider, *On Tyranny* (n 13).
[1205] Moreno-Lax, 'The "Crisification" of Migration Law' (n 47) 11.

focused way, enabling new patterns of action or justifying the continuation of (dubious, though) established modalities.[1206]

These modalities include several practices that institutionalise violations, such as pushbacks and detention,[1207] yet not as a temporary emergency reaction but, most importantly, as a permanent political strategy against a specific group.[1208] Moreno-Lax rightly claims that '[t]he warlike conceptualisation allowed for the adoption of highly restrictive measures'.[1209] In these cases, the states abuse the war narrative to enact certain policies while simultaneously dehumanising migrants to mere objects of warfare. Mann's theory on border crimes as crimes against humanity pinpoints how the weaponisation of migrants violates their dignity, which Article 7 should protect.[1210] It demonstrates that crimes against migrants show a combination of violations. The direct-structural violence overlap, as well as the dehumanising effect of degrading human beings to objects.

In sum, the migration-specific circumstances exhibit several elements indicating the relevance as a conflict-setting. The sections below consider the 'migration crisis' under the framework of IHL and PCS, emphasising the proximity between the migration context and dimensions of (armed) conflict.

2.2.3.1 The 'Migration Crisis' as a Structural and Protracted Social Conflict

Considering the 'migration crisis' as a conflict reveals several elements of needs-based struggles from the group's perspective. It further exhibits political and governance-related matters that have become systemic. Rubenstein's concept of structural conflict underscores

[1206] Ibid, 3 (footnotes omitted).
[1207] See Agamben, *Homo Sacer* (n 13) 170 ('The Camp as Paradigm').
[1208] Moreno-Lax, 'The "Crisification" of Migration Law' (n 47) 24.
[1209] Ibid, 22.
[1210] See Chapter II at 4.5.

this aspect in the context of migration. It provides the link to the design behind the system that is not a result of failure, but a product of the structure *designed* to create violence. The 'crisis' setting also involves a political-social conflict between states and migrants and between migrants and host communities. Moreover, within states, the topic of migration has created deep political polarisation.[1211]

Several scholars have further highlighted that various global political conflict situations have emerged from the Covid-19 pandemic.[1212] The pandemic has unveiled the deep political and social tension arising from immigration. For instance, Omar Grech argues that suspending basic human rights during the pandemic raises concern about whether states are prompted 'to abuse more frequently fundamental rights, especially with reference to migrants and asylum seekers'.[1213] Grech further warns that

> [i]f in the post-pandemic phase these inequalities are not addressed or are even exacerbated, the risks of a "*war between the poor*" in the form of conflict between the worst-hit locals and the migrant communities, will become more likely.[1214]

The incompatibility of objectives becomes more evident when the 'migration crisis' is viewed from all perspectives. Health and economic considerations between migrant communities and host communities create a deep division with a high potential for escalation. Although both groups have the same needs, the governments fail to provide them. Often, host communities blame migrant communities, and political and social conflict arises.[1215] From the perspective of the migrants-government-relation as two conflicting parties, Azar's PSC theory becomes even more relevant. The incompatibility of

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[1211] Peace Direct, 'Migration & Peacebuilding: Analysis and Recommendations from a Global Consultation, Exploring How Peacebuilding and Migration Intersect' (2022) 27.
[1212] The contributions 'Part II: Global political conflicts after the pandemic' in Rubenstein and Simmons, *Conflict Resolution after the Pandemic* (n 1102).
[1213] Grech, 'Migration and the COVID-19 pandemic' (n 1102) 47.
[1214] Ibid, 47 (emphasis added).
[1215] Ibid, 48 (manifested in the narrative 'our citizens first').

goals may stem from the same needs. Migrants are predominantly fleeing insecure environments, seeking physical or economic safety and security elsewhere.[1216] States also seek security on their territory, as the security and defence narrative shows. Both parties primarily have security needs. However, the conflict erupts from the incompatibility of the means to achieve the desired security. It appears irreconcilable when migrants seek physical security by entering the state, seeking asylum, and requiring access to political participation and development needs, and states seek to exclude migrants because they are framed as the embodiment of insecurity and threat.[1217]

According to PSC theory, this form of conflict may show highly intense violence, but even if not, it can erupt at any point from the protracted struggle for these needs.[1218] The four components – security, development, political access, and identity needs – which migrants seek by trying to access the asylum system are met with violence and exclusion by the states, who struggle for similar needs, even if these are not human-rights-based but appear rather populist and nationalist. And yet, populist needs appear as indicative of the opposing identity needs of the state and its citizens, often fearing cultural losses, which creates an additional reason for conflict and highlights the (socio-ethnic) identity component in PSC theory.[1219]

One presumed difference between the current migration 'conflict' and the basics of the early PSC theory is the capacity question. However, fragility and incompetence are determining elements in Azar's early theory.[1220] The universality of basic needs, such as

[1216] Johanna Mannergren Selimovic, 'Challenging the 'Here' and 'There' of Peace and Conflict Research: Migrants' Encounters with Streams of Violence and Streams of Peace', 16 Journal of Intervention and Statebuilding 5 (2022) 586.
[1217] Innes, 'Human Mobility and Security' (n 211) 174.
[1218] Peace Direct, 'Migration & Peacebuilding' (n 1211) 27, citing Fady Traore 'tensions that can degenerate into conflicts'.
[1219] Innes, 'Human Mobility and Security' (n 211) 174.
[1220] Azar, *The Management of Protracted Social Conflict* (n 65) 12.

security, also applies to wealthy states governed by dominant groups who fail to include marginalised groups despite sufficient resources.[1221] As highlighted by Grech, who analysed the Northern Ireland conflict, states exploit their asymmetrical power vis-à-vis less powerful groups to resolve the emerging needs-based conflict.[1222] Moreover, it appears that wealthy, functioning states rather *create* the narrative of incapacity, and fail to substantiate the claim with facts.[1223] In the migration context, not only the security threat rhetoric but also the narrative that states are incapable of handling, i.e. lack the capacity to cope with the high migration influx, has been firmly anchored in the debate.[1224]

However, overwhelmed asylum systems require stronger responsibility sharing, particularly with smaller or first-entry states.[1225] They do not justify severe violations of fundamental rights contrary to international law. Furthermore, as argued by Moreno-Lax, the emergency narrative that legalises and institutionalises violence is a deliberate choice. The deliberate and intentional nature of these choices is grounds for arguing that the requirements of crimes against humanity are met. The structural violence embedded in the protracted social conflict, as well as the consciously prolonged border crisis, becomes part and parcel of the crimes. By adopting restrictive laws and policies and upholding the violations with impunity, as proposed earlier, the violence becomes 'nested' into the migration system as a whole, indicating the manifestation of a structural conflict, as proposed by Rubenstein. It is precisely the state's capacity, the tactical decisions, and the

[1221] Ibid, 10-11.
[1222] Grech, *Human Rights and the Northern Ireland Conflict* (n 166).
[1223] Regional Information Centre for Western Europe, 'Migration to the EU: facts, not perceptions', United Nations (14 December 2024).
[1224] Lorena Stella Martini and Tarek Megerisi, 'Road to Nowhere: Why Europe's Border Externalisation Is a Dead End', European Council on Foreign Relations: Policy Brief (December 2023) 2 and 30.
[1225] Catherine Phuong, 'Identifying States' Responsibilities towards Refugees and Asylum Seekers', European Society of International Law, Conference Paper: International Law: Contemporary Problems, ESIL Research Forum (2005) 7; Jean-François Durieux and Jane McAdam, 'Non-Refoulement through Time: The Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies', 16 International Journal of Refugee Law 1 (2004) 4-24.

deliberate policies that create the space for (international) criminal law within this context. However, under IHL/ICL, the 'migration crisis' may not cross the threshold to an armed conflict, although instances of erupted violence have also occurred, as shown in the next section.

2.2.3.2 The 'Migration Crisis' as an Armed Conflict Under IHL/ICL

Whereas conflict studies permit analysing the root causes and consequences of conflict as well as reconceptualising the 'migration crisis' as a dimension of it, defining a conflict under international law is less flexible. It clearly requires the armed fighting of two or more groups to internationalise tensions and riots.[1226] The groups must show a level of organisation, as held by the ICTY and the ICC.[1227] Due to a lack of organisation, migrants may not be considered a 'party' under international law. They do not follow a command structure nor are sufficiently organised to engage in the conflict as an opposing party,[1228] they rather appear as a randomly aggregated community of fate. Although they share common objectives and defining characteristics that may qualify them as a population under Article 7 or even an identifiable group according to the crime of persecution,[1229] they lack an internal structure and do not organise themselves intentionally.

One exception may be the circumstances leading to the case of *N.D. and N.T. v. Spain* before the ECtHR.[1230] Migrants united as a group of around 2000 persons and organised to cross the border all at the same time to confront the Moroccan and Spanish border guards,

[1226] See for the exception of one-sided conflict such as occupation *supra* at 2.2.1.
[1227] *Tadić* (Judgment) (n 1) para 562; *Limaj et al.* (Judgment) (n 33) para 84.
[1228] Bartels, 'The Classification of Armed Conflicts' (n 91) 605. For a third state as the party in the situation of instrumentalisation, see above Huttunen, 'Countering Instrumentalised Migration' (n 1199).
[1229] Detailed in Chapter II.
[1230] *N.D. and N.T. v. Spain* (Judgment) GC, ECtHR Application Nos 8675/15 and 8697/15 (13 February 2020).

hoping to outweigh the state by their number.[1231] The excessive counterforce by the border guards led to the dispersion of the group within a few hours. The ECtHR held that the group 'create[d] a clearly disruptive situation which is difficult to control and endangers public safety',[1232] arguing that they engaged in 'culpable conduct'.[1233] This act of empowerment to confront the border may primarily be considered a form of 'insurgency' by migrants against the state's exclusion. Yet, it may also indicate the sheer asymmetry of the conflict. The state was armed with weapons, technology, and resources. The migrants were 'armed' with only their bodies, vulnerability,[1234] and fundamental rights. Prior to the 'storming'[1235] of the border, according to a report by Amnesty International, the Moroccan police had repeatedly destroyed the migrants' personal belongings, burnt down the informal camps, and cut off the water supply, rendering their situation desperate in Marocco and resulting in the choice to march to the border towards Spanish territory.[1236]

The Grand Chamber held that the migrants deliberately took advantage of their large numbers and used force.[1237] Lacking material resources, migrants possessed no weapons or objects beyond the sheer size of their group. Armed fighting must not be classified according to the technological quality of the weapons used; sticks, stones, or fire could qualify.[1238] In this unique case, the group of migrants appeared to be organised, following a structure and possibly receiving commands from selected internal leaders. If it was accepted that their bodies exerted force, as the Court ruled, it could be argued that armed fighting took place, yet only the states were armed with 'regular' weapons. Since single

[1231] Ibid, para 208.
[1232] Ibid, para 201.
[1233] Ibid, para 208-231.
[1234] Samira Akbarian, *Zivilier Ungehorsam als Verfassungsinterpretation* (Civil Disobedience as Constitutional Interpretation) (Mohr Siebeck 2023), describes vulnerability used as a tool by the so-called climate stickers to disrupt traffic.
[1235] *N.D. and N.T. v. Spain* (Judgment) (n 1230) para 231.
[1236] AI, 'Morocco: "They beat him in the head"' (n 442) 26-28.
[1237] *N.D. and N.T. v. Spain* (Judgment) (n 1230) para 208.
[1238] UCDP, 'Definitions, sources and methods' (n 1149) 3.

outbursts of violence constitute riots or insurgencies, the circumstances nevertheless do not qualify as a conflict under international law. Yet, if these random moments of organisation began repeating, regional conflicts between migrants and the respective state would be thinkable and possibly trigger the rules of IHL.

