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Part 2 Jurisdiction, Admissibility, and Applicable Law: Compétence, Recevabilité, Et Droit Applicable, Art.7 Crimes against humanity/Crimes contre l'humanité

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(p. 145) Article 7. Crimes against humanity/Crimes contre l'humanité

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

- a) Murder;**
- b) Extermination;**
- c) Enslavement;**
- d) Deportation or forcible transfer of population;**
- e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;**
- f) Torture;**
- g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;**
- h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;**
- i) Enforced disappearance of persons;**
- j) The crime of apartheid;**

1. Aux fins du présent Statut, on entend par crime contre l'humanité l'un quelconque des actes ci-après lorsqu'il est commis dans le cadre d'une attaque généralisée ou systématique lancée contre toute population civile et en connaissance de cette attaque:

- a) Meurtre;**
- b) Extermination;**
- c) Réduction en esclavage;**
- d) Déportation ou transfert forcé de population;**
- e) Emprisonnement ou autre forme de privation grave de liberté physique en violation des dispositions fondamentales du droit international;**
- f) Torture;**
- g) Viol, esclavage sexuel, prostitution forcée, grossesse forcée, stérilisation forcée ou toute autre forme de violence sexuelle de gravité comparable;**
- h) Persécution de tout groupe ou de toute collectivité identifiable pour des motifs d'ordre politique, racial, national, ethnique, culturel, religieux ou sexiste au sens du paragraphe 3, ou en fonction d'autres critères universellement reconnus comme inadmissibles en droit international, en corrélation avec tout acte visé dans le présent paragraphe ou tout crime relevant de la compétence de la Cour;**
- i) Disparitions forcées de personnes;**
- j) Crime d'apartheid;**

k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

k) Autres actes inhumains de caractère analogue causant intentionnellement de grandes souffrances ou des atteintes graves à l'intégrité physique ou à la santé physique ou mentale.

2. For the purpose of paragraph 1:

2. Aux fins du paragraphe 1:

a) 'Attack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

a) Par « attaque lancée contre une population civile », on entend le comportement qui consiste en la commission multiple d'actes visés au paragraphe 1 à l'encontre d'une population civile quelconque, en application ou dans la poursuite de la politique d'un État ou d'une organisation ayant pour but une telle attaque;

b) 'Extermination' includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

b) Par « extermination », on entend notamment le fait d'imposer intentionnellement des conditions de vie, telles que la privation d'accès à la nourriture et aux médicaments, calculées pour entraîner la destruction d'une partie de la population;

c) 'Enslavement' means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

c) Par « réduction en esclavage », on entend le fait d'exercer sur une personne l'un quelconque ou l'ensemble des pouvoirs liés au droit de propriété, y compris dans le cadre de la traite des être humains, en particulier des femmes et des enfants;

d) 'Deportation or forcible transfer of population' means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

d) Par « déportation ou transfert forcé de population », on entend le fait de déplacer de force des personnes, en les expulsant ou par d'autres moyens coercitifs, de la région où elles se trouvent légalement, sans motifs admis en droit international;

e) 'Torture' means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

e) Par « torture », on entend le fait d'infliger intentionnellement une douleur ou des souffrances aiguës, physiques ou mentales, à une personne se trouvant sous sa garde ou sous son contrôle; l'acception de ce terme ne s'étend pas à la douleur ou aux souffrances résultant uniquement de sanctions légales, inhérentes à ces sanctions ou occasionnées par elles;

f) 'Forced pregnancy' means the unlawful confinement * of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

g) 'Persecution' means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

h) 'The crime of apartheid' means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

i) 'Enforced disappearance of persons' means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of this Statute, it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above.

f) Par « grossesse forcée », on entend la détention illégale d'une femme mise enceinte de force, dans l'intention de modifier la composition ethnique d'une population ou de commettre d'autres violations graves du droit international. Cette définition ne peut en aucune manière s'interpréter comme ayant une incidence sur les lois nationales relatives à la grossesse;

g) Par « persécution », on entend le déni intentionnel et grave de droits fondamentaux en violation du droit international, pour des motifs liés à l'identité du groupe ou de la collectivité qui en fait l'objet;

h) Par « crime d'apartheid », on entend des actes inhumains analogues à ceux que vise le paragraphe 1, commis dans le cadre d'un régime institutionnalisé d'oppression systématique et de domination d'un groupe racial sur tout autre groupe racial ou tous autres groupes raciaux et dans l'intention de maintenir ce régime;

i) Par « disparitions forcées de personnes », on entend les cas où des personnes sont arrêtées, détenues ou enlevées par un État ou une organisation politique ou avec l'autorisation, l'appui ou l'assentiment de cet État ou de cette organisation, qui refuse ensuite d'admettre que ces personnes sont privées de liberté ou de révéler le sort qui leur est réservé ou l'endroit où elles se trouvent, dans l'intention de les soustraire à la protection de la loi pendant une période prolongée.

3. Aux fins du présent Statut, le terme « sexe » s'entend de l'un et l'autre sexes, masculin et féminin, suivant le contexte de la société. Il n'implique aucun autre sens.

* In the original version, a comma followed the word 'confinement'. It was removed by C.N. 604.1999 of 12 July 1999.

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Introductory Comments

Crimes against humanity were first prosecuted at Nuremberg. But the expression entered international legal terminology because of the wartime atrocities committed against the Armenian population in the Ottoman Empire. A joint declaration from the governments of France, Great Britain, and Russia, dated 24 May 1915, asserted that '[i]n the presence of these new crimes of Turkey against humanity and civilization, the allied Governments publicly inform the Sublime Porte that they will hold personally responsible for the said crimes all members of the Ottoman Government as well as those of its agents who are found to be involved in such massacres'.¹ In a more colloquial sense, 'crimes against humanity' had been used to describe a range of atrocities, including slavery and the slave trade, as far back as the eighteenth century, including by eminent thinkers like Voltaire and Beccaria.²

When the Charter of the International Military Tribunal was being drafted, the chief US negotiator, Robert Jackson, proposed that the category of crimes that had hitherto been labelled 'atrocities, persecutions and deportations' should be renamed 'crimes against humanity'. Jackson said that the suggestion had come from 'an eminent scholar of international law'.³ We know this to have been Hersch Lauterpacht, who held the chair in public international law at the University of Cambridge.

Crimes against humanity might usefully be viewed as an implementation of human rights norms within international criminal law. Just as human rights law addresses atrocities and other violations perpetrated by a State against its own population, crimes against (p. 148) humanity are focused on prosecuting the individuals who commit such violations. That, at least, was their origin and their *raison d'être*, although there have been constant attempts to enlarge the scope. Some of the historic debates about the definition of crimes against humanity, specifically the early requirement of a *nexus* with armed conflict, were confronted in the negotiations and resolved in the final version of the *Rome Statute*. Others, such as the role for State plan or policy, still lack clarity.

Drafting of the Provision

Crimes against humanity was the third category of crime listed in article VI of the Charter of the International Military Tribunal.⁴ Together with the crime of genocide, it figured as Crime No. VIII in the initial 'draft code of offences against the peace and security of mankind', prepared for the International Law Commission by Special Rapporteur Jean Spiropoulos in 1950.⁵ The Commission studied crimes against humanity in depth in 1986, even considering the addition of environmental and drug crimes within the concept.⁶ Inclusion of apartheid as a crime against humanity was also 'generally accepted' by the International Law Commission,⁷ no doubt because it had already been recognized as such in General Assembly resolutions and in the international treaties.⁸

In the 1991 draft Code of Crimes, the International Law Commission abandoned the term altogether, in favour of a cognate concept it labelled 'Systematic or mass violations of human rights'.⁹ The next year, Special Rapporteur Doudou Thiam proposed a draft subject-matter jurisdiction provision for the statute of an international criminal court listing five categories of crimes, including systematic or mass violations of human rights rather than crimes against humanity.¹⁰ However, the 1992 International Law Commission Working Group on the proposed court did not include crimes against humanity within the jurisdiction *ratione materiae* of the proposed institution. In its view, the jurisdiction was to be based solely on treaty provisions in force.¹¹

It seemed 'inconceivable' to the 1993 Working Group of the International Law Commission 'that, at the present stage of development of international law, the international community would move to create an international criminal court without including' crimes against humanity.¹² The Working Group referred to the recognition of (p. 149) crimes against humanity in the recently adopted Statute of the International Criminal Tribunal for the

former Yugoslavia.¹³ In the 1994 draft, crimes against humanity was placed squarely in the enumeration of offences within the Court's subject-matter jurisdiction.¹⁴ Reference was made in the commentary both to article VI(c) of the Charter of the International Military Tribunal and to article 5 of the Statute of the International Criminal Tribunal for the former Yugoslavia which, said the Commission 'in substance covers the same field' as the text it had somewhat idiosyncratically entitled 'systematic or mass violations of human rights' in its 1991 draft Code of Crimes.¹⁵

During the General Assembly phase of the drafting of the *Rome Statute*, attention turned from the presence of crimes against humanity in the subject-matter jurisdiction, which had become well accepted, to the definition. In contrast with genocide, where a well-accepted and essentially immutable text had existed since adoption of the 1948 Convention, in the case of crimes against humanity there was great variation and considerable confusion. Taking the Nuremberg Charter as the starting point, there were differing definitions in the various drafts of the International Law Commission adopted over the years, crowned by the 1991 draft which altogether abandoned the nomenclature, if not the concept as such. Crimes against humanity returned in the law of the ad hoc tribunals, but the Security Council, in a space of eighteen months, adopted two somewhat different definitions with significant legal distinctions.¹⁶ Furthermore, during the drafting of article 7, innovative interpretations of crimes against humanity had begun to emerge from the ad hoc tribunals, including a seminal ruling of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia.¹⁷ As a result, by comparison with genocide, the challenges to the drafters were enormous; they had to craft a new definition, using customary international law as a touchstone and even an authority, when this was convenient, but departing from it at times as well. Whereas the definition of genocide remained essentially static since its first formulation in 1948, and the definition of war crimes built upon existing humanitarian law treaties, defining crimes against humanity was as much an exercise in progressive development of international law as it was of codification. There was strong support for the idea of detailed and precise definition.¹⁸

Both the Ad Hoc Committee¹⁹ and the Preparatory Committee were vexed by the contextual elements, that is, the criteria by which crimes against humanity are set apart from ordinary crimes. There were many different and creative attempts at definition, reflecting if nothing else the confusion in international law on the subject.²⁰ While there was 'general support' for a requirement that they be widespread or systematic, 'to indicate the scale and magnitude of the offences', other factors that were suggested included 'an element of planning, policy, conspiracy or organization; a multiplicity of victims; acts of a certain duration rather than a temporary, exceptional or limited phenomenon; and acts (p. 150) committed as part of a policy, plan, conspiracy or a campaign rather than random, individual or isolated acts in contrast to war crimes'.²¹ The crimes against humanity provision took much of its final form in the Preparatory Committee, although some important issues were left for determination at the Diplomatic Conference.

The initial discussions took place at the first session of the Preparatory Committee, in early 1996.²² The first proposal, loosely based on article 3 of the Statute of the International Criminal Tribunal for Rwanda, seems to have come from the United States,²³ although Japan and Austria submitted similar texts. A working draft quickly emerged during the negotiations,²⁴ with a more detailed text prepared by the Coordinator. It launched the idea of a definitional portion, the ancestor of article 7(2) of the *Rome Statute*.²⁵ The Coordinator also prepared an elaborate document describing the issues that would need to be resolved in agreeing upon a definition.²⁶ It explained:

There was general support for the widespread or systematic criteria to indicate the scale and magnitude of the offences. The following were also mentioned as elements to be taken into account: an element of planning, policy, conspiracy or organization; a multiplicity of victims; acts of a certain duration rather than a temporary, exceptional or limited phenomenon; and acts committed as part of a policy, plan, conspiracy or a campaign rather than random, individual or isolated acts in contrast to war crimes. Some delegations expressed the view that this criterion could be further clarified by referring to widespread and systematic acts of international concern to indicate acts that were appropriate for international adjudication; acts committed on a massive scale to indicate a multiplicity of victims in contrast to ordinary crimes under national law; acts committed systematically or as part of a public policy against a segment of the civilian population; acts committed in application of a concerted plan to indicate the necessary degree of intent, concert or planning; and exceptionally serious crimes of international concern to exclude minor offences, as in article 20, paragraph (e). Some delegations expressed the view that the criteria should be cumulative rather than alternative.²⁷

The document went on to consider the issue of the *nexus* between crimes against humanity and armed conflict that had haunted the entire concept since Nuremberg, noting that there were different views on the subject.²⁸

The Chair presented a revised text at the third session of the Preparatory Committee, in February 1997.²⁹ France proposed a version for the provision that was broadly similar, but shorter because it did not have the definitional section.³⁰ The Working Group (p. 151) adopted a definition evidencing considerable consensus about the punishable acts, but where the contextual elements in the *chapeau* were riddled with square brackets and options.³¹ These were the big questions that the Preparatory Committee left to be resolved at the Diplomatic Conference.

There was surprisingly little consideration of the crimes against humanity provision at the Rome Conference, in comparison with the enormous attention devoted to the definition of war crimes. Nevertheless, a subtle but significant change effected in the Bureau Discussion Paper released in the final weeks of the Conference,³² which seemed to pass without comment of any kind in the Committee of the Whole, was the reordering of the definitions so that crimes against humanity came ahead of war crimes and after genocide. Implicitly, the Bureau was suggesting an alteration in the hierarchy, something confirmed by the association between genocide and crimes against humanity in article 33 concerning the defence of superior orders, and the somewhat secondary position of war crimes suggested by article 124, the opt-out clause. Crimes against humanity had followed war crimes in the statutes of the Nuremberg, Tokyo, Yugoslavia, and Rwanda tribunals. The most significant development in the definition was codification of the principle that crimes against humanity could be committed in time of peace as well as in time of war, a decisive advance over the Charter of the International Military Tribunal and a confirmation of the case law of the innovative International Criminal Tribunal for the former Yugoslavia.

The Bureau Discussion Paper, presented with two weeks remaining in the Conference, went a long way towards finding consensus on crimes against humanity, and by that point few outstanding issues remained.³³ Several delegations had expressed opposition to paragraph 2 of the provision, with its lengthy definitional texts, but many also thought it useful and preferred to retain it. The Bureau seemed to understand that the provision was important in building consensus, and retained it in its Discussion Paper of 6 July and in the final draft.³⁴ Several delegations had also spoken in favour of the conjunction 'or' between 'widespread and systematic'.³⁵ A much smaller number preferred the conjunction 'and', making the definition narrower.³⁶ But when the Bureau fudged the debate by adopting 'or', yet undoing its consequences by defining 'attack' in such a way as to imply that crimes against humanity

need be both widespread *and* systematic, there were few complaints.³⁷ The Bureau added the crime of apartheid to the list, without opposition, but for the more controversial enumeration of gender crimes it said '[f]urther discussion (p. 152) needed'.³⁸ The record of the Conference provides no supplementary guidance as to how this took place. In the final version of the *Rome Statute*, there is a lengthy list of gender crimes, and the curious definition of gender in paragraph 3. In its Discussion Paper, the Bureau also noted proposals to include terrorism and economic embargoes within the category of crimes against humanity,³⁹ but in subsequent discussions there was little support for the idea,⁴⁰ and the matter was dropped.

Analysis and Interpretation

Crimes against humanity lie very much at the core of international criminal justice. Experience at the ad hoc tribunals show that they form the centrepiece of prosecutions. Crimes against humanity largely, if perhaps not entirely, encompass genocide, which is often viewed as an aggravated form of the crime against humanity of extermination or persecution. Moreover, to the extent that war crimes prosecutions in recent times focus on atrocities perpetrated against civilians, they are also subsumed within the category of crimes against humanity.