Concurrently, this example does not seek to provide evidence that a conflict under international law exists and that the rules of IHL currently apply. Quite the opposite, this thesis is based on the premise that the crimes are committed during peacetime. However, these comparisons assist in sensitising the Prosecutor to the proximity between the migration context and dimensions of conflict, thereby urging the opening of PE, similar to the Situation in the Philippines. As highlighted, the PTC's authorisation decision in this case sheds light on the circumstances of a 'one-sided war.' In the Philippines, the drug users are not an organised group, nor are they armed to oppose the government. The Philippine government nonetheless argues that law enforcement acted in self-defence, which appears as misusing and abusing the security narrative to kill drug users with impunity.[1239]

Striking similarities exist in the migration context. Migrants are pushed back and left to die based on the security threat paradigm. If they reach the state's territory, they are registered and kept in detention centres under full control. The Philippines has officially declared a war on drugs, resulting in labelling and eventually taking the lives of drug users. While the tensions discernible in the migration context may not rise to an undeclared war, as Di Cesare contends, the language used, the deep social and political division, and the states' militarised measures strongly signal a targeting of unwanted migration as an opposing party. In particular, land and sea migration is portrayed and stigmatised as the adversary

[1239] Authorisation Decision Philippines (n 46) para 34.

within this dimension of conflict. In both circumstances (border violence and the war on drugs in the Philippines), states have created narratives that result in allegedly justified and pre-emptive self-defence.[1240] The killing of drug users is certainly not justified. However, as shown in the field, several measures against migrants are not justified under international law either.[1241]

Considering the current context of migration as a conflict scenario under international law concretely is not justified as it does not fulfil the restrictive elements of an armed conflict under IHL. The purpose of the concept of 'armed conflict' supports this conclusion. As Bartels notes, its insertion specifically aimed to prevent politicising conflict and criticised the prosecution before the SCSL for implying that political and constitutional processes would establish control and thereby classify conflict as international or non-international.[1242] Therefore, the concept's politicisation must be considered a serious concern. Yet, the purpose of this thesis is precisely to disconnect crimes against humanity from the concept of armed conflict. So long as the ICC system focuses its attention unduly on conflict-related settings and associates a higher degree of severity in armed conflict, using the concept serves to highlight that the context of armed conflict should not be used as the denominator for crimes against humanity in general.

[1240] Terry D. Gill, 'The Temporal Dimension of Self-Defense: Anticipation, Pre-emption, Prevention and Immediacy' in Michael Schmitt and Jelena Pejic (eds), *International Law and Armed Conflict: Exploring the Faultlines* (Brill 2007) 113-115.
[1241] See detailed, Chapter II.
[1242] Bartels, 'The Classification of Armed Conflicts' (n 91) 618.

2.2.4. Concluding Remarks

Available information related to border violence and the state-migrant relationship suggests that a social and political conflict exists. Azar's PSC theory, describing the incompatibility of objectives and the protracted deprivation of basic needs of one specific minority group, is particularly relevant. It appears that migrants struggle for security, access to development, and participation in the destination states. This struggle is further connected to the identity of the excluded group facing repression by the state, as migrants are framed as threats and dehumanised. As a result, migrants' needs clash with identity and security needs of the destination states. The conflict, however, appears as deeply engrained in societal interests and systemic instead of materialising in armed conflict with active fighting or physical clashes between the opposing groups. Rubenstein's concept of structural conflict provides the missing link to the larger system, highlighting that it inherently produces such violence and is *designed* to maintain authority and control over the group(s) deprived of their needs.[1243] The power asymmetry and control of one over the other group is particularly visible in the phenomenon of migration towards the Global North.

Within the meaning of PCS, it can be concluded that the 'migration crisis' constitutes a dimension of conflict. However, caution must be practiced, given the risk of politicising the concept of conflict under IHL, where the notion of 'armed conflict' was precisely introduced to mitigate such risk. The 'migration crisis' should, therefore, not be forced to fit the parameters of conflict under IHL, but instead, viewing it under the framework serves

[1243] Rubenstein, *Resolving Structural Conflicts* (n 65) 10.

two valuable aspects. First, it gives rise to concern that states are, in fact, politicising the war and conflict narrative to militarise their borders, circumvent responsibility, and deprive migrants of their fundamental rights, which should be exposed and counteracted. And second, scrutinising the IHL and PCS elements present in the migration context and comparing them to the authorised investigation in the Philippines may elicit a more receptive position of the ICC bodies towards the protracted violence against migrants as crimes against humanity since the 'war on drugs' and the alleged 'war on migrants' present striking similarities.

2.3. Synthesising the Approaches

Given the fact that there are several avenues to confront the persistent impunity, it is essential to synthesise the approaches. The first approach builds upon the findings of Chapter IV, that crimes against humanity in peacetime are largely disregarded. The first approach thus provides arguments to disconnect the crimes from their historical, influential connection to armed conflict more rigorously in practice since the normative standard no longer postulates such a link. Moreover, the proposal emphasised that the historical connection to conflict further impedes prosecutions in the specific context of migration. It thus formulated an interpretation of the 'policy of toleration' based on structural impunity, which generates multi-layered criminality connected to migration governance, deliberately used by states to masquerade and circumvent responsibility.[1244]

Implementing these suggestions establishes legal admissibility of migrant abuses and enhances a better understanding and more balanced prosecution of crimes against

[1244] For a wider analysis of masquerades in politics, see Itamar Mann, 'Border Masquerades', 39 Berkeley Journal of International Law 1 (2021) 127-152.

humanity in peacetime. In particular, it offers an interpretation for when traditionally non-criminal structural violence, embedded into laws and policies, amounts to crimes against humanity. Applying this approach in practice would impact the OTP's current case selection and may result in opening PE. It argues that crimes against humanity are *prima facie* committed, for which the ICC is the correct forum. Recognising that it is sufficiently probable that these crimes are being committed translates to the necessary evidentiary standard, i.e. they 'appear to be committed,' opening the space for thorough analysis and examination by the OTP.

The second approach asserts that even if a connection to an armed conflict was required because the perception prevails that conflict-related crimes are more severe, the 'migration crisis' can be reframed as a dimension of conflict showing significant similarities with the already authorised investigation into the Situation in the Philippines. While the strict criteria of IHL/ICL do not apply, PCS offer valuable alternatives to understanding the concept of conflict. Several peace and conflict scholars have outlined causes, nature, and possible avenues for resolving conflicts. Two theories are particularly useful for examining the context of migration.

First, Edward Azar's PSC theory, focusing on the struggles of groups over different needs, exposes that the dominant groups (states) deprive less powerful groups (migrants) of their needs for 'security, recognition and acceptance, fair access to political institutions and economic participation'.[1245] Applying his notion strongly signals a political and social conflict with a concerning level of direct and structural violence, in particular, because migrants are systematically deprived of their fundamental rights. The danger of the current situation lies in the potential of the manifestation and normalisation of this violence as

[1245] Azar, 'The Analysis and Management of Protracted Social Conflict' (n 1165) 93.

structural and cultural violence, as suggested by Galtung.[1246] Second, Rubenstein's concept of structural conflict builds upon the deeply engrained, systemic violence. It provides the framework for understanding the complexity of several interlinked systems designed to maintain themselves and to generate violence. Additionally, it confirms the overlapping root causes of such conflicts that exist simultaneously and requires referencing the system holistically.[1247] It further indicates the degree of intentionality based on the conscious design of the system aimed at maintaining itself.

Overall, this approach applies conflict analysis and resolution models to ICL to achieve a fuller understanding of the current debate in the migration context. It further offers a link between the 'structural turn'[1248] in PCS and structural violence under ICL, which is thus far insufficiently recognised. The objective is not to determine the 'migration crisis' as a conflict under IHL/ICL but to emphasise that conflict settings are dynamic processes that change over time and may escalate at any given time. The intention is to sensitise prosecutors in the field of ICL to violence engrained in the structure that may fall short of conflict under IHL but is no less severe. The severity stems from the systematic violation of rights, such as the right to life, liberty, and physical integrity.

Although under IHL, these alleged crimes would lie outside the purview of the framework, they are recognised in other pertinent studies, including PCS. Since the crimes nonetheless appear to fulfil the requirements of codified crimes, i.e. crimes against humanity in peacetime, this approach addresses the severity of the alleged crimes as an essential threshold in ICL. The decisive barrier to applying ICL in this realm may be the belief that violence that is structural and systemic is not sufficiently severe to trigger international

[1246] Galtung, 'Cultural Violence' (n 6) 302. See also Agamben, *Homo Sacer* (n 13) 170, using the example of the concentration camps to describe the normalisation and institutionalisation of the violence.
[1247] Rubenstein, *Resolving Structural Conflicts* (n 65) 96.
[1248] Ibid, 2.

attention.[1249] This thesis already offered reflections on the discriminatory deprivation of fundamental rights of migrants as severe acts relevant under Article 7, particularly through their cumulative effect.[1250] Considering further obstacles to investigating these crimes as peacetime violence, the approach aims to augment the OTP's perceived severity of the migration-related crimes, overall.

In procedural terms, this approach may impact the OTP's assessment at the crossroads to initiating an investigation.[1251] If the Prosecutor believes that the most serious crimes are committed within conflict-like settings – which is discernible from its prioritisation practice[1252] – acknowledging that the migration context qualifies as a conflict according to PCS and moves at the edge of conflict under IHL/ICL may incentivise the Prosecutor. The Situation in the Philippines has provided a solid legal basis for similar arguments in the migratory context, understanding the government's campaign against Philippine civilian drug users as a 'war on drugs.' In a similar vein, the second approach would assist the Prosecutor's arguments, for instance, for a request for authorisation of an investigation according to Article 15 (3) ICC Statute, arguing that the state is abusing its power based on a conflict-like narrative targeting migrants. The Prosecutor can thus argue that – under the pretext of this 'conflict' – the state enables and legitimises violence that amounts to crimes against humanity.

As noted above, the inhibiting factors must be addressed complementarily to bring about change in this field. Looking at the approaches separately may not suffice to sustainably influence the OTP's *modus operandi*. Both approaches can inform the OTP's interpretation

[1249] Kalpouzos and Mann, 'Banal crimes against humanity' (n 5). With the exception of apartheid indicating the level of systemic oppression.
[1250] See Chapter II at 4.2.2.1.
[1251] Informing admissibility criteria such as complementarity, gravity, and interest of justice. OTP, PPPE (n 123) paras 5-9.
[1252] See Chapter IV at 2.2.

of peacetime crimes against humanity more broadly; however, only by applying the dual strategy can the barriers to prosecuting the crimes be overcome. The first approach establishes legal admissibility, providing normative clarity on the connection to conflict and defining the degree of state power abuse deliberately maintained by impunity. The second approach assists in proceeding, surmounting the erroneous perception that the crimes are not sufficiently severe. This would lead to a new, integrated conception of prosecuting crimes against migrants.

3. Conclusion

This chapter advanced a refined doctrinal understanding of the policy element in Article 7 and reconceptualises the migration context through the lens of conflict theory, offering a dual strategy for prosecutorial engagement with crimes that have remained under-addressed in ICL practice. Key findings of previous chapters informed this strategy and resulted in developing two practical approaches based on normative arguments. Applying them to the ICC's prosecution practice could be a starting point for confronting the impunity for crimes against migrants.

The first approach advocated disconnecting crimes against humanity from conflict by correcting erroneous narratives elicited by controversial views on the history of crimes against humanity, especially the war *nexus*. It argued for a historical interpretation of crimes against humanity, favouring a wider application based on the *lex desiderata*. Given that the abuse of state authority represents the (original) rationale of crimes against humanity most adequately, contemporary forms of misuse of state power, such as the intentional use of systematic impunity, i.e. structural impunity, appear as a tool to enable

and encourage further crimes in the context of migration. The approach thus offered a link to structural violence that exceeds the threshold to criminality, by suggesting that when states engage in previous endangering behaviour, creating a setting in which unlawful acts are enabled, there are strong indicators for a multi-layered system of criminality.

The Australian case serves as an exemplary case study. Australian transfer and offshore policies were considered to be in conflict with international law.[1253] The ensuing detention of hundreds of asylum-seekers in the islands' centres under inhumane conditions satisfied the constitutive elements of severe deprivation of physical liberty according to Article 7 (1)(e) by the OTP.[1254] Australia further deliberately failed to address the violations and/or initiate investigations into the ill-treatment, qualifying as the policy of toleration. To abide by the exceptionality and lift non-criminal structural violence to crimes against humanity, the chapter thus developed three layers of micro-macro-criminality. Intercepting boat arrivals and transferring them to the offshore processing centres could be considered previous endangering behaviour and triggers the duty to act.[1255] The deliberate inaction and purposely created impunity consciously encouraged further crimes. Applying this approach in practice would impact the OTP's assessment at the PE stage and could lead to the confirmation that these crimes, in fact, do 'appear to' be committed.

Moreover, as argued in previous chapters, the ICC bodies assume the severity of the crimes when conflict-like circumstances exist. An analysis of the Situation in the Philippines supported the view as a unique peacetime situation. Despite this, the 'war on drugs' narrative may contribute to the perception that it also resembles a conflict setting. Drawing from PCS, the second approach suggested reframing the 'migration crisis' as a conflict-like

[1253] Holvoet, 'The Prototype of Passively Encouraged Crimes' (n 262).
[1254] ICC-OTP, Report on Preliminary Examinations (n 50) 46-48.
[1255] See *supra* 2.1.3.

scenario relevant under international law. This approach emphasised the design behind the state's violence as a structural and protracted social and political conflict, deliberately created to justify militarised measures. It underscored the relevance of (international) criminal law in this realm due to the non-accidental character of the systemic violence against migrants, implying intent and knowledge (*mens rea*).

This approach argued that the Prosecutor may recognise that *even if* a *nexus* to conflict was required, the 'migration crisis' already qualifies based on prominent peace and conflict theories, but also shows overlapping elements with IHL/ICL. IHL, in the strict sense, does not apply, although individual circumstances, such as the facts leading to the *N.D. and N.T.* judgment before the ECtHR and the Belarusian so-called instrumentalisation of migrants, already satisfy several elements of conflict even under IHL. The approach nonetheless does not seek to argue that the 'migration crisis' amounts to an armed conflict under ICL but aims to sensitise the Prosecutor to the proximity between the 'migration crisis' and other forms of protracted and systemic conflicts.

Applying only the first approach risks that the OTP's engagement with crimes against migrants terminates after the PE stage. Applying only the second approach is not productive, as it misses the previously developed arguments that crimes against humanity must be disconnected from the conflict narrative first to understand their appearance in peacetime more fully. The chapter thus concluded with a comprehensive and practical synthesis of the two approaches, offering a dual strategy based on a novel conception of border crimes as crimes against humanity.

Although these findings are drawn from the concrete reality of migrants, the concept of crimes against humanity warrants further engagement. Several normative and interpretative areas remain unclear or are misconceived. The following and last chapter offers a more

accurate conception by reimagining its current understanding in light of the findings of this thesis. It aims to offer an additional synthesis of the findings into one tangible and refined concept, applicable beyond the phenomenon of migration.

Chapter VI: Reimagining Crimes Against Humanity

A 'crime against humanity' is a chameleon like creature. We all have a sense of what it is but find it hard to be specific about its elements.[1256]

1. Introduction

The concept of crimes against humanity has preoccupied courts and scholars since its inception. Compelling works on its philosophical underpinnings, conceptual framework, and the most appropriate legal interpretation of its constitutive elements continue to shape its understanding.[1257] These efforts have significantly advanced a comprehensive view of the legal interests the norm seeks to protect and provided guidance on its most adequate application to contemporary contexts. Rather than proposing a wholly new theory, this chapter reframes the existing concept of crimes against humanity through the lens of 'reimagination,' drawing on historical, normative, and jurisprudential insights.

[1256] Robert Dubler, 'What's in a Name? A Theory of Crimes Against Humanity', Australian International Law Journal 15 (2008) 106. See also, Van Den Herik and Van Sliedregt, 'Removing or Reincarnating the Policy Requirement' (n 148) 825 ('a chameleonic crime that can change colour over time, since it does not possess an unambiguous conceptual character.'); Moruf O. Mimiko *et al.*, 'Unresolved Jurisprudence of Crime against Humanity under Article 7 of the Rome Statute of the International Criminal Court', Beijing Law Review 7 (2016) 420-429.

[1257] See *supra* (n 13).

It emphasises that the concept is well formulated and developed and focuses on its extraordinary potential for the protection of civilians, above all, in peacetime. The need for this additional contribution stems from the persistent impunity for state-led structural violence in peacetime – such as the violence against migrants. The chapter thus proposes a recalibration of how crimes against humanity are interpreted and applied in legal practice to ensure that this form of violence falls within the Court's purview. This effort is grounded on the Rome Statute's text and the protection gaps revealed in the current jurisprudence. This reimagined conception synthesises the two practical approaches developed in Chapter V – detaching crimes against humanity from conflict, and reframing the 'migration crisis' as a conflict-like scenario – into one unified framework.

This chapter thus proposes *reimagining* the concept of crimes against humanity by returning to its original idea in thought and practice. Crimes against humanity presented an exceptional notion of a morally influenced defence mechanism against abusive states at all times. Piercing state sovereignty for the benefit of civilians, particularly persecuted minorities, was groundbreaking. However, its full scope was denied.[1258] The chapter offers a normatively grounded process for 'returning' to a desired law that already existed but did not come to full fruition. It draws from the works of other authors who have developed models of rethinking and reimagining when contemporary circumstances expose deficiencies and existing concepts require adaptation.[1259]

Moreover, this research has frequently articulated that the crime of persecution, i.e. the severe and discriminatory deprivation of fundamental rights contrary to international law, plays a critical role in the context of migration. It appears as the blueprint of crimes against migrants, yet its precise interpretation under Article 7 (1)(h) warrants further research,

[1258] As the war *nexus* limited the concept's scope, see in detail Chapter III at 3.2.
[1259] E.g., Drumbl, *Reimagining Child Soldiers* (n 58).

especially for peacetime contexts. This chapter offers a brief reflection on this crime, highlighting a gap in research. The chapter outlines open questions about the crime's essence and purpose and suggests engaging in a future project to complement the present research.

The concept of crimes against humanity is reimagined as a notion that seeks to criminalise systems of structural violence, systemic oppression, and the severe deprivation of fundamental rights that exceed the threshold to criminality. This effort goes beyond serving the Prosecutor to open preliminary examinations into the crimes against migrants. It is a legal and moral imperative and must have broader implications for crimes committed beyond conflict to ensure that ICL remains responsive to modern-day atrocities.

2. Reimagining Crimes Against Humanity

Reimagining ideas and concepts is an important endeavour.[1260] Certain concepts may have served a crucial role at a time but have become outdated, at best, or abused for malicious purposes, at worst. Reimagining such concepts fulfils the objective of understanding the world better, as it has changed, and provides a more accurate framework to address contemporary challenges. The need to reimagine an idea, notion, or concept is often born out of concern, deficiency, and dissatisfaction.[1261] It is further grounded in the belief that change and reform are not only possible and desirable, but also necessary.[1262]

Although this desire may often result from revealing a deficiency in the context of one specific phenomenon, the biggest concern is that reimagining processes are then forced to

[1260] See *infra* at 2.2.
[1261] For instance, Janet Newman, 'The Political Work of Reimagination' in Davina Cooper *et al.* (eds), *Reimagining the State Theoretical Challenges and Transformative Possibilities* (Routledge 2019) 20.
[1262] Ibid, 20; Drumbl, *Reimagining Child Soldiers* (n 58) 2.

fit the specific circumstances. Instead, phenomena exist; the concept, however, is created 'from sense impressions, percept, or even fairly complex experiences'.[1263] Logical constructs transform these experiences by generalisation and abstraction.[1264] Forcing the concept to fit the phenomenon is a fallacy; it is to treat the concrete as the abstract.[1265] This must be counteracted by a thorough analysis of the relationship between the concept and the context to which it refers, and which it has thus far failed to capture. Reimagining a concept requires that it holds true for other contexts as well; otherwise, it fails to refine and transform the understanding of the abstract. Such a process is thus only meaningful when it serves the improvement beyond the individual phenomenon. In this endeavour, although arguments are drawn from a concrete reality, they seek to inform the understanding of a broader question.

The arguments in this thesis are drawn from the context of migration as the concrete reality. This reality provides the phenomenological circumstances, in the present case, migration towards the Global North, which is met with violence and exclusion and may constitute crimes against humanity. The in-depth analysis of this phenomenon yielded findings that can be transformed into more general statements about the concept of crimes against humanity, in particular when committed outside of armed conflict. Based on this process and the findings, the thesis proposes one way in which the understanding of crimes against humanity could be improved overall.

[1263] Abhik Ghose, 'Research Framework: Theory and Concepts' in *Designing of Research* (IGNOU 2017) 62-63.
[1264] Ibid, 63.
[1265] Ibid.

2.1. Concepts of Rethinking and Reimagining

There seems to be a trend of 'rethinking', 'reimagining', and 'reconceptualising' certain ideas and concepts, including in the realm of ICL.[1266] Whereas this highlights that reality progresses and changes, resulting in the need to modify the theories and concepts that seek to describe them, it also indicates the desire for a better and more nuanced understanding of certain phenomena. 'Rethinking' and 'reimagining' processes often divert to 'revisiting' questions that have presumably already been answered.[1267] This entails replying to these questions again, but from a different perspective or with a different methodological approach,[1268] transforming practices, politics, or law as responses to given phenomena.[1269] It requires challenging how these phenomena were studied in the first place and what novel methods and new data are available to comprehend complex issues more adequately.[1270]

Often, these processes seek to propose a framework for the future, going beyond mere descriptive value and instead enhancing specific (but abstract) values such as 'security' or 'humaneness'.[1271] Weber *et al.*, for instance, suggest a 'preferred future' of border control, criticising the current concept and policies as deficient, and argue for relaxed borders to meet the challenges and potential of globalisation, in which they inherently find value.[1272]

[1266] *Inter alia*: Drumbl, *Reimagining Child Soldiers* (n 58); Moyn, 'From Aggression to Atrocity' (n 574) 341-360; Erica Chenoweth and Adria Lawrence (eds), *Rethinking Violence: States and Non-State Actors in Conflict* (MIT Press 2010); Carsten Stahn, 'Beyond the Status Quo: Rethinking International Criminal Law' in Stahn, *A Critical Introduction* (n 633); Cooper *et al.*, *Reimagining the State* (n 1261); Timonthy William Waters, *Boxing Pandora: Rethinking Borders, States, and Secession in a Democratic World* (Yale UP 2020); Jacobs, *Rethinking Security* (n 211); Bruce Western (guest ed), 'Reimagining Justice: The Challenges of Violence & Punitive Excess', 151 Daedalus 1 (2022); Leanne Weber (ed), *Rethinking Border Control for a Globalizing World: A Preferred Future* (Routledge 2015); Katharina Natter, 'Rethinking immigration policy theory beyond 'Western liberal democracies',' 6 Comparative Migration Studies 4 (2018) 1-21; ESPMI Network, 2 Refugee Review: Re-conceptualizing Refugees and Forced Migration in the 21st Century 1 (2015); Terje Einarsen, 'Reconceptualising International Crimes' in *The Concept of Universal Crimes in International Law* (FICHL Publication Series No. 14, 2012) 135-286.

[1267] Chenoweth and Lawrence, *Rethinking Violence* (n 1226) 3.

[1268] Ibid.

[1269] For instance, Cooper *et al.*, *Reimagining the State* (n 1261).

[1270] Chenoweth and Lawrence, *Rethinking Violence* (n 1226) 3.

[1271] Generally, Weber, *Rethinking Border Control for a Globalizing World* (n 1266) xx. Concretely, Atadjanov, *Humanness as a Protected Legal Interest* (n 13).

[1272] Ibid.