The classic definitions of crimes against humanity, in such instruments as the Charter of the Nuremberg Tribunal, are vague and open-ended, leaving courts to interpret the scope of such expressions as 'persecution' and 'inhumane acts'. Out of concern with the uncertain parameters of the crime, the drafters of the *Rome Statute* included extra language designed to restrain efforts at generous or liberal interpretation, most notably in paragraph 2 of article 7. This understanding was further confirmed in the Elements of Crimes:

Since article 7 pertains to international criminal law, its provisions, consistent with article 22, must be strictly construed, taking into account that crimes against humanity as defined in article 7 are among the most serious crimes of concern to the international community as a whole, warrant and entail individual criminal responsibility, and require conduct which is impermissible under generally applicable international law, as recognized by the principal legal systems of the world.⁴¹

Perhaps such declarations will reassure States that are considering ratification of the *Rome Statute* but that are anxious about the uncertain boundaries of crimes against humanity. It is not without interest that this message supporting a conservative and constrained interpretation of article 7 has not received much attention in the case law of the Court. Quite predictably, it was referred to by Judge Hans-Peter Kaul in a dissenting opinion arguing for a narrow construction of article 7. Judge Kaul highlighted the words 'must be strictly construed'.⁴² However, the paragraph about strict construction was ignored by the majority, which adopted a broad interpretative approach, relying on the case law of the International Criminal Tribunal for the former Yugoslavia and the 1991 report of the International Law Commission, adopted at the zenith of its expanding vision of (p. 153) international crimes.⁴³ Indeed, Judge Kaul's dissent appears to contain the only reference to the paragraph in the entire case law of the Court.⁴⁴

Of the many authoritative definitions of crimes against humanity, in such legal instruments as the Charter of the International Military Tribunal, the various drafts of the International Law Commission, and the statutes of the ad hoc tribunals, article 7 is in many respects the most restrictive. Some have taken it as a codification of customary international law. For example, Judge Loucaides of the European Court of Human Rights wrote: 'As regards the elements of crimes against humanity, one may take the recent Rome Statute of the International Criminal Court as declaratory of the international law definition of this crime ...'.⁴⁵ In *Katanga*, the Trial Chamber stated that article 7 had been negotiated 'insofar as

that jurisprudence identifies a pertinent rule of custom'. This had as a consequence, said the Chamber, that it could refer to case law of the ad hoc tribunals to the extent that this identified relevant customary rules, within the meaning of article 31(3)(c) of the Vienna Convention on the Law of Treaties.⁴⁶ But the better view is probably that article 7 is specific to the jurisdiction of the Court and that, bearing in mind article 10 of the *Rome Statute*, it should not be taken as confining the scope of the customary law meaning of the term. It has been argued that this is also the import of the introductory words: 'For the purposes of this Statute ...'.⁴⁷ At the same time, article 7 undoubtedly constitutes a 'low common denominator' or minimum standard reflecting the content of crimes against humanity and therefore deserving of universal application.

Contextual Elements (Art. 7(1))

Five distinct 'contextual elements' of crimes against humanity have been identified. As a Pre-Trial Chamber has explained, these contextual elements 'derive from a combination of the "*chapeau*" of Article 7(1) of the Statute and the definition of "attack" provided by Article 7(2) of the Statute'.⁴⁸ The five contextual elements are: (i) an attack directed against any civilian population; (ii) a State or organizational policy; (iii) an attack of a widespread or systematic nature; (iv) a *nexus* between the individual act and the attack; and (v) knowledge of the attack.⁴⁹

In *Katanga*, the Trial Chamber declared that the analysis of the contextual elements of crimes against humanity requires a three-stage approach. 'Masterful clarity' is how one commentator described the Chamber's formulation.⁵⁰ The first stage concerns the (p. 154) existence of the attack and involves establishing the existence of 'an operation or course of conduct involving, notably, the multiple commission of acts' listed in article 7(1), that the attack was directed against the civilian population, and that it was carried out in pursuance of a policy of a State or organization.⁵¹ The second step involves characterizing the attack as being widespread or systematic, while the third step consists of establishing a *lien de rattachement* or *nexus* between the widespread or systematic attack and the knowledge of the perpetrator that there is such a *lien* or *nexus*.⁵²

Attack Directed against Any Civilian Population

Reflecting the Nuremberg Charter's definition of crimes against humanity, article 7(1) of the *Rome Statute* requires that crimes against humanity result from an 'attack directed against any civilian population'. These words clarify Nuremberg's great innovation with respect to international criminal law, namely, that individuals associated with an oppressive State apparatus could be prosecuted for crimes committed against their own citizens, and not only for crimes committed against foreign nationals whose protection by international law was already relatively well established.⁵³ Similar language is employed in the statutes of the ad hoc tribunals.⁵⁴ In the Preparatory Committee, some delegations argued for deletion of the phrase, saying it was 'vague, unnecessary and confusing since the reference to attack could be interpreted as referring to situations involving an armed conflict and the term "civilian" was often used in international humanitarian law and was unnecessary in the current context'.⁵⁵

The words 'attack directed against any civilian population' are provided further definition in article 7(2)(a): 'a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack'. The expression 'course of conduct' indicates a 'systemic aspect as it describes a series or overall flow of events as opposed to a mere aggregate of random acts'.⁵⁶ The existence of a pattern is implied by the words 'course of conduct', as they refer to 'a campaign or operation carried out against the civilian population, which involves the multiple commission of acts referred to in article 7(1) of the

Statute'.⁵⁷ Although a course of conduct must necessarily involve the commission of multiple acts,

[t]he occurrence of those acts is not the only evidence that may be relevant to prove its existence. On the contrary, since the course of conduct requires a certain 'pattern' of behaviour, evidence relevant to proving the degree of planning, direction or organization by a group or organization is also relevant in assessing the links and commonality of features between individual acts that (p. 155) demonstrate the existence of a 'course of conduct' within the meaning of article 7(2)(a) of the Statute.⁵⁸

The Elements of Crimes make clear that this need not involve a 'military attack'.⁵⁹ It may involve any mistreatment of the civilian population, and even non-violent attacks.⁶⁰ Although many of the specific acts of crimes against humanity involve physical violence, such offences as persecution and apartheid, for example, may be perpetrated as a result of legislation and government policy. This is set out explicitly in the Elements of Crimes.⁶¹ Thus, '[t]he commission of the acts referred to in article 7(1) of the Statute constitute the "attack" itself and, beside the commission of the acts, no additional requirement for the existence of an "attack" should be proven'.⁶²

According to the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia,

the expression 'directed against' is an expression which 'specifies that in the context of crime against humanity the civilian population is the primary object of the attack'. In order to determine whether the attack may be said to have been so directed, the Trial Chamber will consider ... the means and method used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in its course, the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war.⁶³

The term 'directed' emphasizes the intention of the attack and not its physical result.⁶⁴ The 'attack' rather than the acts of an individual perpetrator must be 'directed against' the civilian population.⁶⁵

The civilian population must be the 'primary object of the attack', and not just an incidental victim.⁶⁶ Pre-Trial Chamber I said the potential civilian victims under article 7 may belong to any civilian population, regardless of nationality, ethnicity, or other distinguishing features.⁶⁷ The population under attack may be defined by its (p. 156) perceived political affiliation.⁶⁸ There is no need to show that the entire population of a geographic entity was targeted by the attack, as long as it is not directed against 'a limited and randomly selected number of individuals'.⁶⁹ Nevertheless, the object of the attack must be a civilian 'population', rather than a limited and randomly selected number of individuals.⁷⁰ A judgment of the International Criminal Tribunal for Rwanda says the 'civilian population' requirement is 'intended to imply crimes of a collective nature and thus excludes single or isolated acts'.⁷¹ The population must be 'predominantly civilian in nature', although non-civilians may be present.⁷² It has been held, with reference to French case law, that they may also include military personnel.⁷³

The definition of 'civilian' in article 50 of Additional Protocol I to the Geneva Conventions has been used as a reference, as it is said to reflect customary law.⁷⁴ A Trial Chamber of the Yugoslavia Tribunal said crimes against humanity can also be perpetrated against members of a resistance movement and former combatants, regardless of whether they have worn uniforms, to the extent they are no longer taking part in hostilities when the crimes are

perpetrated because they have either left the army or are no longer bearing arms or, ultimately, have been placed *hors de combat*, in particular, due to their wounds or their being detained.⁷⁵ This wide definition ‘includes all persons *except* those who have the duty to maintain public order and have the legitimate means to exercise force’.⁷⁶ Antonio Cassese wrote that ‘action between soldiers may not constitute crimes against humanity’.⁷⁷ Generally, the concept of ‘civilian population’ should be construed liberally, in order to promote the principles underlying the prohibition of crimes against humanity, (p. 157) which is to safeguard human values and protect human dignity.⁷⁸ Depending upon the circumstances, police officers may be considered as ‘civilians’.⁷⁹

State or Organizational Policy

‘Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced’, reads the judgment of the International Military Tribunal.⁸⁰ This oft-cited phrase expresses a vital idea, but it may also have contributed to some misconception about the nature of international crimes. The Nuremberg court made the statement in answer to the charge that the Nazi leaders were not responsible because they were acting in the interests of the State. Where the famous pronouncement about ‘abstract entities’ may mislead is in suggesting that the State’s role is irrelevant or even secondary to the discussion about crimes against international law.⁸¹ According to Judge Hans-Peter Kaul, in a dissenting opinion, the requirement of a State policy is a ‘decisive, characteristic and indispensable feature of crimes against humanity’.⁸²

This is an area where the law applicable to the International Criminal Court is somewhat different from that applied by the International Criminal Tribunal for the former Yugoslavia. The Tribunal’s Appeals Chamber has taken the view that there is no requirement of a State or other policy with respect to crimes against humanity.⁸³ The distinction was noted by the Supreme Court of Canada, which referred to article 7(2)(a) of the *Rome Statute* as evidence that ‘customary international law may evolve over time so as to incorporate a policy requirement’.⁸⁴ The explanation given by the Appeals Chamber of the Yugoslavia Tribunal for the absence of a State policy requirement under customary international law is unconvincing. The references it cites in support do not, on closer examination, bolster its conclusions.⁸⁵ Moreover, it completely ignores other (p. 158) relevant authorities suggesting the contrary, first and foremost article 7(2)(a) of the *Rome Statute*.⁸⁶ Some writers have argued that the policy requirement in article 7(2) is inconsistent with customary law,⁸⁷ but like the Appeals Chamber of the International Criminal Tribunal, they rely upon selective authorities and, moreover, they do not consider the strong policy concerns about an open-ended definition that can extend to virtually everything except isolated crimes committed by individuals. With such a broad conception of crimes against humanity, many States will be reluctant to join the Court or to accept the other obligations that may accompany international crimes, such as a duty to try and extradite, to exercise universal jurisdiction, and to discourage the use of amnesty.

In his three-volume work, *The Legislative History of the International Criminal Court*, the chair of the Rome Conference Drafting Committee and one of the leading experts on crimes against humanity, Professor M. Cherif Bassiouni, argues:

Contrary to what some advocates advance, Article 7 does not bring a new development to crimes against humanity, namely its applicability to non-state actors. If that were the case, the mafia, for example, could be charged with such crimes before the ICC, and that is clearly neither the letter nor the spirit of Article 7. The question arose after 9/11 as to whether a group such as al-Qaeda, which operates on a worldwide basis and is capable of inflicting significant harm in more than one state, falls within this category. In this author’s opinion, such a group does not qualify for inclusion within the meaning of crimes against humanity as defined

in Article 7, and for that matter, under any definition of that crime up to Article 6(c) of the IMT, notwithstanding the international dangers that it poses ... The text [of article 7(2)] clearly refers to state policy, and the words 'organizational policy' do not refer to the policy of an organization, but the policy of a state. It does not refer to non-state actors ...⁸⁸

Professor Bassiouni's explanation excludes State-like actors, who may control territory and persecute civilian populations under their domination. It helpfully signals the fact that 'organizational' should be construed within the context of 'State policy', however, and cannot be applied to any form of organization.

Article 7(2)(a) of the *Rome Statute* defines the expression '[a]ttack directed against any civilian population', which is used in the *chapeau* of article 7(1), as 'a course of conduct involving the multiple commission of acts referred to in paragraph (1) against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack'. The idea is given further specificity in the Elements of Crimes: 'It is understood that "policy to commit such attack" requires that the State or organization actively (p. 159) promote or encourage such an attack against a civilian population.'⁸⁹ This sentence is supplemented with a rather enigmatic footnote:

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.⁹⁰

According to Pre-Trial Chamber I, the requirement of an organizational policy is aimed at ensuring that an attack, 'even if carried out over a large geographical area or directed against a large number of victims, must still be thoroughly organized and follow a regular pattern'.⁹¹ In addition, it must be conducted in furtherance of a common policy involving public or private resources.⁹² The policy may be 'implemented either by groups who govern a specific territory or by an organization that has the capability to commit a widespread or systematic attack against a civilian population', and it need not be 'explicitly defined or formalised (indeed, an attack which is planned, directed or organised—as opposed to spontaneous or isolated acts of violence—will satisfy this particular criterion)'.⁹³ It may consist of a policy adopted by regional or even local organs of the State.⁹⁴ In a dissenting opinion, Judge Kaul took a more restrictive approach. He insisted upon distinguishing between attribution of responsibility, which might be relevant to very remote bodies within a State, and the ability to formulate a State policy, which required 'policy-making at the high level'. He acknowledged that 'a policy may also be adopted by an organ which, albeit at the regional level, such as the highest official or regional government in a province, has the means to establish a policy within its sphere of action'.⁹⁵

Proof of the State or organizational policy will generally be inferred from repeated acts that follow the same logic, as well as evidence of preparatory activities or collective mobilization that is orchestrated or coordinated.⁹⁶ Some Pre-Trial Chambers have been quite demanding of evidence of a policy. At the confirmation hearing stage, a Pre-Trial Chamber dismissed crimes against humanity charges because (p. 160) it said the evidence was insufficient to establish the existence of a policy.⁹⁷ Judge Monageng dissented, taking the view that evidence suggesting the attacks had the purpose of revenge or intimidation in no way undermined the conclusion that they were in furtherance of a policy directed at a civilian population.⁹⁸ The decision was appealed, but the Appeals Chamber did not address this issue.⁹⁹ In *Gbagbo*, the Pre-Trial Chamber adjourned the confirmation hearing because it felt the evidence of policy was insufficient.¹⁰⁰ It requested the Prosecutor to provide further information on the following: 'How, when and by whom the alleged policy/plan to attack the

“pro-Ouattara civilian population” was adopted, including specific information about meetings at which this policy/plan was allegedly adopted as well as how the existence and content of this policy/plan was communicated or made known to members of the “pro-Gbagbo forces” once it was adopted.¹⁰¹ Judge Fernández dissented, referring to the drafting of the *Statute* when the words ‘policy to commit such attack’ replaced the earlier formulation of ‘policy to commit *those* acts’. She said ‘it would be a legal and methodological mistake to seek to assess the policy requirement in relation to separate acts, or “incidents”, instead of considering it with respect to the attack as a whole’, adding that a ‘piecemeal approach to facts and evidence is simply not helpful to assess systemic forms of criminality’.¹⁰² The Prosecutor decided to close a preliminary examination of the situation in Honduras because of insufficient evidence of policy. ‘[W]hile it appears that the de facto regime developed a plan to take over power and assert control over the country, the design of this plan and implementation of measures pursuant to this plan did not entail or amount to a policy to commit an attack against the civilian population in question within the meaning of article 7 of the Statute’, she wrote in her report.¹⁰³

In *Katanga*, the Trial Chamber explicitly criticized case law of the Pre-Trial Chambers for their understanding of the notion of ‘policy’, saying that it had been confused with the requirement that the attack be ‘systematic’.¹⁰⁴ According to the Trial Chamber, the ‘systematic’ requirement referred to the organized nature of violent attacks. Thus, all ‘systematic’ attacks directed against a civilian population presume the existence of a policy of a State or organization. But it said this did not mean that the two terms should be viewed as synonyms. According to the Chamber, ‘it is not so much the policy as it is the widespread or systematic nature of the attack—viz. a consideration of the scale and regular (p. 161) nature of the pattern followed—which first and foremost distinguishes a crime against humanity and constitutes its “hallmark”’.¹⁰⁵

A Pre-Trial Chamber described the *Statute* as ‘unclear’ in considering ‘the criteria pursuant to which a group may qualify as an organization within the meaning of article 7(2)(a) of the Statute’.¹⁰⁶ Moreover, there are conflicting views about the issue among the judges, as one Chamber has noted,¹⁰⁷ and there is no authoritative pronouncement by the Appeals Chamber. The majority of Pre-Trial Chamber II rejected the view that such organizations must be ‘state-like’, saying that ‘the formal nature of a group and the level of its organization should not be the defining criterion. Instead, as others have convincingly put forward, a distinction should be drawn on whether a group has the capability to perform acts which infringe on basic human values’.¹⁰⁸ It said it was ‘useful’ to refer to the 1991 report of the International Law Commission on the Code of Crimes, which said it could not ‘rule out the possibility that private individuals with de facto power or organized in criminal gangs or groups might also commit the kind of systematic or mass violations of human rights covered by the article’.¹⁰⁹ In *Gbagbo*, the Trial Chamber noted the debate about whether the organization contemplated by article 7(2)(1) need be ‘State-like’, but said that it was not necessary for it to address the question.¹¹⁰ The alleged organization was labelled the ‘pro-Gbagbo forces’ and the ‘inner circle’, an influential body within the Côte d’Ivoire Government. Gbagbo himself was President of the country.

The thesis that an organization be ‘State-like’ was defended by Judge Hans-Peter Kaul, who dissented in the rulings of Pre-Trial Chamber II. Judge Kaul referred to ‘the underlying rationale or *raison d’être* of crimes against humanity’, saying that a teleological interpretation of the concept of crimes against humanity required that the ‘organization’ (p. 162) referred to in article 7(2)(a) be ‘State-like’.¹¹¹ Judge Kaul said he disagreed with including a ‘mafia-like criminal gang’ within the scope of crimes against humanity, noting that this could distort the Court’s work to the detriment of victims.¹¹² He compared the different language versions of the Statute in concluding that ‘organizational’ meant ‘to pertain to an organization’.¹¹³ Judge Kaul also observed that the Elements of Crimes use the expression ‘the State or organization’. Noting the juxtaposition of the notions of ‘State’

and 'organization' in article 7(2)(a), Judge Kaul said this indicated that although 'organizations' did not require the 'constitutive elements of statehood', they indicated a requirement of 'some characteristics of a State', whereby a private 'organization' operates as 'an entity which may act like a State or has quasi-State abilities'. He said that characteristics of such an organization involve:

(a) a collectivity of persons; (b) which was established and acts for a common purpose; (c) over a prolonged period of time; (d) which is under responsible command or adopted a certain degree of hierarchical structure, including, as a minimum, some kind of policy level; (e) with the capacity to impose the policy on its members and to sanction them; and (f) which has the capacity and means available to attack any civilian population on a large scale.¹¹⁴

Judge Kaul said that 'non-state actors which do not reach the level described above are not able to carry out a policy of this nature, such as groups of organized crime, a mob, groups of (armed) civilians or criminal gangs'.¹¹⁵

Pre-Trial Chamber II held that 'organizations not linked to a State may, for the purposes of the Statute, elaborate and carry out a policy to commit an attack against a civilian population'.¹¹⁶ It said that the determination of whether an entity was an 'organization' for the purposes of article 7(2)(a) should be made on a 'case-by-case' basis. It said there were 'a number of considerations', including whether the group: is under a responsible command, or has an established hierarchy; possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population; exercises control over part of the territory of a State; has criminal activities against the civilian population as a primary purpose; articulates, explicitly or implicitly, an intention to attack a civilian population; the group is part of a larger group, which fulfills some or all of the abovementioned criteria. The Pre-Trial Chamber said that 'while these considerations may assist the Chamber in its determination, they do not constitute a rigid legal definition, and do not need to be exhaustively fulfilled'.¹¹⁷

The Pre-Trial Chamber subsequently held that the Mungiki constituted an organization within the meaning of article 7(2)(a). It noted that the Mungiki 'was a hierarchically (p. 163) structured organization under the control of Maina Njenga' with an 'effective system of ensuring compliance by the members with the rules and orders imposed by higher levels of command', that it was 'a large organization and included a trained quasi-military wing', and that it 'controlled and provided, in certain parts of Kenya, essential social services, including security' in certain of the slums of Nairobi.¹¹⁸ Dissenting, Judge Kaul said that the Mungiki, 'like many other criminal gangs in Kenya or elsewhere, remain a somewhat structured, outlawed, violent criminal gang engaged in organized crime and deriving revenues from the illegal provision of certain community services to the local population, mainly in the slums of Nairobi', but that it was not an organization within the meaning of article 7(2)(a).¹¹⁹

In another judgment in the *Situation in Kenya*, the same Pre-Trial Chamber held the 'Network', a body consisting of political representatives, representatives of the media, former members of the Kenyan police and army, Kalenjin elders, and local leaders, to be an organization governed by article 7(2)(a).¹²⁰ Judge Kaul considered the Network to be 'essentially an amorphous alliance' of 'coordinating members of a tribe with a predisposition towards violence with fluctuating membership'. He said that planning and coordination of violence in a series of meetings 'does not transform an ethnically-based gathering of perpetrators into a State-like organization'.¹²¹

Trial Chamber II considered the same issue with respect to combatant groups in the Democratic Republic of the Congo. The majority said that ‘by no means can it be ruled out, particularly in view of modern asymmetric warfare, that an attack against a civilian population may also be the doing of a private entity consisting of a group of persons pursuing the objective of attacking a civilian population; in other words, of a group not necessarily endowed with a well-developed structure that could be described as quasi-State’.¹²² Rejecting the approach by which the organization should be ‘state-like’, the majority said a restrictive conception of organization would not strengthen the purpose of the Statute which was the repression of the most serious crimes.¹²³ Judge van den Wyngaert, dissenting, said she did not believe ‘that whatever corporate shape the so-called “Ngiti-fighters of Walendu-Bindi” took qualifies as an “organization” in the sense of article 7(2)(a)’.¹²⁴ Yet another decision, citing a dissenting opinion of Judge Hans-Peter Kaul as authority, concluded that the *Forces républicaines de Côte d’Ivoire* met the criteria for an organized armed group as a party to a non-international armed conflict. (p. 164) Consequently, they ‘inevitably’ qualified as an organization pursuant to article 7 of the *Rome Statute*.¹²⁵

Widespread or Systematic Attack

For a crime against humanity to be committed, a civilian population must be the object of an attack that is ‘widespread or systematic’. The language is derived from the definition of crimes against humanity in the Statute of the International Criminal Tribunal for Rwanda.¹²⁶ It was also confirmed as a condition under customary international law in the first major judgment of the International Criminal Tribunal for the former Yugoslavia, issued in May 1997.¹²⁷ The two proposals for the *chapeau* or introductory paragraph of the crimes against humanity provision in the Preparatory Committee draft statute both used the words ‘widespread’ and ‘systematic’, but between them were the conjunctions ‘[and] [or]’, in square brackets, indicating that there was no consensus as to whether the conditions were disjunctive or cumulative. In its 6 July 1998 Discussion Paper, the Bureau opted for the formulation ‘widespread or systematic’, but at the same time added a definition for ‘attack’ that seemed to suggest that it needed to be both widespread and systematic.¹²⁸

The terms ‘widespread’ and ‘systematic’ are not defined in the *Rome Statute*. The two conditions are disjunctive, in that if a Chamber is satisfied that the attack is ‘widespread’, it need not also consider whether it is ‘systematic’.¹²⁹ Pre-Trial Chamber I held that ‘widespread’ refers to ‘the large-scale nature of the attack, as well as to the number of victims’.¹³⁰ An attack was deemed widespread that ‘affected hundreds of thousands of individuals and took place across large swathes of the territory of the Darfur region’.¹³¹ It must be ‘massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims’.¹³² It involves an attack ‘carried out over a large geographical area or an attack in a small geographical area directed against a large number (p. 165) of civilians’.¹³³ A widespread crime may be a ‘cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude’.¹³⁴ The assessment is ‘not exclusively quantitative or geographical, but must be carried out on the basis of the individual facts’.¹³⁵ The ad hoc tribunals have viewed the term ‘widespread’ as ‘encompassing an attack carried out over a large geographical area or an attack in a small geographical area, but directed against a large number of civilians’.¹³⁶

The term ‘systematic’ pertains to ‘the organized nature of the acts of violence and to the improbability of their random occurrence’.¹³⁷ They must be characterized as being organized in nature and manifesting a pattern ‘in the sense of non-accidental repetition of similar criminal conduct on a regular basis’.¹³⁸ An attack was held to be ‘systematic’ because ‘it lasted for well over five years and the acts of violence of which it was comprised followed, to a considerable extent, a similar pattern’.¹³⁹ According to Pre-Trial Chamber I, ‘[t]he term “systematic” has been understood as either an organized plan in furtherance of a common policy, which follows a regular pattern and results in a continuous commission of

acts or as “patterns of crimes” such that the crimes constitute a “non-accidental repetition of similar criminal conduct on a regular basis”’. It said that ‘in the context of a systematic attack, the requirement of a “multiplicity of victims” pursuant to article 7(2)(a) of the Statute ensures that the attack involved a multiplicity of victims of one of the acts referred to in article 7(1) of the Statute’.¹⁴⁰

It has been argued that the combined effect of articles 7(1) and 7(2)(a) is to make the requirements of ‘widespread’ and ‘systematic’ cumulative. Thus, according to Professor Kai Ambos:

Ein weiteres Problem ergibt sich aus einem Widerspruch zwischen Art. 7(1) und (2) (a). Während in Absatz 1 ein ausgedehnter *oder* systematischer Angriff verlangt wird, definiert Absatz 2 (a) den Angriff als Verhaltensweise, die in der mehrfachen Begehung der in Abs. 1 genannten Handlungen besteht (d.h. ‘ausgedehnt’ ist) *und* in Ausführung oder zur Unterstützung der Politik eines Staates oder einer Organization vorgenommen wird (d.h. ‘systematisch’ ist). Damit wird die ursprüngliche alternative Formulierung des Absatzes 1 zu einer kumulativen Voraussetzung gemacht und mehr als in Absatz 1 verlangt. Nr. 3 der Einführung der Elemente zu Art. 7 definiert nun den Angriff gegen eine Zivilbevölkerung als ‘course of conduct involving the multiple commission of acts ... pursuant to or in furtherance of a State or organizational [p. 407] policy to commit such attack.’ Damit wird im Ergebnis der kumulativen Formulierung des Art. 7(2)(a) gefolgt, wobei die mehrfachen Handlungen nicht einen militärischen Angriff darstellen müssen und die ‘policy (p. 166) to commit such attack’ impliziert, dass der Staat oder die betreffende Organization einen solchen Angriff fördere oder dazu ermutige.¹⁴¹

In practice, this may not be such a limitation because ‘widespread’ and ‘systematic’ tend to overlap, and manifest themselves in many of the same factors.¹⁴² The Court should obviously consider the number of victims and the nature of the acts.¹⁴³ It should also take into account the existence of a political objective and an acknowledged policy or plan pursuant to which the attack is perpetrated, or an ideology, in the broad sense of the word, that contemplates the destruction, persecution, or weakening of a community, the preparation and use of significant public or private resources, and the participation of high-level political or military authorities.¹⁴⁴ It is the attack itself that must be widespread or systematic, and not the specific acts with which the accused is charged.¹⁴⁵

The specific acts charged against an individual defendant need not be widespread or systematic. Even ‘a single act of murder by a perpetrator may constitute a crime against humanity provided the legal requirements with regard to the contextual element of crimes against humanity, including the nexus element, are met’, Pre-Trial Chamber II has stated.¹⁴⁶ In other words, the single act must be situated within a widespread or systematic attack, in which others participate.

Nexus with the Attack

There must be a *nexus* or link between the acts perpetrated by the accused and the attack directed against the civilian population.¹⁴⁷ In other words, they must be ‘in furtherance of’ the widespread or systematic attack against the civilian population.¹⁴⁸ In establishing the *nexus*, the Court considers the nature, aims, consequences, targets, and alleged perpetrators, in addition to the times and locations of the acts.¹⁴⁹ ‘Isolated acts that clearly differ in their nature, aims and consequences from other acts that occur during an attack, fall outside the scope of Article 7(1) of the Statute.’¹⁵⁰ However, the specific acts with which the accused is charged need not be shown to be widespread (p. 167) and systematic.¹⁵¹ Under certain circumstances, even a single act can constitute a crime against humanity, when committed within the appropriate context, but an isolated act cannot.¹⁵² To satisfy the

required *nexus* between an individual act and the attack, incidents in the context of which the alleged crimes were committed should share common features ‘in terms of their characteristics, nature, aims, targets and alleged perpetrators, as well as times and locations’.¹⁵³

Knowledge of the Attack

Article 7(1) requires that the perpetrator have ‘knowledge of the attack’. It is the first definition to require this explicitly, although undoubtedly knowledge of the attack is an element of crimes against humanity under customary international law.¹⁵⁴ An accused who lacks such knowledge cannot be found guilty of crimes against humanity, although he or she may still be liable for prosecution by national courts for the underlying criminal behaviour, such as murder.¹⁵⁵ The phrase ‘knowledge of the attack’ was not present in the final draft statute adopted by the Preparatory Committee, and emerged in the Bureau Discussion Paper of 6 July 1998.¹⁵⁶ The knowledge requirement is further developed in the Elements of Crimes.¹⁵⁷ The final Element for each punishable act of crime against humanity contains the following ‘context element’: ‘The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.’¹⁵⁸ The Introduction to the Elements for crimes against humanity provides further clarification:

However, the last element should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization. In the case of an emerging widespread or systematic attack against a civilian population, the intent clause of the last element indicates that this mental element is satisfied if the perpetrator intended to further such an attack.¹⁵⁹

For Pre-Trial Chamber I:

[i]t may be noted that the ad hoc tribunals have understood [the reference to knowledge of the attack] to mean that the perpetrator knew that there was an attack on a civilian population, and that his or her acts were a part of that attack. Therefore, in the view of the Chamber, knowledge of (p. 168) the attack and the perpetrator’s awareness that his conduct was part of such attack may be inferred from circumstantial evidence, such as: the accused’s position in the military.¹⁶⁰

Indeed, the approach of the *Rome Statute* is consistent with case law of the ad hoc tribunals. According to the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia, evidence that a person knowingly took the risk of participating in the implementation of a policy does not suffice to prove knowledge of the attack.¹⁶¹

That the accused had knowledge of the context of the attack will be inferred from such factors as the historical and political circumstances in which the acts of violence occurred, the functions of the accused when the crimes were committed, the responsibilities of the accused within the political or military hierarchy, the direct and indirect relationship between the political and military hierarchy, the scope and gravity of the acts perpetrated, the nature of the crimes committed, and the degree to which they are common knowledge.¹⁶² The prosecution need not establish that the accused knew the details of the attack or approved of the context in which his or her acts occurred.¹⁶³ It is only necessary to establish ‘knowledge of the attack in general terms’.¹⁶⁴ The perpetrator need not be a leader in the organization responsible for the attack or even a member.¹⁶⁵ The accused must only understand the overall context in which his or her acts took place.¹⁶⁶ Motives for participation in the attack are irrelevant, however.¹⁶⁷ At best, ‘evidence that [acts were committed] for purely personal reasons could be indicative of a rebuttable assumption that he was not aware that his acts were part of that attack’.¹⁶⁸ Whether the accused intended

his or her acts to be directed against the targeted population or merely against the individual victim is irrelevant, because it is the attack, and not the acts of the accused, that must be directed against the targeted population.¹⁶⁹

No Requirement of Armed Conflict

There can be no doubt that by its silence on the subject, the *Rome Statute* excludes any *nexus* between crimes against humanity and armed conflict. It is an issue on which the *Rome Statute* confirms an important evolution in international law.¹⁷⁰ When the concept was first developed, at the London Conference and in the Charter of the International Military Tribunal, a connection between the punishable act and armed conflict was imposed.¹⁷¹ The four powers that established the Nuremberg Tribunal would not have recognized crimes against humanity otherwise, because of the implications this might (p. 169) have concerning the treatment of minorities within their own countries or their colonies. Only by linking crimes against humanity to the aggressive war could the United States, the United Kingdom, France, and the Soviet Union ensure that Nazi atrocities committed against German nationals would be punishable, but at the same time no precedent would be set that they might later regret.¹⁷² Some have argued that under customary law, crimes against humanity never required any *nexus* with armed conflict, and that the norm imposed by the Nuremberg Tribunal was merely a technique to define jurisdiction. But in December 1946, the UN General Assembly '[a]ffirm[ed] the principles of international law recognized by the Charter of the Nurnberg Tribunal and the judgment of the Tribunal'.¹⁷³ Four years later, the International Law Commission prepared a codification of these principles that confirmed the *nexus* with armed conflict.¹⁷⁴