Chenoweth *et al.* suggest rethinking 'violence' by deconstructing the dichotomy between 'present or absent' violence.[1273] They complement deconstructing the *status quo* by introducing a different lens on violence overall, namely its dynamic nature instead of static factors determining it, implicitly stressing the value of non-violence/peace.[1274]

Rethinking and reimagining are similar approaches, as Cooper *et al.* explore. The reimagination process 'involves deliberate practices, interpreting, cutting and connection-drawing, as alternative histories and futures get posited'.[1275] Compared to rethinking, which is rather aimed at novel future thinking, reimagining is 'often associated with hopes and longings for better futures or nostalgic returns to romanticised pasts'.[1276] Although the authors criticise the reduction to nostalgia, this thesis precisely engages in reimagining because it recalls a past concept as a lost value and missed opportunity to mind.[1277]

For Cooper *et al.*, reimagining the 'state' involves addressing the past, future, as well as the present; hence it 'calls forth present-day action'.[1278] The scholars' main objective is to reduce harm and injury done by the state. This is strongly reminiscent of Lauterpacht's efforts to deconstruct the state as an abstract entity.[1279] Without this groundbreaking effort, individual criminal responsibility would not have existed at Nuremberg, which profoundly transformed thinking about crimes and accountability. In a way, Lauterpacht and the other exiled lawyers also reimagined the state. At the same time, the concept of individual criminal responsibility, established by the destruction of the concept of the state and accepted as the new paradigm in ICL, fails to positively transform liability for *all* contexts. In Mark Drumbl's renowned book on child soldiers, he challenges the concept related to

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[1273] Chenoweth and Lawrence, *Rethinking Violence* (n 1226) 3-5.
[1274] Ibid, 5-6.
[1275] Cooper *et al.*, *Reimagining the State* (n 1261) 2.
[1276] Ibid, 2.
[1277] Ibid.
[1278] Ibid.
[1279] See *supra* (n 628).

juvenile criminal responsibility.[1280] Drumbl highlights that individual criminal responsibility creates undesired consequences for child soldiers, because the concept of child soldiers is misconceived.[1281] He therefore deconstructs the dichotomous (mis)conception about militarised youth typified as either monsters or helpless victims without agency.[1282] By *reimagining* child soldiers, he proposes a new understanding of the concept that underscores the values of fairness and justice and alleviates the negative consequences in practice.[1283]

These examples emphasise that rethinking and reimagining processes aim to challenge objective conditions, such as criteria meant to determine concepts, legal definitions, acquired facts and possibly faulty conclusions drawn from them. Furthermore, they question the subjective manifestations of these concepts, such as perceptions, misconceptions, beliefs, and possibly prejudice.[1284] This highlights the dual effort necessary to deconstruct concepts as they are manifested objectively and consolidated subjectively.

Although this thesis generally refers to the *concept* of crimes against humanity, reconceptualising it is not necessary.[1285] The concept of crimes against humanity, derived from several compelling theories about the purpose and essence of crimes against humanity, the conception of humanity, and international crimes overall, is well articulated,[1286] although it is often vague and ambiguous and remains in constant flux.

[1280] Drumbl, *Reimagining Child Soldiers* (n 58).
[1281] Ibid, 7-8.
[1282] Ibid.
[1283] Ibid, 212.
[1284] Ibid, 26 ff. For the discussion about concepts and conceptions, see the famous paper, Walter Bryce Gallie, 'Essentially Contested Concepts', 56 Proceedings of the Aristotelian Society 167 (1956). On justice: John Rawls, *A Theory of Justice* (revised ed) (Harvard University Press 1999). On equality: Ronald Dworkin, *Law's Empire* (Harvard University Press 1986).
[1285] Against this view, proposing to reconceptualise, see: Massimo Renzo, 'Crimes against humanity and the limits of international criminal law', 4 Law and Philosophy 31 (2012) 443-476.
[1286] *Inter alia*: Bassiouni, *Crimes Against Humanity* (2011) (n 28); Sadat, *Forging a Convention* (n 13); Sadat, 'The Forgotten Crime' (n 2); Kuschnik, 'Humaneness, Humankind and Crimes Against Humanity' (n 13);

While amending the norm may be(come) necessary, for instance, in the form of explicitly adding certain acts to the list,[1287] the concept underlying the criminalisation of these acts has extraordinary potential.

This thesis aims to reimagine the concept of crimes against humanity rather than redefine or reconceptualise them. This need stems from misconceptions about its historical origin and development, the misinterpretation of certain elements, and inaccurate conclusions drawn from them. Whereas this thesis developed arguments for why these proposed fallacies exist, they remain debatable and highly controversial. What appears uncontroversial is that systematic and widespread violence occurs, and impunity persists; two matters ICL inherently aims to reduce.[1288] The reasons for this should continue to be analysed, and new approaches be developed to address them, yet the general need to bridge the protection gap is evident. Mann articulates the need to 'reimagine and reinterpret international law'[1289] more broadly, which would require a 'historical corrective, a rejection of the traditions that allow such rights to be denied *in reality*'.[1290]

In the following, only one aspect of international law, namely crimes against humanity and some of its underlying historical traditions, is reimagined to refine the view on the existing concept and address the structural and direct violence against migrants, denying them the entitlement and enjoyment of fundamental rights. It draws from experiences and ideas about crimes against migrants as crimes against humanity under ICL and integrates the expertise from PCS, contributing to the 'wider political project'[1291] envisioned by Mann.

Geras, *Crimes Against Humanity: Birth of a Concept* (n 13); Luban, 'A Theory of Crimes Against Humanity' (n 1); Dubler, 'What's in a Name? A Theory of Crimes Against Humanity' (n 1256); Sands, *East West Street* (n 13).

[1287] Notwithstanding that the residual clause in Article 7 (1)(k) is well equipped to respond to new types of atrocities, see Kuschnik, 'Humaneness, Humankind and Crimes Against Humanity' (n 13); MacNeil, *Legality Matters* (n 14); also: *Ongwen* (Judgment) (n 145) paras 2741-2753 punishing forced marriage.

[1288] Preamble of the Rome Statute.

[1289] Mann, 'Border Crimes as Crimes against Humanity' (n 5) 1189.

[1290] Ibid.

[1291] Ibid.

This, in turn, informs a more sophisticated understanding of migration as a phenomenon met with violence and exclusion.[1292] While change is specifically necessary in the context of migration towards the Global North, the proposal must also apply beyond this phenomenon.[1293] It therefore offers a theoretical reframing that serves as a basis for unfolding the full potential of the concept of crimes against humanity for relevant contemporary representations otherwise disregarded. This is intended to facilitate the prosecution of such crimes.

2.2. Reimagining in Light of the *Lex Desiderata* in Law and Practice

One approach to reimagining a legal concept, as Mark Drumbl proposes for the law and policy on child soldiers, is to consider international law developments in their conventional sequences. Traditionally, '*lex desiderata* would become *lex ferenda* which then would concretize into *lex lata* once many traditional actors with international legal personality adopt it as such'.[1294]

As highlighted in Chapter I, this process, slightly modified, can be applied to the concept of crimes against humanity. By following the sequences, the evolutionary path can be traced and the moments when misconceptions and misinterpretations emerged can be uncovered. Reimagining the concept of crimes against humanity in this way directly informs how the OTP might evaluate the policy element, structural impunity, and severity

[1292] For the exclusionary practices, according to migration law and PCS, see Chapter V at 2.2.3. For the philosophical and political underpinnings, see Agamben's works that deal extensively with the exclusion from legal and political protections and oppression, e.g., Agamben, *Homo Sacer* (n 13); Agamben, *State of Exception* (n 218); Giorgio Agamben, *Means Without End: Notes on Politics* (University of Minnesota Press 2000).
[1293] See for a list of neglected situations, Sadat, 'The Forgotten Crime' (n 2) 524-525.
[1294] Drumbl, *Reimagining Child Soldiers* (n 58) 102.

in case selection – enabling recognition of peacetime patterns of abuse that would otherwise fall outside the conventional conflict-based criteria.

To begin with, several essential sections in Chapters II and III examined the *lex lata*, the current law, as codified in Article 7 of the ICC Statute and interpreted by international courts, tribunals, and scholars. Although not all components of crimes against humanity are settled law, the norm provides a stable point of reference for the application to relevant circumstances. Chapter II has turned to that question in detail, setting the foundation for this research by applying the *lex lata* to the context of migration towards the Global North as normatively examined by leading scholars in the field and practically applied in several CSO contributions. It has revealed that despite controversies about the interpretation of certain components of Article 7, it can convincingly be argued that, in several contemporary situations, the violence against migrants *prima facie* qualifies as crimes against humanity.

If this is the case, a proposition supported by the body of research examined in Chapter II, this thesis explored why the crimes against migrants are not prosecuted. It provided several explanations for the existence of conceptions about the crimes that impede the ICC's investigation of the abuses, contributing to the persistent and structurally embedded impunity, as brought forward in Chapters II and IV. In Chapter III of this thesis, the development of crimes against humanity was analysed, underscoring the *lex desiderata* at the time when the criminal concept did not yet exist in positive law. The initial idea of a universal code to protect civilians at all times depicted the desired law. However, the consideration of the insertion of the war *nexus* meant to limit its application and frustrate this aspiration. As a result, the emerging *lex ferenda,* the then-future law, crystallised into adopting the London Charter in 1945, significantly limiting the scope by including the

nexus to war and generating the perception that crimes against humanity are inherently connected to conflict. Although several arguments support the opposite view, this *(mis)perception* percolated throughout the second half of the 20th century and influenced a discussion about the *(mis)conception*, which remains unsettled to date.

After systematically investigating the prosecution practice before the ICC in Chapter IV and demonstrating that impunity prevails on a structural level in the context of migration specifically and in peacetime contexts more broadly, two approaches to facilitate overcoming these barriers were proposed in Chapter V to confront the impunity. The developed dual strategy represents the *desired application* of the law based on corrected erroneous interpretations attached to faulty *perceptions* about crimes against humanity. It challenged how the misperceptions impacted contemporary thinking about and applying crimes against humanity in practice.

In completing the cycle, reimagining crimes against humanity to protect any population at all times from the abusive state authority requires 'returning' to the (unfulfilled) *lex desiderata* proposed by the exiled lawyers prior to the London agreement of 1945. The original concept was designed to cover peacetime mass human rights violations against civilians of any nationality, ethnicity, race, gender, or other identifying attribute by the state that turned against them.[1295] Hence, to counteract the disregard of crimes against migrants as crimes against humanity, it is crucial to revert to the original concept, the *lex desiderata* of a universal code to protect all civilians.[1296] This early version was perfectly designed to capture the crimes, above all, the severe and systematic deprivation of fundamental rights. Interpreting the concept in light of the early conceptualisation would

[1295] Lauterpacht, 'The Grotian Tradition in International Law' (n 39) 51; Irvin-Erickson, 'Hersch Lauterpacht' (n 40) 5.
[1296] Ibid.

reestablish the full protection scope of the current concept of crimes against humanity. Chapter III also emphasised that Article 7 of the Rome Statute, in its wording, reflects this idea, highlighting its potential once more. However, it also revealed that the deeply engrained (mis)perception about crimes against humanity results in the limitation of the potential in reality.

In parallel, the increasing focus of ICL on mass atrocities in recent decades has failed to sufficiently include *peacetime* crimes against humanity. While it is comprehensible that the high number of conflicts has attracted attention, this symbolises the limited view on contemporary forms of crimes under international law. However, the capacity underlying crimes against humanity in the context of peace can be addressed and further developed when the armed conflict-*nexus*-perception is abandoned. The existence and the function of the policy are crucial in this regard. Detaching crimes against humanity from the image of a war-waging state may permit focusing on more covert interplays between macro and micro-criminal contexts. As suggested with the first approach, the policy of toleration may represent a contemporary adaptation of state power abuse, creating and deliberately using structural impunity as part of a larger system generating violence.[1297] This form of impunity thus needs to be imagined as a component of crimes against humanity as part of an ongoing attack, not a result of the unaddressed crimes. To comply with the principle of strict construction in criminal law and the exceptionality of passive behaviour as foreseen in the Elements of Crimes, recognising a state's previous endangering behaviour that enables the direct perpetration of crimes could serve as a qualifier.