Although the International Law Commission considered eliminating the connection between crimes against humanity and armed conflict as early as 1954,¹⁷⁵ the drafters of the *Rome Statute* were also influenced by the wording of article 5 of the Statute of the International Criminal Tribunal for the former Yugoslavia, adopted by the Security Council in May 1993. It said that crimes against humanity are punishable 'when committed in armed conflict, whether international or internal in character'.¹⁷⁶ Without much doubt, those in the UN Secretariat who drafted this provision believed that such a limitation was imposed by customary international law, and that to prosecute crimes against humanity in the absence of armed conflict would violate the maxim *nullum crimen sine lege*.¹⁷⁷ Eighteen months later, when it adopted the Statute of the International Criminal Tribunal for Rwanda, the Security Council did not include an armed conflict *nexus*.¹⁷⁸ But this was explained as a departure from customary international law.¹⁷⁹

At the 1995 Ad Hoc Committee, in discussion of the contextual element or *chapeau*, reference was made to the ad hoc tribunal statutes as a source of 'guidance'.¹⁸⁰ According to the Report, '[t]here were different views as to whether crimes against humanity could be committed in peacetime in the light of the Nürnberg precedent, as well as the statute of the ad hoc Tribunal for the former Yugoslavia'. Reference was made by some delegations to the absence of such a requirement in the Statute of the International Criminal (p. 170) Tribunal for Rwanda, as well as to an early Trial Chamber decision of the International Criminal Tribunal for the former Yugoslavia.¹⁸¹ A few weeks after the Committee issued its report, the Appeals Chamber of the Yugoslavia Tribunal declared that the *nexus* between crimes against humanity and war had disappeared. It is interesting to compare the equivocation of the Ad Hoc Committee with the certainty and self-confidence of the Appeals Chamber judges, who said it is 'a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict'.¹⁸² Much later, the Appeals Chamber explained that in 'drafting Article 5 of the Statute of the International Criminal Tribunal for the former Yugoslavia and imposing the additional jurisdictional requirement that crimes against humanity be committed in armed conflict, the Security

Council intended to limit the jurisdiction of the Tribunal to those crimes which had some connection to armed conflict in the former Yugoslavia'.¹⁸³

Debate persisted on this subject in the sessions of the Preparatory Committee.¹⁸⁴ Those arguing against the link with armed conflict proposed alternative contextual elements, employing terms like 'widespread' and 'systematic', so as to distinguish crimes against humanity from ordinary crimes. China and Russia insisted upon retaining the *nexus* with armed conflict.¹⁸⁵ Some delegations took the view that 'existing law required some type of connection to an armed conflict in a broad sense, with references being made to the Nürnberg Charter, the Yugoslavia Tribunal Statute, the memorandum of its President and the Nikolic case pending before it; and that customary law had not changed owing to the adoption of human rights instruments which provided specific procedures for addressing violations or the Rwanda Tribunal Statute'.¹⁸⁶ Others said that the *nexus* 'was no longer required under existing law, with attention being drawn to article I of the Genocide Convention, Control Council Law Number 10, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, the Rwanda Tribunal Statute, the Yugoslavia Tribunal Appeals Chamber decision in the Tadić case and the Draft Code'.¹⁸⁷ The United States went so far as to contend that even at Nuremberg those who conceived of the concept did not consider this to be an element of crimes against humanity.¹⁸⁸ A proposal to make elimination of the *nexus* explicit by incorporating, in the *chapeau* of the crimes against humanity provision, the words 'in time of peace or in time of war',¹⁸⁹ did not survive in the final draft of the Committee. One of the alternatives in the draft crimes against humanity provision adopted by the Preparatory Committee was '[in armed conflict]'.¹⁹⁰

(p. 171) At the Rome Conference, many of the early comments on this point by delegations lacked clarity. Thus, in the initial debate on the subject in the Committee of the Whole, in the minds of a significant number of participants the issue appeared to be framed as whether crimes against humanity should only apply during international armed conflict or whether they should be extended to non-international armed conflict.¹⁹¹ Many delegations insisted that crimes against humanity could be committed in peacetime,¹⁹² while a handful took the contrary view.¹⁹³ A few questioned use of the term 'civilian population', which they thought implied a *nexus* with armed conflict.¹⁹⁴ In the final days of the Conference, the attention of many delegations seemed to shift to war crimes, and while several States argued strongly that the war crimes provision should not apply to internal conflicts, they made no similar claims with regard to crimes against humanity. Excluding war crimes for internal armed conflict but allowing crimes against humanity in peacetime would seem blatantly contradictory in terms of legal theory, but this is indeed what the record of the Conference indicates.

No Requirement of Discriminatory Intent or Motive

In the Statute of the International Criminal Tribunal for Rwanda, crimes against humanity must be committed 'on national, political, ethnic, racial or religious grounds'.¹⁹⁵ Although there is no similar formulation in the equivalent provision of the Statute of the International Criminal Tribunal for the former Yugoslavia, the Secretary-General's Report to the Security Council on its establishment described crimes against humanity as acts committed 'on national, political, ethnic, racial or religious grounds'.¹⁹⁶ His views were echoed by three members of the Security Council.¹⁹⁷ Eventually, the Appeals Chamber of the Yugoslavia Tribunal confirmed that there was no discriminatory intent or motive requirement for crimes against humanity, with the exception of the specific punishable act of persecution.¹⁹⁸

During debate in the Preparatory Committee, views were expressed supporting both approaches.¹⁹⁹ One of the alternative formulations in the final draft of the Preparatory (p. 172) Committee included the words '[on political, philosophical, racial, ethnic or religious grounds or any other arbitrarily defined grounds]'.²⁰⁰ It received no support whatsoever in the general debate, and was eliminated in the Bureau Discussion Paper of 6 July 1998.²⁰¹ There can be no doubt, therefore, that there is no requirement of a discriminatory intent or motive with respect to article 7 generally. Article 7(1)(h), concerning persecution, is the exception, because of its reference to 'political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law'.

Punishable Acts

A list of punishable acts follows the *chapeau* or introductory paragraph in the definition of crimes against humanity. In some but not all cases, the punishable act is supplemented by article 7(2) with a paragraph providing definition. The Elements of Crimes also contribute to defining the meaning and scope of the punishable acts. The enumeration of punishable acts is an exhaustive one, although flexibility is achieved with the final paragraph criminalizing 'other inhumane acts'.

Murder (Art. 7(1)(a))

The first punishable act is 'murder'—*meurtre* in French, unlike the statutes of the ad hoc tribunals where the term *assassinat* is used. This contrasts with the first punishable act of genocide, which is 'killing', and the first for war crimes, 'wilful killing'. The discrepancy is explained by the historic models for the definitions of these different crimes. 'Murder' was the first punishable act of crimes against humanity in the definition of the Charter of the International Military Tribunal, and has retained this position in subsequent instruments, such as the statutes of the ad hoc tribunals.

There is no definition of murder in article 7(2). The Elements of Crimes for the crime against humanity of murder state: 'The perpetrator killed one or more persons.' The word 'killed' is supplemented by a footnote: 'The term "killed" is interchangeable with the term "caused death". This footnote applies to all elements which use either of these concepts.'²⁰² The ordinary meaning of 'murder' is intentional homicide. The Elements seem to suggest that murder as a crime against humanity might be committed in the case of involuntary homicide or manslaughter, but this must be read in light of article 30 of the *Statute*, which speaks of both intent and knowledge.²⁰³ The Prosecutor must establish that the perpetrator meant to cause death or was aware that death would occur in the ordinary course of events. Intent can be inferred from the use of a firearm against unarmed persons.²⁰⁴ A conviction for the crime against humanity of murder 'requires the perpetrator's intent to kill one or more persons. Thus, this offence encompasses, first and foremost, cases of *dolus directus* of the first and second degree.'²⁰⁵

(p. 173) For murder as a crime against humanity to be committed, 'the victim has to be dead and the death must result from the act of murder'.²⁰⁶ Murder may be committed either by act or by omission.²⁰⁷ With respect to proof of the crime, 'the death of the victim can be inferred from factual circumstances, and ... the Prosecutor must prove the causal link between the act of murder and the victim's death'.²⁰⁸ If the prosecution relies upon circumstantial evidence, the death of the victim must be the only reasonable conclusion that can be drawn.²⁰⁹ Although 'there is no need to find and/or identify the corpse, the Prosecutor is still expected to specify, to the extent possible, inter alia, the location of the alleged murder, its approximate date, the means by which the act was committed with

enough precision, the circumstances of the incident and the perpetrator's link to the crime'.²¹⁰

Referring to civilians who were not directly participating in hostilities, the Trial Chamber in *Katanga* concluded that the crime against humanity of murder was committed against persons fleeing the attack, those killed in their homes, and those hiding in the bush. Furthermore, it held that civilians not directly participating in hostilities who were killed in a military camp were also victims of the crime. However, it did not conclude that soldiers were victims of the crime against humanity of murder, noting that this had not been part of the charges and so it was unnecessary to rule on the point.²¹¹

Charges of murder as a crime against humanity have been confirmed against Charles Blé Goudé with respect to the suppression of anti-government demonstrations and protests in 2011 involving the death of nearly 200 persons.²¹² The Chamber also confirmed charges against Goudé of 'attempted murder', describing them in the alternative as murder under article 7(1)(a) and other inhuman acts under article 7(1)(k).²¹³

Extermination (Arts 7(1)(b), 7(2)(b))

Extermination is the second punishable act of crimes against humanity. It is listed in article 7(1)(b), and further defined in article 7(2)(b). According to article 7(2)(b): "Extermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population.' Pre-Trial Chamber I has described it as 'a mass killing of members of a civilian population'.²¹⁴ It is similar to the crime against humanity of murder, except that the killing takes place on a large scale.²¹⁵

(p. 174) The Preparatory Committee draft statute offered two options for the definition of extermination in article 7(2)(b), 'wilful' and 'intentional';²¹⁶ the latter was selected in the Bureau Discussion Paper of 6 July 1998.²¹⁷ According to the Elements of Crimes of extermination, '[t]he perpetrator killed one or more persons, including by inflicting conditions of life calculated to bring about the destruction of part of a population'. A footnote supplements the word 'killed': 'The conduct could be committed by different methods of killing, either directly or indirectly.' A second footnote is placed at the end of the sentence: 'The infliction of such conditions could include the deprivation of access to food and medicine.' A second sentence in the Elements declares: 'The conduct constituted, or took place as part of, a mass killing of members of a civilian population.' A footnote follows the words 'as part of': 'The term "as part of" would include the initial conduct in a mass killing.'²¹⁸ There is a similar sentence in the Elements for genocide, included apparently so as to resist arguments by which the first perpetrators in what would become a mass killing have not yet participated in a mass killing.

The text of article 8(2)(b) reflects a vision of the crime against humanity of extermination by which it is analogous to the third punishable act of genocide ('Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part'). Certainly, the crime against humanity of extermination fills a useful gap in international criminal justice, by providing a mechanism for prosecution in cases where there is mass killing, but where all of the elements of genocide, notably the targeting of a national, ethnic, racial, or religious group, are not present.²¹⁹ In many ways it resembles genocide, except that there need be no proof of intent to destroy the population being attacked, nor is the description of the population confined to one nation. Speaking to the Security Council in June 2009, Prosecutor Moreno-Ocampo said:

Under paragraph 2(b) of article 7 of the Rome Statute, extermination includes ‘the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population’. That provision mirrors those of article 6 of the Statute, on genocide, which establishes that causing serious bodily or mental harm to members of a group and deliberately inflicting on that group conditions of life calculated to bring about its physical destruction, in whole or in part, can constitute genocide. The only difference between extermination and genocide is the latter’s requirement that an intention to eliminate a specific group be demonstrated, in this case the Fur, Massalit and Zaghawa. Extermination has been happening since at least 2004, and it is happening today. Extermination is happening, with 2.5 million victims so far. Extermination is happening before the eyes of the international community.²²⁰

There have been several convictions for extermination at the ad hoc tribunals, where it is used to cover situations of mass killing, but not situations concerning ‘conditions of life’. Fortunately, the words ‘*inter alia*’ were added to article 8(2)(b) by the Bureau Discussion Paper of 6 July 1998, following a proposal from Cuba,²²¹ giving the concept considerably more flexibility. According to the case law, extermination encompasses ‘acts committed with the intention of bringing about the death of a large number of victims either (p. 175) directly, such as by killing the victim with a firearm, or less directly, by creating conditions provoking the victim’s death’.²²² The Appeals Chamber of the Rwanda Tribunal has explained: ‘Murder as a crime against humanity does not contain a materially distinct element from extermination as a crime against humanity; each involves killing within the context of a widespread or systematic attack against the civilian population, and the only element that distinguishes these offences is the requirement of the offence of extermination that the killings occur on a mass scale.’²²³ Accordingly, ‘for the crime of extermination to be established, in addition to the general requirements for a crime against humanity, there must be evidence that a particular population was targeted and that its members were killed or otherwise subjected to conditions of life calculated to bring about the destruction of a numerically significant part of the population’.²²⁴ According to a Trial Chamber of the Rwanda Tribunal, ‘[t]he scale of the killing required for extermination must be substantial. Responsibility for a single or a limited number of killings is insufficient.’²²⁵ But the Prosecutor is not required to furnish a precise list of victims in order to establish commission of the crime.²²⁶ Moreover, any attempt ‘to set a minimum number of victims in the abstract will ultimately prove unhelpful; the element of massive scale must be assessed on a case-by-case basis in light of the proven criminal conduct and all relevant factors’.²²⁷

A charge of extermination was approved by Pre-Trial Chamber I in the *Bashir* arrest warrant. The example provided by the Chamber was ‘the alleged killing of over a thousand civilians in connection with the attack on the town of Kailek ... primarily from the Fur, Masalit and Zaghawa groups, in the Darfur region’.²²⁸ Subsequently, in *Hussein*, the Prosecutor sought and obtained charges of murder as a crime against humanity with respect to killings of groups of twenty, twenty-one, and thirty-two individuals. These were not charged as the crime against humanity of extermination.²²⁹

Enslavement (Arts 7(1)(c), 7(2)(c))

The crime against humanity of enslavement is listed in article 7(1)(c) of the *Rome Statute*. It is defined by article 7(2)(c): ‘“Enslavement” means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.’ The definition was not included in the draft statute prepared by the Preparatory Committee, where there were proposals to refer to slavery-related practices and forced labour.²³⁰ (p. 176) The text of the definition was developed at the Rome Conference, appearing first in the Bureau Discussion Paper of 6 July 1998, which spoke of ‘deprivation of physical liberty in the course of

trafficking in persons, in particular women and children for the purpose of sexual exploitation'.²³¹ Negotiations continued, and the references to 'deprivation of physical liberty' and 'for the purpose of sexual exploitation' were removed.²³²

The Elements of Crimes follow the definition in the *Statute*, but add several examples: 'The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.'²³³ When this text was being negotiated in the Preparatory Commission, there were 'serious concerns because of the commercial nature of each illustration'.²³⁴ Out of concern that this might limit the concept to acts involving a commercial or pecuniary exchange, a footnote was added:

It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.²³⁵

The Supplementary Slavery Convention referred to in the footnote defines 'servile status' as including debt bondage, serfdom, forced marriage, and child exploitation.²³⁶ The examples of powers attaching to the right of ownership over persons provided in the Elements are of course not exhaustive. As a Trial Chamber has explained, '[p]owers attaching to right of ownership must be construed as the use, enjoyment and disposal of a person who is regarded as property, by placing him or her in a situation of dependence which entails his or her deprivation of any form of autonomy'.²³⁷

That slavery and the slave trade are contrary to customary international law, and subject to individual criminal liability, is axiomatic.²³⁸ The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia has noted that article 1(1) of the 1926 Slavery Convention²³⁹ defines slavery as 'the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised'.²⁴⁰ It said this was preferable to words employed by a Trial Chamber, describing slavery as 'the exercise of any or all of the powers attaching to the right of ownership over a person'.²⁴¹

The Appeals Chamber of the Yugoslavia Tribunal has confirmed that the traditional concept of slavery, as defined in the 1926 Slavery Convention and often referred to as (p. 177) 'chattel slavery', has evolved to encompass various contemporary forms of slavery which are also based on the exercise of any or all of the powers attaching to the right of ownership. As the Appeals Chamber explained:

In the case of these various contemporary forms of slavery, the victim is not subject to the exercise of the more extreme rights of ownership associated with 'chattel slavery', but in all cases, as a result of the exercise of any or all of the powers attaching to the right of ownership, there is some destruction of the juridical personality; the destruction is greater in the case of 'chattel slavery' but the difference is one of degree. The Appeals Chamber considers that, at the time relevant to the alleged crimes, these contemporary forms of slavery formed part of enslavement as a crime against humanity under customary international law.²⁴²

International humanitarian law does not prohibit all labour by protected persons in armed conflicts. For example, article 51 of the fourth Geneva Convention seeks to regulate the practice of forced labour, declaring that an Occupying Power may not compel protected persons to work unless they are over eighteen years of age, and then only on work which is necessary either for the needs of the army of occupation, or for public utility services, or for the feeding, sheltering, clothing, transportation, or health of the population of the occupied

country.²⁴³ Article 5 of Additional Protocol II to the Geneva Conventions also contemplates forms of forced labour:

In addition to the provisions of Article 4 the following provisions shall be respected as a minimum with regard to persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained ... (e) they shall, if made to work, have the benefit of working conditions and safeguards similar to those enjoyed by the local civilian population.²⁴⁴

In peacetime, however, the prohibition of slavery or enslavement would appear to be an absolute one, consistent with non-derogable norms in international human rights treaties. The case law of the Yugoslavia Tribunal has established that ‘the exaction of forced or compulsory labour or service’ is an ‘indication of enslavement’, and a ‘factor to be taken into consideration in determining whether enslavement was committed’.²⁴⁵ Often forced or compulsory labour or service is without remuneration, and frequently, though not necessarily, it involves physical hardship, sex, prostitution, and human trafficking, and these too are factors to be assessed.²⁴⁶

Evidence that a person was kept in captivity in the absence of other indications would not be enough to establish the crime of enslavement.²⁴⁷ Duration is a factor in determining enslavement, but it is not an element. Lack of consent or resistance is not an element of the crime of enslavement.²⁴⁸ As the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia has explained: ‘The question turns on the quality of the relationship between the accused and the victim. A number of factors determine that quality.’²⁴⁹ Other factors in determining enslavement have also been identified, such (p. 178) as restrictions on freedom to come and go or on any freedom of choice or movement as well as, more generally, measures to prevent or deter escape. Furthermore, ‘[t]he use of threats, force or other forms of physical or mental coercion, the exaction of forced labour, the exertion of psychological pressure, the victim’s vulnerability and the socioeconomic conditions in which the power is exerted may also be taken into account’.²⁵⁰

Charges of enslavement have been authorized in several arrest warrants in the *Situation in Uganda*, including that of Dominic Ongwen.²⁵¹ The related crime against humanity of sexual slavery has also been charged. In those cases, Chambers have given judicial consideration to the broader concepts of slavery and servitude.²⁵²

Deportation or Forcible Transfer of Population (Arts 7(1)(d), 7(2)(d))

The crime against humanity of deportation is derived from the Nuremberg Charter.²⁵³ Article 7(1)(d) of the *Rome Statute* modifies it somewhat, with addition of the words ‘or forcible transfer of population’. The prohibition ‘aims at safeguarding the right and aspiration of individuals to live in their communities and homes without outside interference’.²⁵⁴ It is defined in article 7(2)(d): ‘“Deportation or forcible transfer of population” means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.’ The Elements of Crimes add to this significantly:

1. The perpetrator deported or forcibly¹² transferred,¹³ without grounds permitted under international law, one or more persons to another State or location, by expulsion or other coercive acts.
2. Such person or persons were lawfully present in the area from which they were so deported or transferred.

3. The perpetrator was aware of the factual circumstances that established the lawfulness of such presence.

When the *Rome Statute* was being drafted, some States were concerned that if the provision was not carefully defined it might cover 'lawful deportation under national and international law'. Various suggestions were made to narrow what at first glance looks like a blanket prohibition.²⁵⁵ At the same time, the provision reflects an important expansion in its coverage not only of actual deportation beyond a State's borders, but also 'forcible transfer' within those borders. The Preparatory Committee final draft listed 'deportation (p. 179) or forcible transfer of population',²⁵⁶ without square brackets indicating that the phrase enjoyed consensus. However, there was still much disagreement about the definitional paragraph:

(b) 'deportation or forcible transfer of population' means the movement of [persons] [populations] from the area in which the [persons] [populations] are [lawfully present] [present] [resident] [under national or international law] [for a purpose contrary to international law] [without legitimate and compelling reasons] [without lawful justification].²⁵⁷

This text was much amended during the Rome Conference. Nepal presented a new draft, although it does not appear to have had much influence on the outcome.²⁵⁸ Concerns about the breadth of the provision resurfaced, with various proposals aimed at limiting its scope.²⁵⁹ The definition of deportation or forcible transfer only appeared in its final version in the Bureau Discussion Paper of 6 July 1998.²⁶⁰

With reference to the Elements of Crimes, Pre-Trial Chamber II has noted that the crime against humanity of deportation or forcible transfer of population requires that 'the perpetrator deported or forcibly transferred ... one or more persons ... by expulsion or other coercive acts'. It said that a literal interpretation of the wording led to the conclusion that deportation or forcible transfer of population is an 'open-conduct crime': 'In other words, the perpetrator may commit several different conducts which can amount to "expulsion or other coercive acts", so as to force the victim to leave the area where he or she is lawfully present'.²⁶¹

Several decisions of the International Criminal Tribunal for the former Yugoslavia have considered whether 'deportation or forcible transfer' requires that an international border be crossed. A Trial Chamber of the Tribunal said it was clear 'that the Statute of the International Criminal Court does not require proof of crossing an international border but only that the civilian population was displaced'.²⁶²

A 'forcible' transfer refers to a situation where the individual has no free or 'genuine' choice to remain in the territory.²⁶³ Thus, the trier of fact 'must consequently consider the prevailing situation and atmosphere, as well as all relevant circumstances, including in particular the victims' vulnerability, when assessing whether the displaced victims had a genuine choice to remain or leave and thus whether the resultant displacement was unlawful'.²⁶⁴ Even where those displaced may have wished, or even requested, to be removed, they may have been denied a genuine choice.²⁶⁵ In *Muthuara et al.*, a Pre-Trial Chamber confirmed charges of forcible displacement on the basis of evidence showing destruction of homes in residential areas, brutal killings and injuries, rapes, and public (p. 180) announcements to the effect that 'all Luos must leave'. According to the Chamber, this amounted to coercion.²⁶⁶ In *Bashir*, Pre-Trial Chamber I concluded there were reasonable grounds to believe that 'hundreds of thousands of civilians belonging primarily to the Fur, Masalit and Zaghawa groups were subject, throughout the Darfur region, to acts of forcible transfer'.²⁶⁷ In her application for authorization to investigate the *Situation in Georgia*, the

Prosecutor invoked the displacement of the majority of the ethnic Georgian population in South Ossetia.²⁶⁸

Deportation and forcible transfer are allowed on 'grounds permitted under international law'. One such ground is when 'the security of the civilians or imperative military reasons so demand'.²⁶⁹ According to a judgment of the International Criminal Tribunal for the former Yugoslavia, '[e]vacuation is by definition a temporary and provisional measure and the law requires that individuals who have been evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased'.²⁷⁰ It notes that international humanitarian law had long recognized not only the right but also the duty of military commanders to evacuate civilians when they are in danger as a result of military operations. Humanitarian reasons are also a justification for evacuation of a civilian population.²⁷¹

Imprisonment (Art. 7(1)(e))

Imprisonment was not listed as a crime against humanity in the Charter of the International Military Tribunal, but it appeared in the definition in Control Council Law No. 10.²⁷² In article 7(1)(e) of the *Rome Statute*, imprisonment is expanded to include 'other severe deprivation of physical liberty in violation of fundamental rules of international law'. There is no additional definition of imprisonment in article 7(2). The Elements of Crimes require that the perpetrator imprisoned or otherwise severely deprived of physical liberty one or more persons, that '[t]he gravity of the conduct was such that it was in violation of fundamental rules of international law', and that the perpetrator was aware of the factual circumstances establishing such gravity.²⁷³

Discussions during drafting of the *Rome Statute* reveal some unease among a few delegations that 'lawful imprisonment in the exercise of State authority' might be contemplated by the provision.²⁷⁴ Of course, that is the whole point of the provision. It will particularly address situations where an abusive justice system imprisons individuals, generally in accordance with its own laws, as part of a widespread or systematic attack on a civilian population.²⁷⁵ The Preparatory Committee draft reflected the debate with (p. 181) several sets of square brackets: '[detention or] [imprisonment] [deprivation of liberty] [in flagrant violation of international law] [in violation of fundamental legal norms]'.²⁷⁶ After perfunctory debate in the Committee of the Whole,²⁷⁷ the Bureau settled on what became the final text.²⁷⁸

According to the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia, 'imprisonment ... should be understood as contemplating arbitrary imprisonment, that is to say, the deprivation of liberty of the individual without due process of law, as part of a widespread or systematic attack directed against a civilian population'.²⁷⁹

The crime against humanity of imprisonment has been charged by the Court in some of the Sudanese cases.²⁸⁰

Torture (Arts 7(1)(f), 7(2)(e))

The prohibition of torture by international law has evolved from a variety of sources, including the Lieber Code of 1863 and Hague Convention IV of 1907. Torture was not part of the definition of crimes against humanity in the Charter of the International Military Tribunal, and appeared for the first time in the enumeration of Control Council Law No. 10.²⁸¹ As a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia pointed out in *Furundžija*:

no State has ever claimed that it was authorized to practice torture in time of armed conflict, nor has any State shown or manifested opposition to the implementation of treaty provisions against torture. When a State has been taken to task because its officials allegedly resorted to torture, it has normally responded that the allegation was unfounded, thus expressly or implicitly upholding the prohibition of this odious practice.²⁸²

In 2012, the International Court of Justice confirmed that the prohibition of torture was part of customary international law and, moreover, constituted a peremptory norm (*jus cogens*). The Court referred to the prohibition in a range of international instruments of universal application (although not the *Rome Statute*), said it had been introduced into the domestic law of almost all States, and, finally, noted that ‘acts of torture are regularly denounced within national and international fora’.²⁸³

Torture is defined in article 7(2)(e): ‘“Torture” means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering (p. 182) arising only from, inherent in or incidental to, lawful sanctions.’ The Elements of Crimes essentially repeat the terms of this definition. A footnote states: ‘It is understood that no specific purpose need be proved for this crime.’²⁸⁴

The Preparatory Committee final draft revealed continuing debate about the parameters of the crime against humanity of torture. The first of two alternatives showed many unresolved issues: ‘[“torture” means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person [in the custody or physical control of the accused] [deprived of liberty]; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions [in conformity with international law]]’. The second alternative was to employ the definition set out in article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.²⁸⁵ The Convention definition requires that torture be committed with a purpose, namely ‘obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind’,²⁸⁶ when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. There was little debate in the Committee of the Whole, and the Bureau proposed what became the final text in its 6 July 1998 Discussion Paper.²⁸⁷

Case law of the ad hoc tribunals has imported the prohibited purpose requirement from the Torture Convention into the definition of crimes against humanity. To qualify as the crime against humanity of torture, ‘[t]he act or omission must aim at obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person’.²⁸⁸ This has been taken as a representative and not an exhaustive enumeration.²⁸⁹ For example, ‘humiliating the victim or a third person constitutes a prohibited purpose for torture under international humanitarian law’.²⁹⁰ It has been noted that torture is not a gratuitous act of violence, but seeks to attain a certain result or purpose. In the absence of such purpose or goal, even very severe infliction of pain would not qualify as torture.²⁹¹ But while there must be evidence of the prohibited purpose, it need not be the sole or even the predominant purpose for inflicting the severe pain or suffering.²⁹² Torture for purely private purposes falls outside the scope of the definition. Because of the footnote in the Elements of Crimes, eliminating the prohibited purpose requirement, there is a clear discrepancy between the definition of torture under customary law, as interpreted by the ad (p. 183) hoc tribunals, and the one to be applied by the International Criminal Court in accordance with the *Rome Statute* as complemented by the Elements of Crimes. In this respect, there is a difference

with torture as a war crime, where a specific purpose is required.²⁹³ On the other hand, when torture is prosecuted as a war crime, there is no requirement that the victims were in the custody or under the control of the perpetrator.²⁹⁴

Some early rulings of the International Criminal Tribunal for the former Yugoslavia held that at least one of the perpetrators of torture must be a public official or, at any rate, someone not acting in a private capacity; that is, that it be 'committed by, or at the instigation of, or with the consent or acquiescence of, an official or other person acting in an official capacity'.²⁹⁵ This view was based on the inclusion of such a criterion within the Torture Convention. Subsequent decisions said this is not a requirement of the crime of torture under customary international law.²⁹⁶ In *Kvočka*, a Trial Chamber explained that 'the state actor requirement imposed by international human rights law is inconsistent with the application of individual criminal responsibility for international crimes found in international humanitarian law and international criminal law'.²⁹⁷

It is the severity of the pain or suffering inflicted in the case of torture that sets it apart from similar offences. According to Pre-Trial Chamber II, 'although there is no definition of the severity threshold as a legal requirement of the crime of torture, it is constantly accepted in applicable treaties and jurisprudence that an important degree of pain and suffering has to be reached in order for a criminal act to amount to an act of torture'.²⁹⁸ In assessing the seriousness of such mistreatment, it has been held that the objective severity of the harm inflicted must first be assessed. The Court should then consider subjective criteria, such as the physical or mental effect of the treatment upon the particular victim and, in some cases, factors such as the victim's age, sex, or state of health.²⁹⁹ According to a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia:

When assessing the seriousness of the acts charged as torture, the Trial Chamber must take into account all the circumstances of the case, including the nature and context of the infliction of pain, the premeditation and institutionalisation of the ill-treatment, the physical condition of the victim, the manner and method used, and the position of inferiority of the victim. The extent that an individual has been mistreated over a prolonged period of time will also be relevant.³⁰⁰

Although torture often causes permanent damage to the health of its victims, permanent injury is not a requirement for the crime.³⁰¹ The mental suffering of an individual forced (p. 184) to watch severe mistreatment of a relative could reach the level of gravity required for the crime of torture. In *Kvočka*, a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia wrote: '[B]eing forced to watch serious sexual attacks inflicted on a female acquaintance was torture for the forced observer. The presence of onlookers, particularly family members, also inflicts severe mental harm amounting to torture on the person being raped.'³⁰²

Discussing the mental element of the crime against humanity of torture, Pre-Trial Chamber II considered that it fell within the '[u]nless otherwise provided' exception to the general rule, set out in article 30 of the *Rome Statute*. The Chamber said that:

it is not necessary to demonstrate that the perpetrator knew that the harm inflicted was severe. This interpretation is consistent with paragraph 4 of the General Introduction to the Elements of Crimes. To prove the mental element of torture, it is therefore sufficient that the perpetrator intended the conduct and that the victim endured severe pain or suffering.³⁰³

It was referring to the General Introduction to the Elements of Crimes, which states that '[w]ith respect to mental elements associated with elements involving value judgement, such as those using the terms "inhumane" or "severe", it is not necessary that the perpetrator personally completed a particular value judgement, unless otherwise indicated'.³⁰⁴

Perhaps the most striking example of torture in the case law of the International Criminal Tribunal for the former Yugoslavia concerns rape. The tribunals have frequently been praised for their inclusion of rape within the scope of the crime of torture. In its ruling dealing with the Foča camp, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia stated:

[S]ome acts establish per se the suffering of those upon whom they were inflicted. Rape is ... such an act ... Sexual violence necessarily gives rise to severe pain or suffering, whether physical or mental, and in this way justifies its characterization as an act of torture. Severe pain or suffering, as required by the definition of the crime of torture, can thus be said to be established once rape has been proved, since the act of rape necessarily implies such pain or suffering.³⁰⁵

The Tribunal has noted that '[t]he psychological suffering of persons upon whom rape is inflicted may be exacerbated by social and cultural conditions and can be particularly acute and long lasting'.³⁰⁶ But Pre-Trial Chamber II has refused to confirm a charge of torture that overlapped with a charge of rape. It said that specific material elements of torture, namely severe pain and suffering and control by the perpetrator over the victim, were also inherent in the act of rape. Rape has the additional specific material element of penetration, 'which makes it the most appropriate legal characterization in this particular case'.³⁰⁷ In the same case, other alleged acts of torture referred to by the Prosecutor, separate from the rapes themselves, were insufficiently pleaded and the Pre-Trial Chamber did not confirm the charges.