Against this background, crimes against humanity can address both direct and structural violence when it exceeds the severity threshold to criminality.[1298] Depending on the

[1297] Rubenstein, *Resolving Structural Conflicts* (n 65) 10.
[1298] Detailed, Chapter IV at 3.2.

circumstances, the threshold may be crossed when the unlawful acts are embedded in systems of institutionalised violence, consciously aiming to further fundamental rights violations and deprivations on a large scale. More precisely, when the structural violence created or maintained by the state through its policies is complemented by acts enlisted in Article 7 (1)(a) to (h) committed by individual perpetrators. The *chapeau* of Article 7 represents the structural dimension of state violence on the macro level. The commission of acts enlisted in the article signals the micro level. When the acts are 'part of' the attack, the severity threshold from non-criminal structural violence to crimes against humanity appears to be crossed. The acts committed on the micro level are then reinforced and maintained by structural impunity. The latter criterion further guarantees that the concept is not overstretched as it requires a third layer of deliberate (passive) behaviour, i.e. the deliberate toleration of crimes consciously aimed at encouraging the attack.

Understanding crimes against humanity in this way addresses a space that currently exists in a legal vacuum. Traditional structural violence remains outside the purview of criminal law, rightly so, when the violence is not part of a larger system of criminality nor shows a certain severity, justifying international intervention. Moreover, as this research has explored, a vacuum exists for acts that *are* criminalised, but prosecutors do not consider them sufficiently severe in their totality. Responsibility is being circumvented by diverting to one or the other argument. Unlawful laws and policies at the macro-level criminality are reduced to non-criminal structural violence, which also fails to consider the two-layered policy with the second one being the deliberate and conscious maintenance and encouragement of the crimes via impunity.[1299] Alternatively, micro-criminal conduct – the individual unlawful acts – is often deemed insufficiently severe when characterised merely

[1299] Such as in the Australian case, see in detail Chapter V at 2.1.

as breaches of human or refugee rights, thereby excluding them from the ambit of crimes against humanity. Such an interpretation, however, fails to account for the cumulative and systematic nature of these deprivations, which may well satisfy the requisite threshold of severity under Article 7 of the Rome Statute.[1300] Crucially, these abuses escape accountability since the causal connection between these layers remains unacknowledged.

The reimagined concept, however, accounts for both lines of reasoning, combining counterarguments into one concise concept that addresses this protection gap. Under this model, a state's systematic detention of migrants in inhumane conditions, its failure to investigate abuses despite capacity and awareness, and the prior enactment of laws enabling such treatment would together constitute a deliberate attack on a civilian population. Reimagining the multilayered system of criminality in this way provides the OTP with a framework to pursue accountability without requiring an armed conflict context.

This reimagining does not stand in isolation. Recent ICC jurisprudence – such as the Philippines and Myanmar situations – has already demonstrated increased receptivity to a broader understanding of structural violence and state policy, particularly for peacetime contexts. The proposed reimagined concept builds upon this implicit interpretative shift, but goes beyond identified limitations, such as in the situation in the Philippines.[1301] It understands crimes against humanity not as a norm that only addresses systematic killings, rape, or imprisonment, but instead the systematic exclusion and oppression of civilian groups by a state or state-like entity outside the confines of conflict scenarios. In particular, when the entity's instruments to achieve the exclusion involve acts of severe deprivation of individuals' right to life, liberty, or physical and mental integrity and are deliberately

[1300] See Chapter IV at 2.2.2.1.
[1301] Ibid and at 3.

maintained by impunity. Exceptionally, the crime of apartheid, although currently only applicable to different racial groups, criminalises such systems of oppression and deprivation as a crime against humanity according to Article 7 (1)(j) ICC Statute. For this reason, several authors have argued that the current migration divide amounts to a global apartheid system.[1302] Although this speaks for the general awareness of the severity of such systems in ICL, case law on this crime does not exist, as it has never been charged.[1303] It further shows that Article 7 is well suited to target discrimination. In light of the reimagined concept, the crimes requiring a discriminatory ground may also capture a structural dimension, namely when discrimination becomes institutionalised by laws, policies, and practices. Particularly, the crime of persecution, as shown in Chapter IV, may be addressed under the proposed model. However, the crime could benefit from further research as the concept and interpretations are not always clear.

As emphasised in Chapter II, a better interpretation of identifying versus targeting on discriminatory grounds is necessary. Moreover, more research could enhance the understanding of the cumulative effect of several acts on the severity assessment.[1304] Most importantly, the crime's nature is distinct from the other enlisted crimes,[1305] and it is not a stand-alone crime. It is an exceptional category within the ICC Statute. The reimagined concept may therefore not yet fully capture the specifics of this crime, but it sets the foundation for future work. The final section thus briefly reflects on the nature and essence of the crime of persecution and discusses possible questions for future research.

[1302] *Supra* (n 190).
[1303] In detail, see Carola Lingaas, 'The Crime against Humanity of Apartheid in a Post-Apartheid World', 2 Oslo Law Review 2 (2015) 86-115.
[1304] See Chapter II at 4.2.2.1.
[1305] Commonly divided into murder-type and persecution-type acts, where the latter requires specific intent; see UNWCC, History of the UNWCC (1948) (n 1) 178 (at (iii)(a)); Bassiouni, *Crimes Against Humanity* (2011) (n 28) 373, 377.

2.3. Contemplating Future Research: The Crime of Persecution

I can hardly imagine an attitude more dangerous, since we actually live in a world in which human beings as such have ceased to exist for quite a while, since society has discovered discrimination as the great social weapon by which one may kill men without any bloodshed; (...).[1306]

The severe deprivation of fundamental rights criminalised in Article 7 (1)(h) ICC Statute responds to Hannah Arendt's rightful claim that discrimination is not only a powerful weapon but does not require physical destruction or extreme direct violence.[1307] Persecution as codified in the Rome Statue, however, lacks clear guidance. This may be because the established jurisprudence mainly refers to the cases decided by the ICTY, but the legal basis for persecution in the ICTY Statute and the ICC Statute differ considerably.[1308] Moreover, the crime's vagueness renders it complicated in its practical application.[1309] Chapter II discussed the crime's relevance in the context of migration and exposed its objective to criminalise discriminatory systems of deprivation by various means. Given that the crime's substance and boundaries remain controversial, it requires further analysis and engagement by courts and scholarship.

The major challenge is determining the threshold when practices, such as humiliation, 'hate speech,' instrumentalisation, and denial of access to rights, amount to 'discrimination

[1306] Hannah Arendt, 'We Refugees' (originally published in 1943 in The Menorah Journal), reprinted in Marc Robinson, *Altogether Elsewhere: Writers on Exile* (Faber and Faber 1994) 118.
[1307] Similarly, Kalpouzos and Mann, 'Banal crimes against humanity' (n 5) 26, related to the gravity requirement; Rob Nixon, *Slow Violence and the Environmentalism of the Poor* (HUP 2011); Nouwen, 'As You Set out for Ithaka' (n 92) 227-260.
[1308] Pocar, 'Persecution as a Crime' (n 310) 363, arguing that the ICC Statute deviates from the customary law as established by the ICTY and ICTR. See also Ken Roberts, 'The Law of Persecution Before the International Criminal Tribunal for the Former Yugoslavia', 15 Leiden Journal of International Law 3 (2002) 623-639.
[1309] Ibid, 363.

in fact'.[1310] In essence, the criminalisation depends on the circumstances in which acts of persecution are situated to internationalise the fundamental rights violations.[1311] The OTP's arrest warrant applications in the Situation of Afghanistan clarify that the Taliban's full control over women and girls amounts to this severity, including the deprivation of the right to education and freedom of movement.[1312] In the migration context, the states' goal to fully control (im)migration is comparable, as migrants are denied access to the asylum procedure, their freedom of movement is restricted through detention, and the right to effective remedy is impeded, among others, by preventing access to legal counsel. These measures, however, must also be discriminatory, which has thus far not been accepted.[1313]

As shown in Chapter II, in the migration context, the country of origin, as a unique category, serves as a discriminatory ground universally accepted as impermissible. Especially because the country of origin is closely connected to the identity of human beings, and several countries of origin carry a negative social meaning. For instance, Sub-Saharan African countries, which results in differential treatment that may amount to discrimination in fact.[1314] To substantiate these preliminary findings, in-depth future research on the topic is necessary.

One reason why there is a reluctance to accept the crime of persecution may be its understanding as a 'heightened' crime against humanity, i.e. it is viewed as a precursor to genocide, due to its specific intent.[1315] This could impede the acceptance of the crime's

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[1310] Ibid, 360.
[1311] Helen Brady and Ryan Liss, 'The Evolution of Persecution as a Crime Against Humanity', in Morten Bergsmo, CHEAH Wui Ling, SONG Tianying and YI Ping (eds), *Historical Origins of International Criminal Law: Volume 3* (Torkel Opsahl Academic EPublisher 2015) 431. Concerning hate speech, famously, *Nahimana et al.* (Appeal Judgment) (n 319).
[1312] See Chapter II at 4.2.2.1.
[1313] Explicitly in Australia, ICC-OTP, Report on Preliminary Examinations (n 50) para 51; and not mentioned in the Libyan context.
[1314] See Chapter II at 4.2.2.3.
[1315] Fournet and Pégorier, "Only One Step Away From Genocide" (n 855) 713-738; Valérie V. Suhr, *Rainbow Jurisdiction at the International Criminal Court* (T.M.C. Asser Press 2021) 155.

relevance. The scholarly disagreement about its character illustrates how it is currently understood and why it needs further elaboration.

While genocide requires the intent to destroy, persecution requires the intent to discriminate.[1316] The *mens rea* leads to linking the two crimes.[1317] However, genocide protects the group and persecution the individual belonging to a group, the legally protected interests thus differ.[1318] Nersessian shows that 'physical and biological existence as such'[1319] underlies genocide, while 'unlawful deprivations of fundamental rights on account of individual characteristics'[1320] define the protected interest in persecution.

Genocide aims to protect the existence of the group as such and as a value to the diversity of the world as a whole.[1321] Persecution protects individuals who are part of a larger society from being singled out and deprived of fundamental rights that others enjoy. As held by the ICTY, the inhumanity stems from the discrimination based on a ground closely connected to the identity of the individuals.[1322] Moreover, through the connection requirement in persecution, it becomes an umbrella crime for crimes against humanity.[1323] The discrimination lifts 'ordinary' human rights violations to a crime under international law. The violations must infringe on the most fundamental rights by the enlisted acts or cumulatively amount to the required severity.[1324] The deprivation's duration can lead to

[1316] Ibid, 717.
[1317] Ibid, 733. Similarly, Frulli, 'Are Crimes against Humanity More Serious than War Crimes?' (n 167) 329-350, establishing a hierarchy of gravity dependent on the *mens rea*, at 337-338.
[1318] Brady and Liss, 'The Evolution of Persecution as a Crime Against Humanity' (n 1311) 491; Nersessian, 'Comparative Approaches to Punishing Hate' (n 534) 221. For persecution in the context of sexual and gender minorities, see Suhr, *Rainbow Jurisdiction* (n 1315) 181.
[1319] Nersessian, 'Comparative Approaches to Punishing Hate' (n 534) 260.
[1320] Ibid.
[1321] Raphaël Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (The Lawbook Exchange 2008); William A. Schabas, *Genocide in International Law: The Crime of Crimes* (CUP 2009) 2-3.
[1322] *Tadić* (Judgment) (n 1) para 697.
[1323] See Chapter II at 4.2.2.
[1324] *Nahimana et al.* (Appeal Judgment) (n 319) para 987; Ambos and Wirth, 'The Current Law of Crimes Against Humanity' (n 19) 82.

crossing the threshold.[1325] When an attack against a population is carried out, the crimes of persecution do not require that the entire targeted population be discriminated against. It suffices that, for instance, hundreds of individuals are imprisoned, and a small portion is imprisoned *because* of their protected identity. These individuals are then persecuted, not the entire population. For genocide, the group as such must be discriminated against. At the same time, certain individuals may face discrimination within a society based on a prohibited ground. They consistently face measures that are not crimes, such as racial profiling. When racial profiling, a practice that singles out individuals from the broader society, leads to prolonged detention under inhumane conditions, the crime of persecution may connect to the enlisted act of imprisonment. In light of these examples, the different protected legal interests, and the connection requirement, persecution and genocide may be viewed through a less linear lens.

In a simplified manner, genocide *can* be a result of persecution if one of the four comprehensively listed grounds applies and the connected acts indicate destruction, such as murder or extermination (Article 7 (1)(a) or (b)). Apartheid *can* be the result of persecution if the racial ground applies, and the acts indicate the maintenance of an oppressive and dominating system (Article 7 (1)(j)). Ethnic cleansing *can* be a result of the forcible transfer of populations if the displacement is based on ethnicity (Article 7 (1)(d)).[1326] Genocide, apartheid, and ethnic cleansing are all preceded by acts of deprivation and based on discrimination. Persecution thus seems to be a warning system for *several* possibly ensuing crimes under international law, not only genocide, as often argued. Yet, it is neither clear nor predictable how such violence will develop.

[1325] Li, 'Persecution' (n 957) 303.
[1326] In the context of the Yugoslav conflict, ethnic cleansing, i.e. persecution on ethnic grounds, was considered its 'flagship crime', see Brady and Liss, 'The Evolution of Persecution as a Crime Against Humanity' (n 1311) 500.

Viewing the crime of persecution as preceding other crimes may convey the impression that it would *narrow* the application of crimes against humanity because of the specific discriminatory intent, which is particularly difficult to prove in practice. In general terms, this is true. However, future research may thus focus on the crime of persecution in peacetime when crimes against humanity are the only applicable crimes. Persecution may be a potential precursor, not for genocide, but for crimes against humanity. Severe deprivation of fundamental rights may already occur *before* the connection to other enlisted acts or crimes. At this stage, the discriminatory measures do not amount to crimes against humanity but may indicate the potential for escalation.

Recalling Leila Nadya Sadat's proposal of the 'atrocity cascade' that addresses a sliding scale of violations, persecution may uniquely be added to the visualisation. Sadat places human rights violations *before* crimes against humanity, and crimes against humanity *before* crimes in armed conflict.[1327] She argues that crimes against humanity can address 'human rights abuses [that] deteriorate to the point of becoming criminal, and if not staunched, descend further into war, and even into genocide'.[1328] She thus organises the three core crimes as interconnected. Despite the critique that automatism should be avoided,[1329] this understanding of the transition from peacetime to armed conflict is noteworthy.

Since the crime of persecution is not a stand-alone crime, Sadat does not consider it in the atrocity cascade as a unique category. However, there could be value in identifying persecution as a warning system in peacetime. In this context, persecution may be placed *before* crimes against humanity – not *between* crimes against humanity and genocide, as

[1327] Sadat, 'The Forgotten Crime' (n 2) 530.
[1328] Ibid, 530.
[1329] See *supra* at (n 1031).

suggested in scholarship. Acts of persecution as acts of severe deprivation of fundamental rights relevant under Article 7(1)(h) may represent Sadat's category of 'human rights violations' that could 'deteriorate' into crimes against humanity.

Deliberating on further research, persecution in peacetime would strongly benefit from more attention. Beyond conflict, it is difficult to imagine that the severe deprivation of fundamental rights is committed without a 'reason', i,e. without a connected ground. For instance, methods of transferring populations or systematic imprisonment may target anyone during conflict due to chaos and reactive or strategic military decisions. In peacetime, if e.g. systematic imprisonment exists, there seems to be no precedent for an arbitrary selection of individuals. Syria serves as an example of sliding into civil war, where the human rights violations prior to the conflict were based on the attribution of a political ground, i.e. the later opposition.[1330] Specific individuals are selected either because they fulfilled the characteristic or because it was subjectively attributed by the perpetrator.

In peacetime, the selection criteria may correspond to a ground 'universally recognized as impermissible'.[1331] In addition, in the context of migration, the brief analysis of the crime of persecution highlighted that several grounds may be applicable, among others, the 'country of origin'.[1332] Indeed, it is *lex lata* that not all acts require discriminatory intent. The maxim of *id quod plerumque accidit* further warns that what happens most of the time does not equal the law.[1333] The specificities of this unique crime in a peacetime context therefore require in-depth analysis to assess whether it has normative value beyond individual examples.

[1330] Sadat, 'The Forgotten Crime' (n 2) 531-532.
[1331] Article 7 (1)(h) ICC Statute.
[1332] See Chapter II at 4.2.2.3.
[1333] See *supra* (n 891).

To conclude, Sadat argues that crimes against humanity must be studied more thoroughly, and charges could function as 'a potential tool for mass atrocity prevention'.[1334] While this thesis centres on retribution and redress, rather than prevention, recognising persecution as an early indicator for the potential escalation of discriminatory rights deprivation into crimes against humanity may enhance the analytical utility of Sadat's atrocity cascade model.

3. Conclusion

This chapter engaged with the question of how the concept of crimes against humanity can be better understood in the specific context of peace. It addressed the concern of a protection gap for migrants as crimes committed in peacetime, by underscoring that the current interpretation is deficient and proposed a corrected view on crimes against humanity. The main findings of this chapter pertain to the belief that change in this field is possible, desirable, and necessary. It advocated for an interpretation that seeks to overcome the entrenched impunity faced by migrants subjected to systemic violence, and more broadly aims to restore the protective function of crimes against humanity as a tool for justice and accountability beyond the confines of armed conflict.

To achieve this, this chapter employed the method of reimagination, a process of approaching existing concepts from a new perspective by engaging in past, present, and future ideas.[1335] Reimagining the concept of crimes against humanity can advance its understanding by recalling a lost opportunity from the past to mind. It proposed to interpret the concept in light of the pre-1945 desired law (*lex desiderata*), which remained

[1334] Sadat, 'The Forgotten Crime' (n 2) 531-532.
[1335] E.g. Chenoweth and Lawrence, *Rethinking Violence* (n 1226) 3.

unfulfilled. The emerging law in 1945, designed to protect civilians at all times, especially from the violence of their own state, had extraordinary potential. Yet, its scope was limited by the war *nexus*. The Rome Statute does not impose a restriction, reflecting the pre-1945 value of crimes against humanity. Although Article 7 permits a broad protection scope, in practice, the concept is still applied restrictively, influenced by misperceptions related to the *nexus* to war.

Reimagining the concept would thus correct the misperceptions which are deeply embedded into thought and practice and re-establish the full protection scope of crimes against humanity committed in peacetime settings. It represents a universal, morally guided code that qualifies state sovereignty and protects human dignity and physical integrity. Successfully implementing this reimagined concept would render crimes against humanity a relevant crime for addressing systems of structural violence, severe deprivation of fundamental rights, and deliberately upheld impunity. The chapter has also shown that the crime of persecution, unlike often understood as a precursor for genocide, could be identified as a warning system in peacetime for human rights violations escalating into crimes against humanity. The value of future research may thus significantly lie in its potential for mass atrocity prevention and could become part of a larger effort to reimagine crimes against humanity.

Reimagining crimes against humanity in the proposed way is not a theoretical exercise, but a legal necessity. If International Criminal Law is to remain responsive to contemporary forms of state-led violence, especially outside warzones, prosecutors and judges must return to the foundational spirit of the norm – its *lex desiderata* – and allow it to evolve in line with the structural forms of exclusion, deprivation, and impunity that define the modern era.

Chapter VII: Conclusion

This thesis has examined how the concept of crimes against humanity – under Article 7 of the ICC Statute – can and should respond to the widespread, systematic violence committed against migrants in peacetime. It has identified and analysed the reasons why such violence remains unaddressed by the ICC, arguing that a combination of historical misinterpretations, structural impunity, and doctrinal gaps contributes to the persistence of unaccountability. A key normative contribution of the thesis is its call to reimagine crimes against humanity by interpreting them according to the broader, morally grounded vision of protection developed in pre-1945 legal thought.

Beyond this, the thesis also makes a distinctive methodological contribution by applying theoretical insights from PCS to reinterpret the elements of crimes against humanity. This interdisciplinary engagement offers a novel lens through which to understand the structural and state policy dimensions of the crime, reframing how Article 7 might be applied to peacetime contexts such as migration governance. Together, these normative and methodological insights form the foundation for the practical approaches developed in this research to support prosecutorial action by the ICC and confront the deepening normalisation of violence at and within borders.

1. Reflection and Synthesis of the Chapters

The concept of crimes against humanity possesses significant potential for the protection of civilians from state power abuse at all times. In law and practice, however, it remains undervalued and, mostly, not applied. This thesis has examined the underlying reasons for the lack of an appropriate application and proposed a method to reimagine the concept to bring this potential to fruition. The phenomenon of migration towards the Global North has served as a context from which central normative and interpretative insights were drawn. The following takeaways are essentially obtained from the context of migration yet conduce to refining the understanding of crimes against humanity overall, ideally also contributing to confronting impunity in other peacetime contexts.

This research investigated the question of *why* the alleged crimes against humanity in the context of migration have not yet resulted in thorough investigations by the ICC. It built upon existing scholarship and additional commentary that argues persuasively that the alleged crimes against migrants *prima facie* amount to crimes against humanity according to Article 7 of the ICC Statute. Chapter II identified three main arguments underlying this legal opinion: First, the violations migrants face infringe on life, liberty, and physical and mental integrity. Hence, they imply a degree of severity that crimes against humanity explicitly criminalise and ICL inherently aims to address. This section identified a research gap on the crime of persecution and offered an additional analysis. It argued that the cumulative effect of migration governance measures and the 'country of origin' as a prohibited discriminatory ground should be considered. In combination, these suggestions could result in the OTP's acceptance that the requirements of this crime can *prima facie* be established, potentially leading to reconsideration of PE in the Australian case, and

beyond. However, further inquiry is needed to resolve interpretative issues related to the complexity of the crime of persecution.

Second, legal scholarship contends that severe violations are committed on a large scale following a systematicity and pattern, which are, third, interconnected with an overarching policy following a plan, namely deterrence and defence. This section underlined that besides the active policy enabling the violations, the passive policy, a policy of toleration, is especially relevant in the migration context. It demonstrated that this form of policy is understudied and only addressed in a limited number of contributions in literature. The current interpretation of the law on crimes against humanity is underdeveloped to respond to atrocities involving tolerating state practice. The chapter identified that the toleration of crimes has become a relevant component of the states' method to prevent migrants from exercising their fundamental rights. The degree and quality of impunity indicate its deliberate use to uphold and encourage further crimes.

This impunity prevails on the national level as well as the international level, which prompted scholarship to address broader questions pertaining to ICL and the concept of crimes against humanity in relation to migratory flows.[1336] The chapter thus underscored the most relevant theories, namely crimes against humanity as (cosmo)political crimes, as a concept capturing structural violence which is traditionally viewed as non-criminal systemic violence outside the purview of ICL, and the instrumentalisation of human beings as an attack on human dignity, as argued by Mann.[1337] This thesis built upon these theories and established a normative and conceptual framework of crimes against humanity, responding to these specific factors.

[1336] Chapter II at 4.5.
[1337] Mann, 'Border Crimes as Crimes against Humanity' (n 5) 1179-1190.

Due to a continuous lack of accountability, the chapter transitioned into studying additional underlying causes for impunity at the international level, which have not yet been addressed in scholarship. Chapter III explored the historical development of crimes against humanity, the current understanding of its *raison d'être*, and barriers to applying the framework to the context of migration. It identified misinterpretations about the crimes that are rooted deeply in their historical context. The most critical instant was marked by its first codification in 1945 when the Allied powers formulated the criminal concept to try the Axis criminals and inserted the so-called war *nexus* linking crimes against humanity to WWII. However, the early conception of crimes against humanity was well-formulated to cover crimes unrelated to armed conflict, given that these crimes initially emerged from the slave trade and other colonial atrocities. The emerging *lex desiderata* at the time pre-1945, and shortly before the first legal codification, the *lex ferenda*, did not come to fruition. The chapter revealed that with the adoption of the IMT Charter, the false perception that crimes against humanity are inherently conflict-related took root. It remains a misperception engrained in thought and practice, influencing the applicability of crimes against humanity to contemporary cases.