(p. 185) Charges of torture were refused by the Pre-Trial Chamber in *Mbarushimana*.³⁰⁸ The dissenting judge in that case specified that torture could not be charged because the victim was fleeing when the acts took place and could therefore not be in the 'custody or under the control of' the alleged perpetrators.³⁰⁹ When it authorized the investigation in *Situation in the Republic of Côte d'Ivoire*, the Pre-Trial Chamber said it was satisfied there was a reasonable basis to consider that the crime against humanity of torture had been committed by pro-Gbagbo forces.³¹⁰ However, it has not been charged against the defendants in the cases arising from that situation. Torture is charged in the arrest warrants in two of the Sudanese cases.³¹¹

Rape and Other Sexual Violence (Arts 7(1)(g), 7(2)(f))

Article 7(1)(g) of the *Rome Statute*, declaring '[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity' to be crimes against humanity, is an extensive provision concerning crimes of sexual violence. By comparison, the statutes of the ad hoc tribunals for the former Yugoslavia and Rwanda list only 'rape'.³¹² Rape was not listed in the Charter of the Nuremberg Tribunal, although it was included some months later in the crimes against humanity provision of Control Council Law No. 10.³¹³ The *Rome Statute's* crimes against humanity provision concerning rape and other sexual violence was negotiated very much in parallel with the two equivalent provisions listed under war crimes³¹⁴ and the texts are very similar. There are six distinct crimes within the provision.

A suggestion to expand the provision from 'rape' to a rather lengthy enumeration of sexual offences emerged during the Preparatory Committee. According to the 1996 Report, there were proposals to refer to 'other serious assaults of a sexual nature, such as forced impregnation' as well as 'enforced prostitution'.³¹⁵ There was also talk of including rape and other sexual offences under the general heading of 'cruel treatment' or 'other inhumane acts'.³¹⁶

Special rules of evidence set out in the Rules of Procedure and Evidence are applicable to crimes of sexual violence. A legal requirement of corroboration may not be imposed for, 'in particular, crimes of sexual violence'.³¹⁷ Evidence of prior sexual conduct is (p. 186) inadmissible.³¹⁸ There are detailed provisions concerning the availability of a defence of consent.³¹⁹ According to Pre-Trial Chamber II, 'threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or military presence'.³²⁰

Although the crimes of sexual violence are often labelled 'gender crimes', they are neutral with respect to both victim and perpetrator.³²¹ Their inclusion within the *Rome Statute* was largely driven by the need to acknowledge the victimization of women in times of mass atrocity.³²² But with the exception of forced pregnancy, these offences may be applied to both sexes without distinction.³²³

Rape

The term 'rape' is widely used in national justice systems, where its definition varies somewhat. Its meaning has evolved considerably over the years, reflecting changing attitudes towards the nature and gravity of sexual violence.³²⁴ In the first ad hoc tribunal case to consider the definition of the term, a Trial Chamber of the International Criminal Tribunal for Rwanda provided a very broad definition: 'The Chamber considers that rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts ... The Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.'³²⁵ A few months later, a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia, concerned about a possible breach of the *nullum crimen sine lege* principle, took a more positivistic approach, inspired by a recent proposal (p. 187) of a UN Special Rapporteur,³²⁶ holding that rape consisted of 'the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; (ii) by coercion or force or threat of force against the victim or a third person'.³²⁷ This definition was since confirmed in a ruling of the Appeals Chamber.³²⁸

The early case law of the ad hoc tribunals inspired the drafters of the Elements of Crimes, where the term 'rape' is described in considerable detail:

1. The perpetrator invaded ¹⁵ the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent. ¹⁶

Analysing the Elements of Crimes, a Trial Chamber said that the first constitutive element was 'penetration'. It noted that the Element was framed 'so as to foresee also the eventuality that the perpetrator is penetrated in addition to that of the perpetrator causing or prompting penetration'.³²⁹ The second constituent element sets out the conditions and circumstances of the penetration that give it a criminal character. This includes 'the situation where the perpetrator takes advantage of a person's incapacity to give genuine consent due to a natural, induced or age-related incapacity'.³³⁰ The Chamber noted that aside from the situation where 'incapacity' was taken advantage of, the Elements of Crimes 'do not refer to the victim's lack of consent, and therefore this need not be proven'. Thus, the Elements of Crimes contemplate the prosecution of 'any act of penetration taking advantage of a coercive environment'. According to the Chamber, 'establishment of at least one of the coercive circumstances or conditions set out in the second element is therefore sufficient alone for penetration to amount to rape'.³³¹ This is further confirmed by Rule 70 of the Rules of Procedure and Evidence stipulating that consent cannot be inferred by reason of any words or conduct of a victim where force or coercion was used or advantage was taken of a coercive environment.

Rape has been charged in the majority of the cases before the International Criminal Court, but there have been no convictions. In the two rape cases to reach a verdict, the accused were acquitted of rape as a crime against humanity. Mathieu Ngudjolo was acquitted after a rather summary discussion of the evidence, although the Trial Chamber agreed that rapes had been committed by participants in the attack.³³² In *Katanga*, the (p. 188) Trial Chamber held that the rapes committed were not part of the common purpose and therefore could not be attributed to the accused.³³³ Similarly, in *Mbarushimana*, the majority of the Pre-Trial Chamber did not confirm charges of rape for failure to establish the policy element of crimes against humanity.³³⁴ In other cases, charges of rape have been confirmed by the Pre-Trial Chamber³³⁵ or authorized in arrest warrants.³³⁶

Sexual Slavery

Noting that sexual slavery is a form of slavery, a Trial Chamber of the Special Court for Sierra Leone said that 'slavery for the purpose of sexual abuse is a *jus cogens* prohibition in the same manner as slavery for the purpose of physical labour'.³³⁷ It held that 'sexual slavery is an act of humiliation and degradation so serious as to be generally considered an outrage upon personal dignity'.³³⁸ Explaining the absence of 'sexual slavery' in the Statute of the International Criminal Tribunal for the former Yugoslavia, a Trial Chamber observed: 'The setting out of the violations in separate sub-paragraphs of the ICC Statute is not to be interpreted as meaning, for example, that sexual slavery is not a form of enslavement. This separation is to be explained by the fact that the sexual violence violations were considered best to be grouped together.'³³⁹

The Elements of Crimes for the crime against humanity of sexual slavery state: 'The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.' The first sentence is completed with a footnote: 'Given the complex nature of this crime, it is recognized that its commission could involve more than one perpetrator as a part of a common criminal purpose.'³⁴⁰ A footnote to the Elements states: 'It is understood that such deprivation of liberty may, in some circumstances, include exacting forced (p. 189) labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.'³⁴¹ According to Pre-Trial Chamber I, sexual slavery encompasses situations such as forced marriage, domestic servitude, and other forced labour involving compulsory sexual activity, including rape. This can include the

detention of women in ‘rape camps’ and ‘comfort stations’, ‘forced temporary “marriages” to soldiers’, and other practices involving treatment of women as chattel. The Chamber said that these were ‘violations of the peremptory norm prohibiting slavery’.³⁴²

The first component of the Elements, the ‘right of ownership’, is common to the crime against humanity of ‘enslavement’. Readers of this *Commentary* are referred to the discussion of article 7(1)(c) above. With specific reference to ownership in the context of sexual slavery, a Trial Chamber has noted that ‘the exercise of the right of ownership over someone need not entail a commercial transaction’.³⁴³ The same Chamber went on to say that it considered that ‘the notion of servitude relates first and foremost to the impossibility of the victim’s changing his or her condition’.³⁴⁴ This is a curious comment because nowhere in the *Rome Statute* or the Elements of Crimes is the term ‘servitude’ used. It is found in human rights instruments such as article 4 of the Universal Declaration of Human Rights: ‘No one shall be held in slavery or servitude ...’ The European Court of Human Rights has said that ‘la servitude constitue une qualification spéciale du travail forcé ou obligatoire ou, en d’autres termes, un travail forcé ou obligatoire «aggravé». En l’occurrence, l’élément fondamental qui distingue la servitude du travail forcé ou obligatoire, au sens de l’article 4 de la Convention, consiste dans le sentiment des victimes que leur condition est immuable et que la situation n’est pas susceptible d’évoluer.’ The Court said that it was sufficient for this sentiment or feeling to be based upon objective elements that were provoked or sustained by the perpetrators of the acts.³⁴⁵

In *Katanga*, the Trial Chamber focused on the second component of the Elements, the deprivation of liberty, where it insisted upon ‘the subjective nature of such deprivation, that is, the person’s perception of his or her situation as well as his or her reasonable fear’.³⁴⁶ According to the Chamber, this second element ‘concerns the victim’s ability to decide the conditions in which he or she engages in sexual activity’. Thus, ‘the notion of sexual slavery may also encompass situations where women and girls are forced to share the existence of a person with whom they have to engage in acts of a sexual nature’.³⁴⁷ With respect to the facts at issue, the Chamber said ‘in the specific context of the immediate aftermath of the attack on Bogoro, the statement that someone was “taken as a wife” by a combatant or that she was to “become his wife” is a clear reference to a coercive (p. 190) environment entailing almost certain engagement in acts of a sexual nature’.³⁴⁸ It added that ‘the fact that the combatants declared that the civilians captured in Bogoro and brought to their camps were “their wives” does show they all harboured the intention to treat the victims as if they owned them and obtain sexual favours from them’.³⁴⁹ A Pre-Trial Chamber has cautioned that ‘in the absence of other factors, mere imprisonment or its duration are sufficient to satisfy the element of ownership over the victim of the crime of sexual slavery’.³⁵⁰

The *Katanga* Trial Chamber referred to footnotes 17 and 65 of the Elements of Crimes stating that, considering the complex nature of this crime, ‘it is recognized that its commission could involve more than one perpetrator as part of a common criminal purpose’. The Chamber insisted, however, that article 30 of the *Rome Statute* nevertheless applies to each suspect in order to establish individual criminal responsibility for the commission of the crime of sexual slavery.³⁵¹

There have been two acquittals on charges of sexual slavery.³⁵² In *Katanga*, the Trial Chamber concluded that the crime of sexual slavery was committed,³⁵³ although responsibility for it could not be attributed to the accused.³⁵⁴ One charge of sexual slavery has been confirmed by the Court,³⁵⁵ and two others authorized in arrest warrants.³⁵⁶

Enforced Prostitution

The Elements of Crimes state:

1. The perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.
2. The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature.³⁵⁷

The UN Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices During Armed Conflict has described 'enforced prostitution' as referring 'to conditions of control over a person who is coerced by another to engage in sexual activity'.³⁵⁸

The prohibition of 'enforced prostitution' originates in article 27 of the fourth Geneva Convention: 'Women shall be especially protected against any attack on their honour, (p. 191) in particular against rape, enforced prostitution, or any form of indecent assault.'³⁵⁹ The commentary to the Convention explains that the provision was meant to denounce practices conducted during the Second World War: 'In areas where troops were stationed, or through which they passed, thousands of women were made to enter brothels against their will or were contaminated with venereal diseases, the incidence of which often increased on an alarming scale.'³⁶⁰ 'Enforced prostitution' is also prohibited by the Additional Protocols, where it is listed under the general heading of 'outrages upon personal dignity', and where it apparently applies not only to women.³⁶¹ The text in Additional Protocol II underpins a war crime in the Statute of the International Criminal Tribunal for Rwanda,³⁶² but there have been no prosecutions under the provision.

An early proposal presented during sessions of the Preparatory Committee contained a definition of 'enforced prostitution':

Enforced prostitution means intentionally placing or maintaining a person in circumstances in which the person is expected or directed to engage repeatedly over time in sexual acts, and the person's capacity or freedom to refuse has been substantially negated because of the force or threat of force, the circumstances, loss of physical liberty, mental impairment or prolonged periods of serious mental or physical abuse.³⁶³

But in the result, there was never any strong support for including a definition of the concept in article 7(2) or in the Elements of Crimes.

Forced Pregnancy

Probably the most controversial component of the definition was 'forced pregnancy', because of the suggestion that it raised the issue of abortion.³⁶⁴ It is the only crime within article 7(1)(g) to be defined in article 7(2): '“Forced pregnancy” means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy.' The Elements of Crimes repeat this provision in substance, adding nothing further to the definition.³⁶⁵ The reference to national laws was insisted upon by States, including the Holy See, who were concerned that it might otherwise be taken as legitimizing abortion.

Prior to the *Rome Statute*, the expression ‘forced pregnancy’ had been used in the 1993 Vienna Declaration and Programme of Action,³⁶⁶ and in the 1995 Beijing Declaration (p. 192) and Platform for Action.³⁶⁷ Although included in the Statute of the Special Court for Sierra Leone, there were no prosecutions.

Enforced Sterilization

According to the Elements of Crimes for enforced sterilization, ‘[t]he perpetrator deprived one or more persons of biological reproductive capacity’. This sentence is accompanied by a footnote: ‘The deprivation is not intended to include birth-control measures which have a non-permanent effect in practice.’ There is a second Element: ‘The conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent.’ It, too, is followed by a footnote: ‘It is understood that “genuine consent” does not include consent obtained through deception.’

Judges at Nuremberg heard how Nazi doctors had conducted sterilization experiments in Auschwitz and Ravensbruck concentration camps with a view to developing techniques that would enable this to be practised on millions of people.³⁶⁸ This was probably not ‘sexual’ in the way the word is generally understood. Placement of sterilization within the paragraph dealing with sexual violence may not be entirely appropriate. Although it may be argued that sexual violence often brings with it devastating consequences in terms of reproductive ability, with the practical effect of sterilization, it will probably be difficult to prove that this was an intended consequence.

Sexual Violence

The final act within the paragraph dealing with sexual violence consists of ‘other forms of sexual violence of comparable gravity’. This concept of ‘other forms of sexual violence’ is developed in the Elements of Crimes:

The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person’s or persons’ incapacity to give genuine consent.