Examining the post-Nuremberg developments exposed the deep uncertainty about the *nexus*' legacy. The wording of Article 7, however, clearly does not require a linkage to an armed conflict (*lex lata*). Since the historical interpretation resurfaced before the ICC, and may continue to create disagreement, the chapter provided a more nuanced understanding based on the traditional sequences of international law developments, giving precedence to the original idea as a universal moral code applicable at all times (*lex desiderata*). The limitation of this chapter is that it focuses rather narrowly on doctrinal and teleological history to locate the *lex desiderata*. This excluded extra-legal questions, which dominate world politics and legal responses, and warrant further inquiry in future research.

Considering this focus, Chapter III pinpointed two further shortcomings related to the understanding of crimes against humanity. First, arguably, the *nexus* has evolved into the state policy requirement, explicitly codified in Article 7 for the first time. Examining the policy's function exposed that it is the critical component to internationalise crimes against humanity. However, the ICC focuses its resources and attention on armed conflict and related crimes, instead of relying on the degree of state or organisational authority. The distorted view following the legal nature of the linkage to war, arguably, resulted in the attribution of a higher degree of severity for crimes in conflict. This interpretation, however, does not find normative or textual support in the Rome Statute. The chapter thus hypothesised that crimes against humanity in *peacetime* are not considered as severe as conflict-related crimes due to the legacy of the war *nexus*.

From reviewing the OTP's case considerations in Chapter IV, it became clear that crimes against humanity do not occur disproportionally less frequently in peacetime than during armed conflict. Despite a very low conviction rate overall,[1338] crimes against humanity charges have thus far been successful only when connected to an armed conflict. This finding provoked the question of whether impunity for peacetime crimes against humanity exists more broadly, creating a significant protection gap. Due to the low number of peacetime cases in total, further inquiry will be necessary in the future to evidence this claim.

The available investigations and cases before the ICC have thus far supported this hypothesis. Peacetime-related cases, which the OTP only exceptionally considered, were either criticised as insufficiently serious (Libya), descended into armed conflict or should have been considered in an armed conflict context (Libya and Côte d'Ivoire), or prompted

[1338] As of 2024, the Court issued 11 convictions <https://www.icc-cpi.int/taxonomy/term/358?page=0>.

the seminal debate about human rights infractions versus international crimes (Kenya, Judge Kaul's dissenting opinion). The only genuine peacetime situation before the ICC is the investigation in the Philippines, which provided substantial insights into prosecutorial reasoning. The 'war on drugs' narrative, implying a conflict-like scenario, echoed by the ICC bodies, however, demonstrated that even in peacetime, heightened vigilance on the alleged crimes may have resulted from the situation's proximity to a conflict scenario.[1339]

In addition to the perceived severity of conflict-related crimes, Chapters II and IV dealt with the question of whether the alleged crimes against migrants escape accountability because the violations are not considered sufficiently severe. In the Philippines, the crime of murder predominantly led to investigations. Chapter II already argued that the measures resulting in deprivation may amount to the necessary threshold by cumulation under the crime of persecution. However, given that the states' policies covertly enable violence by adopting laws, policies, and measures that do not explicitly order, instigate, or incite the crimes, they may not be recognised as severe, but viewed as non-criminal structural violence outside the scope of ICL. Chapter IV provided an interpretation of crimes against humanity as the norm designed to criminalise structural violence when it exceeds the threshold to criminal behaviour, especially relevant in peacetime when functioning institutions embed this violence into their legal and political system.

This novel interpretation, initiated by Mann and developed further in this thesis, integrates expertise from PCS into the substantive legal elements of Article 7. It understands crimes against humanity as the criminalisation of an interplay between direct and structural violence. The taxonomy of Article 7 supports that the direct violence is foreseen in the enlisted acts as criminalised conduct. Moreover, structural violence is described in the

[1339] Authorisation Decision Philippines (n 46); Chapter IV at 2.2.2.2.

chapeau, embedded into laws, policies, and practices. The structural dimension/contextual elements enable, promote, or even order direct violence, namely unlawful conduct criminalised under Article 7 (1)(a)-(k). This novel conceptual lens provides tools to understand the state policy element and systematic violations not just as organisational structures, but as manifestations of embedded power asymmetries, enabling crimes. In peacetime, understanding crimes against humanity in this way could assist in challenging states that misuse the non-criminal character of structural violence to circumvent responsibility.

Indeed, this conception must comply with the strict principles of ICL and overstretching the concept of crimes against humanity is a legitimate concern. The exceptional quality of impunity was therefore introduced to restrict excessive labelling of structural violence as crimes against humanity. Following the examination of the policy of toleration in the context of migration, this research identified structural impunity for the crimes. Impunity is systematic in its occurrence as cases of ill-treatment of migrants are largely not investigated nor result in consequences for the perpetrators, although violations are likewise systematic. Impunity is structural as it results from a deliberate political choice despite having the capacity to prevent and prosecute wrongdoing. States thereby maintain and increase the likelihood of violations. This new lens on impunity, drawn from HRL and PCS scholarship and applied to ICL as an interpretive tool, shows that impunity can be a central component of the crimes, not merely a failure. ICL must therefore remain flexible in ascertaining the state's involvement in peacetime, when impunity assumes such a key role. This form of impunity indicates the exceptional form of a policy of toleration, consciously encouraging the crimes.

Against this background, in Chapter V, two practical approaches were developed to confront the impunity identified as prevailing in the context of migration. The first advocated for a rigorous abandonment of the perception that crimes against humanity are inherently connected to (armed) conflict. It argued for a historical interpretation *in favour* of a broader scope because it reflects the original protection scope of the norm more adequately. Prosecuting crimes against migrants as peacetime crimes against humanity thus becomes more probable.[1340] This approach suggested focusing on the policy element instead, since it essentially replaced the *nexus*. Since peacetime atrocities may be viewed as non-criminal structural violence, this approach introduced the policy of toleration as a concrete qualifier to such systems of criminality. As an exceptional form of a policy, described in the Elements of Crimes, it reduces the number of potential cases qualifying under the new conceptual framework. It ensures that the acts committed must be carried out by state agents, known to the state authorities, and the state must prove capable of suppressing the crimes.

To legitimise this approach further, an additional criterion was added, namely, previous endangering behaviour. If the state deliberately creates endangering circumstances that facilitate or enable the commission of the crimes, the passive policy connects to a positive previous action. When the previous state action, such as the adoption of laws or policies, is unlawful or highly controversial, arguably, the state has a heightened responsibility to take action. Non-action can then constitute the deliberate failure to act, consciously encouraging the crimes. This approach suggests a three-layered criminality functioning in reciprocity, a macro-micro-macro-criminality. Recognising the third layer, the deliberate use of impunity ensures that states do not evade responsibility. This approach would lead to legal

[1340] For the improbability based on other reasons, see Hodgson, 'Resisting the State Crimes' (n 5) 157.

admissibility of migration-related crimes before the ICC. Under this framework, the Australian case could and should be reconsidered.

The second approach presented in Chapter V drew from Chapters III and IV, in particular the Philippine authorisation decision and argued that the OTP is more likely to act when a situation resembles a conflict-like setting. Although a link to conflict is normatively unnecessary, it suggested that the 'migration crisis' qualifies as a dimension of conflict under prominent peace and conflict theories. Although the strict legal requirements for a conflict under IHL/ICL are not met, PCS assist in expanding the understanding of conflict and pushing against the overly rigid peace and conflict binaries in ICL. Importantly, rather than questioning the parameters for establishing an armed conflict under IHL/ICL, it precisely uses PCS for peacetime settings, drawing attention to latent and structural conflicts, involving systemic violence. This may enrich interpretative thinking in ICL, as Grech argues.[1341]

Pioneering works in PCS profoundly informed the migration context as a protracted, social (Azar) and structural conflict (Rubenstein) in which violence is designed to maintain the authority of a powerful group (states) over the less powerful (migrants) and excludes them from their needs for security, identity, participation, and the exercise of fundamental rights. The conflict is deeply rooted in the same need for security, yet migrants are framed as the embodiment of a threat to states. According to these theories, the 'migration crisis' depicts a dimension of conflict that can erupt into intense physical violence at any given time. The war and conflict narratives used by states to justify restrictive migration measures further dehumanise and instrumentalise migrants. Migration *per se* is framed as a threat that is deliberately upheld and fuelled to enable militarised responses, as, for instance, the

[1341] Grech, *The International Law of Peacebuilding* (n 52) 2, 41, 50.

deployment of NATO forces suggests. Security has become the paradigm of state action, however, the security threat is intentionally created and used as a tactic, as shown by several authors.[1342] This degradation to mere objects and the ensuing dehumanisation also invokes the applicability of crimes against humanity, as proposed by Mann.[1343]

Understanding the root causes of conflict through PCS allowed for an additional perspective on the 'migration crisis.' The struggle for similar needs, such as security, appears incompatible. Migrants struggle for physical and economic security, while states struggle for internal and border security. Even under IHL, clashes and fighting between such groups can indicate that an armed conflict may erupt. Migrants, however, cannot be considered a 'party' as required under IHL/ICL. They are also not a traditional communal group according to Azar's PSC theory. Yet, they are considered a collective, amounting to a civilian population under Article 7, targeted by the state action and requiring protection. All the more so, when the strict rules of IHL do not apply, which are essentially designed to protect non-combatants.

Similarly, in the Philippines, the one-sided war targets a loose aggregation of individuals (drug users and dealers), resulting in killings with impunity.[1344] Drug users are also an unstable and unorganised group falling short of being a party to an armed conflict. As the most useful precedent for asymmetrical power abuse, the OTP may apply this approach to a broader range of peacetime cases, advancing a more balanced prosecution practice. Given the OTP's limited resources, the severity assessment crucially influences case selection and prioritisation. This approach thus enhances the OTP's perceived severity of the situation. When the examined PCS theories are applied to the case of migration, border

[1342] Among others, Moreno-Lax, 'The "Crisification" of Migration Law' (n 47) 11; Kinacioglu, 'Militarized governance' (n 72) 2425.
[1343] Mann, 'Border Crimes as Crimes against Humanity' (n 5) 1179-1183.
[1344] Authorisation Decision Philippines (n 46) para 20.

regimes are reframed not as isolated failures of compliance but as manifestations of deeper political orders characterised by exclusion aimed at deterrence and defence against a perceived enemy. When combined with the requirements of 'systematic' and the 'state policy' under Article 7, PCS enriches both the diagnostic and prosecutorial potential of crimes against humanity.

Both approaches could independently result in a shift in exercising discretion and contribute to addressing the prevailing impunity; however, they have limited prospects of success. Perceptions and misconceptions are deeply engrained in thought and practice and appear to be mutually reinforcing. Following the proposed dual strategy, the approaches should be applied complementarily to achieve a purposeful change in this realm.

At best, the first approach results in the opening of a PE and, therefore, brings crimes against migrants to the attention of the ICC as the correct forum. The second approach assists in proceeding to the investigation phase, where doubt may be raised on whether the conduct exceeds the severity threshold required for the ICC. For the specific context of crimes against migrants, the approaches could, in practical terms, generate constructive progress.

Developing the approaches has further revealed that the misconceptions are not only effectively functioning in relation to migration. The concept of crimes against humanity, as a whole, needs reimagination – a process to address deficiencies and demand positive change, which Chapter VI engaged with. As mentioned, the concept has immense potential; it is not necessary to redefine or reconceptualise it but rather to interpret it in light of its originally desired law pre-1945, the *lex desiderata*.[1345]

[1345] In favour of a reconceptualisation: Renzo, 'Crimes against humanity and the limits of international criminal law' (n 1285).