The Elements specify that ‘comparable gravity’ refers to the other offences in article 7(1)(g) of the *Statute*. The perpetrator must be aware of the factual circumstances that establish the gravity of the conduct.³⁶⁹

The Preparatory Committee final draft contained the phrase ‘or other sexual abuse [of comparable gravity,]’ following the reference to rape in the definition of crimes against humanity.³⁷⁰ Earlier proposals had referred to ‘serious assaults of a sexual nature’.³⁷¹ At the Rome Conference, some delegations said the words ‘of comparable gravity’ should be dropped.³⁷² The Coordinator proposed a draft where these words were removed.³⁷³

(p. 193) A Trial Chamber of the Special Court for Sierra Leone has described ‘other forms of sexual violence of comparable gravity’ as ‘a residual category of sexual crimes listed under Article 2(g) of the Statute, and may encompass an unlimited number of acts’.³⁷⁴ It said: ‘The prohibition embraces all serious crimes of a sexual nature inflicted upon the physical and moral integrity of a person by means of coercion, threat of force or intimidation.’³⁷⁵ According to a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia, ‘sexual violence is broader than rape and includes such crimes as sexual slavery or molestation’.³⁷⁶

A legal difficulty created by this 'residual clause' is its relationship with the more general residual clause of 'other inhumane acts' set out in article 7(1)(k). The international criminal tribunals, whose statutes do not include 'other forms of sexual violence of comparable gravity', have treated acts that might fit within this rubric as 'other inhumane acts'. Thus, there have been convictions for sexual violence perpetrated upon dead bodies³⁷⁷ and forced undressing and public display of women.³⁷⁸ Interpreting provisions similar to those in article 7(1) of the *Rome Statute*, the Appeals Chamber of the Special Court for Sierra Leone held that sexual violence other than that specifically enumerated in article 7(1)(g) could also be prosecuted as 'other inhumane acts'.³⁷⁹

Pre-Trial Chamber II rejected the charge of 'sexual violence' with respect to attacks upon men involving forced circumcision and penile amputation. The Chamber said that 'not every act of violence which targets parts of the body commonly associated with sexuality should be considered an act of sexual violence'. Holding that 'the determination of whether an act is of a sexual nature is inherently a question of fact', it said that the acts were motivated by 'ethnic prejudice and intended to demonstrate cultural superiority of one tribe over the other'.³⁸⁰ Yet the Elements of Crime requires that the act be of 'a sexual nature', and this should not depend upon the motive of the perpetrator.³⁸¹ It is often said that rape and sexual violence are weapons of war, but surely such charges cannot be defeated by the argument that the motive or purpose is military rather than sexual?

Charges of the crime against humanity of 'sexual violence' were authorized in the arrest warrants of Laurent Gbagbo³⁸² and Simone Gbagbo.³⁸³ The redacted version of the warrants that are available publicly do not provide details. However, the Prosecutor (p. 194) did not include this charge in the document containing the charges against Laurent Gbagbo³⁸⁴ and no charge of sexual violence was upheld at the confirmation hearing.³⁸⁵

Persecution (Arts 7(1)(h), 7(2)(g))

Persecution sits very much at the core of crimes against humanity. Most other punishable acts listed as crimes against humanity are also punishable as war crimes, subject of course to the requirement that they be committed in armed conflict. Indeed, most of the punishable acts are treated as ordinary crimes under national justice systems. The specificity of persecution is that it contemplates racist or other discriminatory acts and policies of a State that may in fact be authorized by its legal regime. Persecution is very similar to the cognate concept of gross and systematic violations of human rights. It consists of the severe deprivation of fundamental rights on discriminatory grounds. But it is also the link between crimes against humanity and genocide, in that acts that may begin as persecution of a minority group may lead, in their most extreme manifestation, to a plan for the intentional destruction of the group.

The Charter of the International Military Tribunal contained the crime against humanity of 'persecutions on political, racial or religious grounds'.³⁸⁶ This text was reproduced without change in the statutes of the ad hoc tribunals.³⁸⁷ The corresponding provision in the *Rome Statute* is much more extensive: 'Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.'³⁸⁸

The rather prolix provision had already taken its final form in the draft statute of the Preparatory Committee: '(h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural or religious [or gender] [or other similar] grounds [and in connection with other crimes within the jurisdiction of the Court]'.³⁸⁹ A footnote following the word 'grounds' in the Preparatory Committee draft says: 'This also includes, for example, social, economic and mental or physical disability grounds.'³⁹⁰ The final version emerged in the Bureau Discussion Paper of 6 July 1998.³⁹¹ Persecution is further

defined in article 7(2): ‘“Persecution” means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.’ In the Preparatory Committee draft, the second paragraph definition said ‘persecution means the wilful and severe deprivation of fundamental rights contrary to international law [carried out with the intent to persecute on specified grounds]’.³⁹² It was revised during the Rome Conference, ‘wilful’ being replaced with ‘intentional’, and the words in square brackets simply deleted.³⁹³

(p. 195) The Elements of Crimes provision is inscrutable, and it is doubtful that it adds anything to the text of the *Rome Statute* itself:

1. The perpetrator severely deprived, contrary to international law,²¹ one or more persons of fundamental rights.
2. The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.
3. Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law.
4. The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court.²²
5. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
6. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

When the Elements were being drafted, there was animated debate in the Preparatory Commission about the notion of ‘groups’, with a range of competing proposals. Paragraphs 1 and 2 reflect a compromise, in the first reference to ‘one or more persons’ followed by the idea of targeting a group.³⁹⁴ The reference in enigmatic footnote 21 is to enigmatic paragraph 6 of the General Introduction: ‘The requirement of “unlawfulness” found in the Statute or in other parts of international law, in particular international humanitarian law, is generally not specified in the elements of crimes.’ The expression ‘contrary to international law’, in the first element, is redundant in that it merely repeats the definition in article 7. It seems to have been added to the Elements out of an abundance of caution. But this in turn compelled the reference in the footnote to paragraph 6 of the General Introduction.³⁹⁵

The term ‘fundamental rights’ is not defined or further explained, except to the extent that the phrase is qualified by the words ‘contrary to international law’. Elsewhere, in article 21(3), the *Rome Statute* uses the formulation ‘internationally recognized human rights’. The cornerstone of the international law of human rights is a package of instruments known as the International Bill of Rights. It consists of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and, although this may be a matter of some debate, the three optional protocols. Strict positivists may insist that only the treaties can be sources of ‘international law’, but this seems an overly exigent interpretation and one that may bring perverse results.

In *Ntaganda*, the Pre-Trial Chamber pointed to severe deprivation of several fundamental rights, including the right to property.³⁹⁶ The Chamber cited as authority (p. 196) articles 6(1), 7, and 8 of the International Covenant on Civil and Political Rights.³⁹⁷ But article 8 of the Covenant affirms the prohibition of slavery, something that was not relevant to the case in question. Moreover, the right to property, for which the reference to article 8 seems to have been intended, is not recognized in either of the International Covenants. However, it appears in article 17 of the Universal Declaration of Human Rights, as well as some of the most important regional instruments, notably the first protocol to the European Convention on Human Rights. There is some early judicial authority for treating the destruction of property within the framework of the crime against humanity of persecution.³⁹⁸ In the application for authorization to begin an investigation in the *Situation in Georgia*, the Prosecutor referred to ‘the right to private property’ as the basis for a charge of persecution, noting the destruction of 5,000 homes of ethnic Georgians.³⁹⁹ According to the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia, whether property crimes may amount to persecution will depend upon ‘the nature and extent of the destruction’,⁴⁰⁰ and on the type of property involved.⁴⁰¹ A Trial Chamber of the Tribunal said the destruction of certain types of property ‘may not have a severe enough impact on the victim as to constitute a crime against humanity’, citing as an example the burning of an individual’s car, unless the car would constitute ‘an indispensable and vital asset to the owner’.⁴⁰² In words that were subsequently endorsed by the Appeals Chamber, it noted that ‘the comprehensive destruction of homes and property’ amounting to ‘a destruction of the livelihood of a certain population’ would meet the definition of persecutions.⁴⁰³

Usually, judges of the International Criminal Court refer to the criminal acts that underpin the crime against humanity of persecution without relating this to the recognized terminology of human rights law. Thus, in *Muthuara et al.*, the Chamber referred to killings, displacement, rape, and serious physical injuries rather than to the right to life and security of person and to freedom of movement.⁴⁰⁴ It also listed ‘infliction of serious mental suffering by way of subjecting [the victims] to witnessing the killing and the mutilation of their close relatives’ without specifying the fundamental right at stake.⁴⁰⁵ In *Hussein*, the Pre-Trial Chamber authorized a charge of persecution in the warrant of arrest without specifying either the fundamental rights or the criminal acts that were encompassed,⁴⁰⁶ although the Prosecutor, in his application, had noted ‘murder, rape, attacking the civilian population, outrages upon personal dignity, inhumane acts, pillaging, destruction of property and forcible transfer of the population’ as acts of (p. 197) persecution.⁴⁰⁷ Issuing arrest warrants in *Gaddafi et al.*, the Pre-Trial Chamber referred to ‘inhuman acts that severely deprived the civilian population of its fundamental rights were inflicted on it because of its opposition to Gaddafi’s regime. The civilians were targeted only on the basis of their political opposition (whether actual or perceived) to Muammar Gaddafi and his regime.’⁴⁰⁸ Such acts included torturing dissidents, attacking demonstrators with anti-aircraft guns, live ammunition, sticks, swords, acid and tear gas, arresting journalists, writers, dissidents, demonstrators, and their lawyers, and denying medical care to injured protesters.⁴⁰⁹ There is a report that ‘[a] relative seeking to collect the body of a victim in the aftermath of the attack was forced to sign a statement saying that his brother was “a rat” from the opposition’.⁴¹⁰ The Trial Chamber decision enumerates a long list of abuses without specifying whether all or only some of these are underlying acts of the crime against humanity of persecution.

Article 7 requires that the persecution be ‘against any identifiable group or collectivity’. This formulation is not found in the definitions of crimes against humanity in other international instruments. It bears similarities with the definition of genocide where it is the group that must be targeted and not just the individual on the basis of membership in the group. Genocide requires the intent to destroy the group and not just to attack the individual victim based upon discriminatory grounds. By requiring that the act of

persecution be directed against the group, the *Rome Statute* may appear to suggest something analogous. But this is contradicted by the Elements of Crimes where the targeting of ‘such person or persons by reason of the identity of a group or collectivity’ is contemplated. Moreover, in the Elements this phrase continues with the words ‘... or targeted the group or collectivity as such’, indicating that the drafters understood the distinction between attacking the group and attacking individuals based upon their membership in the group. Although the Elements of Crimes often narrow the scope of the *Rome Statute*, this would appear to be a case where they quite helpfully broaden the interpretation of the text of article 7, and in a manner compatible with the definitions of crimes against humanity in other instruments.

The reference to ‘other grounds that are universally recognized as impermissible under international law’ in the final version of article 7(1)(g) invites the Court to extend the scope of persecution to cover analogous grounds. Similar formulations appear in international human rights law. For example, article 2(1) of the Universal Declaration of Human Rights refers to ‘... distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’. It invites a similar exercise of enlarging the provision beyond the categories that are enumerated explicitly. The text seems to suggest that there may be a distinction between ‘any identifiable group or entity’ and the prohibited grounds of persecution. The notion of ‘any identifiable group or entity’ seems relatively straightforward, and need not be restricted or modified by the list of enumerated grounds as completed by the phrase ‘other grounds that are universally recognized as impermissible under international law’. Thus, persecution may be directed against *any* identifiable group or entity, but the *grounds* must be its association with one of those listed or an analogous ground. The term ‘grounds’ suggests a specific intent or a motive for the act of persecution.

(p. 198) The word ‘impermissible’ is probably meant to refer to international law texts dealing with ‘discrimination’, a word that is not used in article 7, although persecution is often described as a crime of discrimination.⁴¹¹ For example, article 26 of the International Covenant on Civil and Political Rights speaks of ‘... protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’. In identifying ‘other grounds that are universally recognized as impermissible under international law’, reference will probably be made to international human rights law texts and case law concerning discrimination where some helpful guidance may be provided. However, ‘persecution’ as it is contemplated by the *Rome Statute* is probably much more severe in its nature and scale than ‘discrimination’. Acts of discrimination may consist of relatively anodyne distinctions involving unfair but nevertheless somewhat minor consequences for the victim. For this reason, the identification of the ‘other group’ cannot be dissociated from the notion of persecution, because what is ‘impermissible’ is whether an identifiable group or entity, or individual, may be persecuted based upon grounds analogous to those listed in article 7. It will be very difficult to find any grounds that will justify such persecution.

Three rather classic examples of ‘other grounds’ might be considered in this context. The enumeration in article 7 does not mention ‘age’. This category appears occasionally in human rights instruments, but it is usually omitted.⁴¹² The same can be said of sexual orientation, although it may well be subsumed within the term ‘gender’. Use of the term in the *Rome Statute* was controversial and only accepted on the condition that it was accompanied by the definition in article 7(3). Disability would be a good candidate to be considered within ‘other grounds’, the argument being buttressed not only by the footnote

in the earlier draft, but also by more recent confirmation that this is indeed a ground 'universally recognized as impermissible under international law'.⁴¹³

Certainly, in the identification of 'other grounds' it would be a mistake to exclude categories based upon national practice suggesting that persecution on such grounds actually takes place. Negative or contrary practice cannot be useful in this context. There is negative or contrary practice in much of the world with respect to discrimination on the grounds that are enumerated in article 7. Why then would such practice assist in identifying 'other grounds'? The test in the *Rome Statute* is whether the ground is 'universally recognized as impermissible under international law' and not whether acts of persecution in breach of this prohibition actually occur.

The term 'universally recognized' seems to set a very high threshold. Indeed, if strictly construed it is probably an impossible one. That is because international legal instruments use formulations that are similar to what is found in article 7. These instruments are interpreted by tribunals and similar bodies created by treaties that are not fully (p. 199) 'universal' in scope. It would be difficult to demonstrate that discrimination based upon many of the enumerated grounds in article 7 is 'universally recognized as impermissible under international law'. Undoubtedly, the reference to international law comprises customary international law that is universal in application by definition. Here, the problem is that the international human rights tribunals and treaty bodies rarely, if ever, discuss the content of customary international law because of the nature of their own mandates.

If the 'other grounds' formulation in article 7 is to be of any useful effect, it is necessary to construe it in such a way that the real test is whether persecution on such grounds is deemed to be permissible under international law rather than universally prohibited. To do the contrary, and to require the identification of positive evidence of a universal prohibition, makes the reference to 'other grounds' a virtual impossibility. This positive approach to interpreting 'other grounds' should direct the Court to a range of authorities in international law where the inclusion of other categories, like age, disability, and sexual orientation, are considered. Unless there is evidence that discrimination based upon such 'other grounds' is deemed to be acceptable, they should be readily included within the scope of article 7(1)(h) of the *Rome Statute*.