Similar to Mark Drumbl's concept of *Reimagining Child Soldiers*,[1346] crimes against humanity can be reimagined. Developing the concept's full capacity would allow it to constitute a universally applicable morally influenced code that protects civilians of any nationality or characteristic at all times. This would remedy the limitations that were imposed on the criminal concept by the Allies to alleviate political and legal concerns prevailing at the time. Reimagining crimes against humanity as a code that specifically addresses the challenging task of engaging in moral and ethical questions, imposing restrictions on state behaviour, above all, state sovereignty. This is, however, a legal necessity to protect minorities from exclusion, oppression, and deprivation of fundamental rights that other members of the society enjoy, and more accurately reflects the underlying *raison d'être* of crimes against humanity.

Engaging in this process would result in the protection of a much wider group of individuals and go beyond safeguarding migrants in the Global North. It also fills a gap that is otherwise left by the non-applicability of war crimes beyond armed conflict and genocide with a uniquely restrictive scope.

Leila Sadat's notion of the 'atrocity cascade'[1347] has profoundly informed the suggested reimagination, particularly regarding the crime of persecution. As the crime requires a discriminatory element, it could be understood as the alarm system of crimes against humanity in peacetime. Persecution under Article 7 (1)(h) without a connected act or crime may be the best representation of non-criminal structural discrimination. Viewing it as a tool for prevention, its existence may indicate an ensuing escalation into crimes against humanity. Given the limited scope of this thesis, it offered preliminary deliberations.

[1346] Drumbl, *Reimagining Child Soldiers* (n 58) 102.
[1347] Sadat, 'The Forgotten Crime' (n 2) 530.

Exploring the viability of these suggestions must be part of a larger future project on persecution.

In conclusion, this thesis applied a novel interpretative lens to ICL, advancing the doctrinally rich discipline by integrating PCS. It reframes crimes against humanity as the norm that criminalises structural violence in legal terms and thereby bridges the gap between the disciplines. Through this theoretical lens, a 'systematic attack against a civilian population' may be read as a systemic, criminal phenomenon, rather than a series of multiple criminal acts.

Article 7 is well-suited to exclude non-criminal everyday violence from its purview. It is designed to address systematic severe violations of life, liberty, and physical integrity of concern to the international community, including systems of oppression and deprivation. By using PCS frameworks and reimagining crimes against humanity as a morally guided code applicable during armed conflict *and* in peacetime, this thesis contributes to an advanced understanding of the concept of crimes against humanity.

The continuing violence and ongoing risk of further institutionalisation and normalisation of large-scale violations of migrant's fundamental rights render this effort all the more timely and relevant.

2. Significance to the Discipline

Literature has offered compelling theories on crimes against humanity as a concept, as well as how the ICC should interpret its elements to cover the alleged crimes against migrants and open investigations. The body of literature has significantly contributed to

understanding the law on crimes against humanity and border violence. Nevertheless, it proved ineffective in practice and exposed a conceptual gap in legal scholarship.

This research thus built upon and continued the theoretical discourse in the discipline, adding new nuances, such as the specifics of crimes against humanity in peacetime. This effort advanced the theoretical legal framework for contemporary forms of atrocities by abandoning historically rooted misperceptions. In this vein, the hope is that it can encourage other academics in the field to delve even deeper into the question of peacetime crimes, structural violence, and impunity to catalyse improvement.

As few scholars in ICL have utilised the wealth of knowledge developed in PCS, the perspective offered in this thesis promotes a productive interdisciplinary project for the future. It proposed a novel methodological lens for interpreting structural violence in legal terms under Article 7. Overall, this thesis addressed a research gap related to the underlying grounds for impunity in the realm of crimes against humanity and migration by developing normatively grounded approaches to confront the root causes.

This research further provides practical tools to address the disregard of peacetime crimes against humanity and the persistent inaction by the ICC. For instance, the situation in the Philippines could benefit from the questions raised in this thesis. The Prosecutor could reflect on the relevance of persecution in peacetime and evaluate whether drug users are an identifiable group protected by one of the discriminatory grounds impermissible under Article 7 (1)(h). At first thought, drug users may seem outside the protected interest. However, the ‘social’ ground may apply, as they are socially stigmatised, dehumanised, and, in the case of the Philippines, declared as outlawed and not worthy of living. While it must be assessed whether the ground connects to the identity of the victims, fundamental human rights apply to drug users to the same extent as to any other member of society, and

persecution protects singling out individual members. This makes crimes against humanity all the more a universal code for the protection of society as a whole. This highlights that the suggested future research on the crime of persecution is of timely relevance.

As explored in Chapter II, the gender-based persecution of women and girls in Afghanistan critically advanced viewing persecution as a tool to expose discriminatory oppression and exclusion. It also serves as a warning sign for the incremental actualisation of crimes against humanity,[1348] including the risk of and discourse on 'gender apartheid' as a progressive overcoming of the limitations of the crime of (racial) apartheid.[1349] As the first Convention on Crimes against Humanity progresses,[1350] it is paramount to ensure that this crucial moment is not lost when the scope of persecution is negotiated. The mass incarceration of racialised groups, indicating discrimination, exemplifies this. The discriminatory measures may amount to severe deprivation of liberty.[1351] An accurate framework for the crime of persecution is therefore indispensable to achieve accountability for these violations. The advancing Convention to Prevent and Punish Crimes Against Humanity offers a rare opportunity to also discuss the findings of this thesis.[1352] The UN GA could include language explicitly affirming that discriminatory and oppressive systems, amounting to crimes against humanity (persecution and apartheid), must be suppressed effectively. Discriminatory deprivation of rights in peacetime may be

[1348] See Chapter II at 4.2.2.
[1349] For instance, UN GA, 'Draft articles on prevention and punishment of crimes against humanity: Recommendations from the Working Group on discrimination against women and girls', HRC 40th session, UN Doc A/HRC/WG.11/40/1 (15 February 2024).
[1350] UN GA, 'Sixth Committee, Upholding Tradition of Consensus in Historic Meeting, Approves Text to Begin Elaborating International Convention on Crimes Against Humanity: GA/L/3738, Seventy-ninth Session, 38th & 39th Meetings (AM & PM)', Press Release (22 November 2024); 2019 ILC Draft Articles (n 144).
[1351] OHCHR, 'Re: Comments on the Draft Articles on Crimes against Humanity', United Nations Working Group of Experts on People of African Descent and Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, UN Doc ARDS/WGEPAD/20190122/CS/jf (1 April 2019) 3-4.
[1352] UN GA, 'United Nations Conference of Plenipotentiaries on Prevention and Punishment of Crimes against Humanity', Sixth Committee, UN Doc A/C.6/79/L.2/Rev.1 (15 November 2024).

understood as an early indicator and invoke a heightened responsibility to prevent the incremental progression into more violent acts.

The reimagined concept as a norm applicable beyond the confines of armed conflict could be reassured by the UN GA as well as the ICC Assembly of State Parties. Although it has been affirmed that crimes against humanity do not require a *nexus* to an armed conflict,[1353] its legacy continues to distort the perception and influences legal debates and case selection, as shown in Chapters III and IV. An explicit reaffirmation that Article 7 is applicable in peacetime contexts without requiring a conflict-like scenario or extreme outburst of physical violence would be beneficial and support the Rome Statute's desired normative scope.

Moreover, under the reimagined concept, the policy of toleration assumes a key role for peacetime crimes. As proposed in Chapter V, the OTP should reconsider the Australian case in light of the findings on the policy of toleration. Beyond the concrete case, the OTP could formally recognise this passive implementation of a state policy as a legitimate mode of committing crimes against humanity according to Article 7. As examined in Chapters II, III, and V, this passive form of state conduct is a central component in contemporary violent systems, which enables structural harm, especially in migration governance. As further shown in Chapter IV, the OTP's criteria to determine the severity of a situation unduly deprioritises peacetime crimes, contrary to the Rome Statute's intent. The internal ICC framework for case selection and prioritisation criteria could benefit from implementing 'structural impunity,' defined as the systematic and deliberate use of impunity on the domestic level embedded into the state's policies and laws used to maintain and facilitate fundamental rights violations. Recognising this version of impunity

[1353] 2019 ILC Draft Articles (n 144) para 7.

could assist the ICC in evaluating the state's intentional creation of structurally embedded violence and confront the state's attempt to escape criminal accountability.

The findings could therefore assist the OTP, but also scholars, lawyers, activists, and civil society actors involved in fighting against structural violence and engaging in efforts to prosecute crimes against humanity. Based on this thesis, a three-part doctrinal test can be applied to assess when structural violence crosses the threshold to criminality involving the qualifying criteria introduced in this research:

1) Is there an identifiable state or organisational policy enabling systematic rights deprivation?

2) Are unlawful acts committed that fall within the Rome Statute, enabled, promoted, or facilitated by that policy?

3) Is impunity or passive toleration deliberately and consciously used to maintain the violent system?

An additional question, in case the initial state policy does not implicitly or explicitly order, incite to, or instigate unlawful conduct, but creates a system which facilitates the crimes, could be:

4) Are laws, policies, or practices adopted by the state in part or in whole in conflict with international law and create endangering circumstances, invoking a legal duty to repress, prevent, or punish?

The OTP could use this test to ascertain whether criminally relevant state conduct or non-criminal structural harm occurs. Legal scholars, activists, and civil society can further rely on this test to file additional Article 15 submissions urging the OTP to take action. As the violence continues and the risk of normalisation increases, the present work provides a

fresh perspective on the system of border violence and crimes beyond armed conflict and offers tangible tools to confront the enduring impunity.

3. General Impact and Relevance

The comity of European peoples went to pieces when, and because, it allowed its weakest member to be excluded and persecuted.[1354]

Hannah Arendt's famous final sentence of her 1943 essay 'We Refugees' has never compromised relevance. It remains a strong reminder to all peoples that the treatment of their most vulnerable and disadvantaged group is representative of their unity, values, and commitment to the rule of law and human rights overall. A society where exclusion and mistreatment of one part of it without accountability are prevalent must engage in a general discussion about equality as a cornerstone of democracy.

This thesis provided normative explanations for the persistence of impunity pertaining to the law and concept of crimes against humanity and the ICC's prosecution practice. However, several scholars in the field demonstrated that the disproportionate impact on marginalised and vulnerable populations inevitably challenges the fundamental principle of equality.[1355] The structural dimension of impunity, as explored in this research, provided further insights into the concept of impunity generally and demands a deeper discussion about its causes and consequences. While this lies at the heart of the scholars' criticism of

[1354] Arendt, 'We Refugees' (n 1306) 119.
[1355] See the 'second phase' in scholarship, Chapter II at 4.5; see also Judith Butler, *The Force of Non-Violence* (Verso 2020).

global inequality and the hegemonic nature of ICL,[1356] this discussion must be a collective societal effort.

Beyond considering ICL in this endeavour, for instance, as a tool to resist state crimes suggested by Hodgson,[1357] the interdisciplinary approach taken in this thesis proves valuable in including society at large. The research significantly built upon the theoretical ideas developed by Johan Galtung on direct and structural violence. His triangle of violence, which contains cultural violence as the third dimension, is central to understanding how violence interacts. Cultural violence, embedded into society's existence, beliefs, and attitudes, can legitimise direct and structural violence. It impacts the moral judgment about violent behaviour. By culturally accepting and integrating violence into its value and belief system, society can change the judgment about direct and structural violence from a moral 'wrong' to a 'right'.[1358] The role of society is thus essential; it can legitimise – but more importantly – it can also delegitimise violence by preventing it from becoming morally and socially acceptable. The novel method applied in this research can therefore integrate the cultural dimension. This societal element within a violent system must be considered when widespread violence and impunity interact, especially when only one group within a society faces exclusion.

The root causes of impunity may be manifold. The privileged position of the perpetrator state and the disadvantaged status of the victims contribute significantly to its prevalence. However, society as a whole can and must collectively engage in delegitimising such violence.

[1356] Mann, 'Border Violence as Crime' (n 5) 684; Kalpouzos, 'Violence against Migrants' (n 5) 595; Hodgson, 'Resisting the State Crimes' (n 5) 152; Hairapetian, 'A Culture of Impunity' (n 136) 5.
[1357] Hodgson, 'Resisting the State Crimes' (n 5).
[1358] Galtung, 'Cultural Violence' (n 6) 291.

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