The words 'in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court' in article 7(1)(h) echo the provision in the Nuremberg Charter that imposed the famous *nexus* with armed conflict. They seem to have originated in a British draft presented to the Preparatory Committee in March 1996: 'Persecutions on political, racial or religious grounds [in connection with any crime within the jurisdiction of the Court]'.⁴¹⁴ They may have the effect of largely emasculating the concept of persecution, which in its Nuremberg formulation has the potential to address a broad range of atrocities. Under the *Rome Statute* definition, they must be either connected to another act in article 7(1) (that is, otherwise a crime against humanity, and therefore *recondite*) or else to 'any crime within the jurisdiction of the Court', which in practice means war crimes and the crime of aggression. Prosecuting persecution in the presence of genocide would also be totally redundant. A Trial Chamber of the International Criminal Tribunal for the former Yugoslavia rejected the requirement that persecution be connected with a crime within the jurisdiction of the Court or another act of crime against humanity as too narrow, explaining that 'although the Statute of the ICC may be indicative of the *opinio juris* of many States, Article 7(1)(h) is not consonant with customary international law'.⁴¹⁵

At the ad hoc tribunals, judges have imposed somewhat different criteria in delineating the ambit of persecution. They would contend that their approach reflects customary international law. Thus, they take the view that not every act of persecution fits within the definition, and that it must be 'of a gravity equal' to the other punishable acts of crimes against humanity.⁴¹⁶ In practice, this may roughly equate to the requirement of a

connection with ‘another act in article 7(1)’ of the *Rome Statute*. In applying this gravity criterion, the Appeals Chamber of the International Criminal Tribunal for Rwanda has said that it will consider the context because, while it may be difficult to argue that any (p. 200) specific act taken in isolation amounts to persecution, ‘the cumulative effect of all the underlying acts of the crime of persecution’ may determine the result. In the case involving Rwandan media in the 1994 genocide, the Appeals Chamber held that certain acts of hate speech taken in the overall context amounted to persecution.⁴¹⁷

Issuing arrest warrants for persecution in the *Situation in Darfur, Sudan*, Pre-Trial Chamber I accepted the Prosecutor’s submission that ‘Sudanese Armed Forces and the Militia/Janjaweed launched attacks against specific localities believing that they were predominantly inhabited by the Fur population’.⁴¹⁸ The specific acts of persecution alleged against the two accused persons consist of murder, rape, attack of the civilian population, outrages upon personal dignity, inhumane acts, pillaging, destruction of property, and forcible transfer of the population.⁴¹⁹ Inexplicably, persecution was not charged against President Bashir, and it is not included in the arrest warrant.⁴²⁰ In *Ntaganda*, the Pre-Trial Chamber noted that the acts of persecution were directed against a civilian population ‘by reason of their ethnic origin’.⁴²¹ In *Muthuara et al.*, the confirmation decision refers to attacks ‘on political grounds, i.e. by reason of their perceived political affiliation’.⁴²²

In the case against Laurent Gbagbo, the Trial Chamber authorized a charge of persecution in the arrest warrant, noting that participants had ‘targeted civilians who they believed were supporters of Mr Ouattara, and the attacks were often directed at specific ethnic or religious communities’.⁴²³ It concluded ‘that there are reasonable grounds to believe that several acts of persecution based on political, ethnic and religious grounds were committed by pro-Gbagbo forces in the context of the attacks’ associated with political demonstrations, a women’s march, the shelling of a market, and a massacre in Yopougon.⁴²⁴ In her dissenting opinion in *Mbarushimana*, Judge Monageng observed that the Prosecutor had defined the targeted group as being political in nature. She concluded that ‘the alleged targeted group in the instant case lacks the required specificity, ideological coherence and necessary identifiable characteristics in order to fall within one of the protected groups as listed under article 7, be it political or otherwise’.⁴²⁵ She said that ‘noting the purpose of article 7(l)(h) of the Statute, it is my considered view that the civilian population of the Kivu provinces cannot reasonably be conceived as being an identifiable “political” group with a coherent set of ideological beliefs’.⁴²⁶

There is an important relationship between the crime against humanity of persecution and the crime of genocide, in that both require a discriminatory intent. For this (p. 201) reason, persecution has been described as belonging to ‘the same *genus* as genocide’.⁴²⁷ According to a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia, ‘from the viewpoint of *mens rea*, genocide is an extreme and most inhuman form of persecution. To put it differently, when persecution escalates to the extreme form of wilful and deliberate acts designed to destroy a group or part of a group, it can be held that such persecution amounts to genocide’.⁴²⁸ The same link between persecution and genocide was acknowledged by the International Court of Justice.⁴²⁹ Noting these authorities, Pre-Trial Chamber I said that ‘the distinction between genocidal intent and persecutory intent is pivotal in cases of ethnic cleansing’.⁴³⁰ It said that the practice of ‘ethnic cleansing ... usually amounts to the crime against humanity of persecution’.⁴³¹

The discriminatory intent can manifest itself in omission, as well as by act. Thus, ‘an attack “conducted against only the non-Serb portion of the population because they were non-Serbs” was indicative of the necessary discriminatory intent’.⁴³² Discriminatory intent can be inferred from knowing participation in a system or enterprise that discriminates on political, racial, or religious grounds.⁴³³ But ‘[t]he requirement that an accused consciously intends to discriminate does not require the existence of a discriminatory policy or, where such a policy is shown to exist, participation by the accused in the formulation of that

discriminatory policy or practice by an authority'.⁴³⁴ The accused must consciously intend to discriminate,⁴³⁵ and '[w]hile the intent to discriminate need not be the primary intent with respect to the act, it must be a significant one'.⁴³⁶ This discriminatory intent must be established with respect to the specific act that is charged rather than with the attack in general.⁴³⁷ But in addition to the intent itself, the Prosecutor must establish that there were discriminatory consequences; in other words, it is not enough to show that the accused conducted an act with the intent to discriminate: it must be shown that a victim was actually persecuted.⁴³⁸

Persecutions may involve the infliction of physical or mental harm, or infringements upon individual freedom,⁴³⁹ such as the unlawful detention, deportation, or forcible transfer of civilians.⁴⁴⁰ Persecutions can even involve attacks on political, social, and economic rights. The UN Commission of Inquiry on North Korea considered that 'decisions and policies violating the right to food, which were applied for the purposes of sustaining the present political system, in full awareness that such decisions would exacerbate starvation and related deaths of much of the population' amounted to crimes against humanity.⁴⁴¹

(p. 202) A Trial Chamber has referred in particular to 'acts rendered serious not by their apparent cruelty but by the discrimination they seek to instil within humankind'.⁴⁴² Acts of 'harassment, humiliation and psychological abuse' may also amount to persecutions.⁴⁴³ Persecutions can include crimes that target property, which appear on the surface to be less serious, but where the victimization involves discrimination.⁴⁴⁴ The acts of persecution need not, in and of themselves, be punishable as crimes under international law.⁴⁴⁵ Acts deemed not to rise to the level of persecution have included encouraging and promoting hatred on political grounds and dismissing and removing Bosnian Muslims from government.⁴⁴⁶ The Appeals Chamber of the Yugoslavia Tribunal has cautioned that '[i]t is not the case that any type of act, if committed with the requisite discriminatory intent, amounts to persecutions as a crime against humanity'.⁴⁴⁷

Enforced Disappearance of Persons (Arts 7(1)(i), 7(2)(i))

Enforced disappearance of persons is a 'new' crime against humanity, in that it was not recognized explicitly at Nuremberg, in Control Council Law No. 10, or, for that matter, in the statutes of the ad hoc tribunals. The judgment of the International Military Tribunal referred to Hitler's policy of enforced disappearance, to which he gave the Wagnerian epithet *Nacht und Nebel*.⁴⁴⁸ One of the Nuremberg defendants, Keitel, set out Hitler's objective in a letter: 'Efficient and enduring intimidation can only be achieved either by capital punishment or by measures by which the relatives of the criminal and the population do not know the fate of the criminal'.⁴⁴⁹ Enforced disappearance first appeared as a punishable crime against humanity in the final draft Code of Crimes adopted by the International Law Commission in 1996.⁴⁵⁰ The commentary stated: 'Although this type of criminal conduct is a relatively recent phenomenon, the Code proposes its inclusion as a crime against humanity because of its extreme cruelty and gravity'.⁴⁵¹ It has its origins in the 1980s in international human rights law, where the concept was developed to describe widespread practices in certain authoritarian regimes, especially in Latin America, as has extensively been identified by both the Inter-American Court of Human Rights and national courts in that region.⁴⁵² In 1992, (p. 203) the UN General Assembly adopted the Declaration on the Protection of All Persons from Enforced Disappearance, where the phenomenon is described as 'of the nature of a crime against humanity'.⁴⁵³ In 2006, the General Assembly adopted the International Convention for the Protection of All Persons from Enforced Disappearance. Its preamble declares that States Parties are '[a]ware of the extreme seriousness of enforced disappearance, which constitutes a crime and, in certain circumstances defined in international law, a crime against humanity'.⁴⁵⁴

The expression is defined in article 7(2):

‘Enforced disappearance of persons’ means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.⁴⁵⁵

The definition has been cited with approval by the UN Human Rights Committee, noting that enforced disappearance constitutes a violation of several fundamental rights, including the right to liberty and security of the person, the prohibition of torture, the right to be treated with humanity and with respect for the inherent dignity of the human person, and the right to life.⁴⁵⁶

The Elements of Crimes provision for enforced disappearance is the most complex of any of the crimes against humanity, and reflects the unease of many States:

Article (7)(i)

Crime against humanity of enforced disappearance of persons²³²⁴

Elements

1. The perpetrator:

- (a) Arrested, detained ²⁵ ²⁶ or abducted one or more persons; or
- (b) Refused to acknowledge the arrest, detention or abduction, or to give information on the fate or whereabouts of such person or persons.

2.

- (a) Such arrest, detention or abduction was followed or accompanied by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons; or
- (b) Such refusal was preceded or accompanied by that deprivation of freedom.

(p. 204) 3. The perpetrator was aware that: ²⁷

- (a) Such arrest, detention or abduction would be followed in the ordinary course of events by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons; ²⁸ or
- (b) Such refusal was preceded or accompanied by that deprivation of freedom.

4. Such arrest, detention or abduction was carried out by, or with the authorization, support or acquiescence of, a State or a political organization.

5. Such refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons was carried out by, or with the authorization or support of, such State or political organization.

6. The perpetrator intended to remove such person or persons from the protection of the law for a prolonged period of time.

An early draft of article 7(1)(i) in the Preparatory Committee consisted of ‘kidnapping followed by the disappearance of the person’.⁴⁵⁸ The final draft of the Preparatory Committee contained a text based on the definition in the 1992 General Assembly Declaration, but it was entirely in square brackets.⁴⁵⁹ An accompanying footnote said: ‘It was suggested that some more time was needed to reflect upon the inclusion of this subparagraph’.⁴⁶⁰ In the Committee of the Whole at the Rome Conference, enforced disappearance was perhaps the most troublesome of the acts of crimes against humanity. Concerns were expressed that the ‘unclear’ wording of the provision might be used ‘in reference to liberation movements fighting for their freedom and to regain their territory’.⁴⁶¹ Some delegations argued that the provision should not appear in the *Statute*,⁴⁶² while others cited ‘difficulties’.⁴⁶³ Latin American States insisted it be retained in view of their ‘unfortunate experience’.⁴⁶⁴ The square brackets were removed in the Bureau Discussion Paper of 6 July 1998.⁴⁶⁵

According to article 7(2)(i), the disappearance must be attributable either to a State or to a ‘political organization’. The latter term is not defined. The expression is similar but not identical to the notion of ‘State or organizational policy’ employed in article 7(2)(a) and discussed above. The Human Rights Committee has pointed to the difference between the *Rome Statute* term ‘political organization’ and the text of articles 2 and 3 of the International Convention for the Protection of All Persons from Enforced Disappearance, distinguishing between enforced disappearances carried out by States (p. 205) or by persons or groups acting with their authorization, support, or acquiescence, and similar acts conducted by persons or groups acting without such authorization, support, or acquiescence.⁴⁶⁶

In authorizing the investigation into the *Situation in the Republic of Côte d’Ivoire*, the Pre-Trial Chamber concluded that there was a reasonable basis to believe that enforced disappearance had been committed.⁴⁶⁷ Nevertheless, no charges of enforced disappearance have been requested by the Prosecutor. She has indicated that she is examining allegations of enforced disappearance in the Honduras.⁴⁶⁸

Apartheid (Arts 7(1)(j), 7(2)(h))

‘The crime of apartheid’ is defined in article 7(2)(h) of the *Rome Statute* as ‘inhumane acts of a character similar to those referred to in paragraph (1), committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime’. The Elements require that the perpetrator commit an ‘inhumane act’, adding, in a footnote: ‘It is understood that “character” refers to the nature and gravity of the act.’⁴⁶⁹

Apartheid was first identified as a crime against humanity in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.⁴⁷⁰ The International Convention on the Suppression and Punishment of the Crime of Apartheid, which was adopted by the General Assembly in 1973,⁴⁷¹ entering into force three years later,⁴⁷² reads: ‘The States Parties to the present Convention declare that apartheid is a crime against humanity.’ Apartheid featured in discussions within the International Law Commission during the 1980s,⁴⁷³ and was a stand-alone crime in the draft Code adopted by the Commission in 1991.⁴⁷⁴ As the South African apartheid regime was collapsing, the Commission wrote: ‘Apartheid, an institutionalized form of racial discrimination which aims to perpetuate domination of a racial group and oppress it, is nowadays so deeply condemned by the world’s conscience that it was inconceivable for the Commission to

exclude it from a code which punishes the most abominable crimes that jeopardize the peace and security of mankind.⁴⁷⁵

Apartheid had been considered for inclusion in the draft statute by the 1992 International Law Commission Working Group on the proposed court.⁴⁷⁶ There was (p. 206) controversy in the Commission about the significance to be attached to apartheid, and in the 1994 final draft it was relegated to the category of 'treaty crimes'.⁴⁷⁷ The 1996 report of the Preparatory Committee noted laconically that '[s]ome delegations favoured including apartheid and other forms of racial discrimination as defined in the relevant conventions'.⁴⁷⁸ It appeared in the final Preparatory Committee draft,⁴⁷⁹ but as a war crime, reflecting the text of Additional Protocol I to the Geneva Conventions, where apartheid is deemed a grave breach.⁴⁸⁰ There was only a hint that it belonged within crimes against humanity, buried in a footnote stating: 'It was also suggested that the list of acts should include institutionalized discrimination.'⁴⁸¹

During the Rome Conference, Mexico proposed adding apartheid to the list of crimes against humanity.⁴⁸² There was broad support for this,⁴⁸³ but also substantial opposition.⁴⁸⁴ A written amendment was submitted, entitled: 'Institutionalized racial discrimination, including the practices of apartheid.'⁴⁸⁵ A similar proposal was made with respect to the war crimes provision.⁴⁸⁶ The crime of apartheid was incorporated within the enumeration of crimes against humanity in the Bureau Discussion Paper of 6 July 1998⁴⁸⁷ without any subsequent objection.

The crime against humanity of apartheid has not been charged at the International Criminal Court.

Other Inhumane Acts (Art. 7(1)(k))

Article 7(1)(k) of the *Rome Statute* provides the first detailed provision on other inhumane acts: '[O]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to the body or to mental or physical health.' There is no supplementary definition in article 7(2). The Elements of Crimes add: 'It is understood that "character" refers to the nature and gravity of the act.'⁴⁸⁸ Furthermore, they require that the perpetrator 'inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act'.⁴⁸⁹ Interpreting the provision, Pre-Trial Chamber I noted the principle *nullum crimen sine lege* in article 22 of the *Statute*, explaining that 'inhumane acts are to be considered as serious violations of international customary law and the basic (p. 207) rights pertaining to human beings, drawn from the norms of international human rights law, which are of a similar nature and gravity to the acts referred to in article 7(1) of the Statute'.⁴⁹⁰

The concept of 'other inhumane acts' was included in the Charter of the International Military Tribunal, as well as in the statutes of the ad hoc tribunals. Curiously, judges at the ad hoc tribunals have criticized the *Rome Statute* for failing 'to provide an indication, even indirectly, of the legal standards which would allow us to identify the prohibited inhumane acts'.⁴⁹¹ But with reference to much authority in international criminal law as well as to human rights treaties, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia has insisted that 'other inhumane acts' as formulated in the Statute of the Tribunal is part of customary international law and cannot be considered to violate the principle *nullum crimen sine lege*.⁴⁹²

Concerns with the vagueness of the formulation were reflected during the drafting of the *Rome Statute* beginning with the Report of the Preparatory Committee,⁴⁹³ prompting attempts to qualify the concept.⁴⁹⁴ The final draft of the Preparatory Committee contained the following text: '(j) other inhumane acts [of a similar character] [intentionally] causing [great suffering,] or serious injury to body or to mental or physical health'. It was accompanied by a footnote: 'It was suggested that the inclusion of this paragraph should be subject to further clarification.'⁴⁹⁵ At the Rome Conference, concern that 'other inhumane

acts' was too vague and might violate the *nullum crimen sine lege* principle was expressed.⁴⁹⁶ The Bureau Discussion Paper of 6 July 1998 proposed what became the final version, removing the square brackets around 'of a similar character', but deleting the word 'intentionally'.⁴⁹⁷

As a result, the crime against humanity of other inhumane acts may compel a narrower or more restrictive interpretation than that adopted by other international jurisdictions. According to Pre-Trial Chamber I, the *Rome Statute* has given the provision 'a different scope than its antecedents like the Nuremberg Charter and the ICTR and ICTY Statutes'.⁴⁹⁸ Another Pre-Trial Chamber has noted that 'the language of the relevant statutory provision and the Elements of Crimes, as well as the fundamental principles of criminal law, make it plain that this residual category of crimes against humanity must be interpreted conservatively and must not be used to expand uncritically the scope of crimes against humanity'.⁴⁹⁹ Pre-Trial Chamber I has observed that article 7(1)(k) contains limitations, both as regards the action constituting an inhumane act and the (p. 208) consequence required as a result of that action.⁵⁰⁰ It also specified that 'none of the acts constituting crimes against humanity according to article 7(1)(a) to (j) can be simultaneously considered as another inhumane act encompassed by article 7(l)(k) of the Statute'.⁵⁰¹

At the ad hoc tribunals, 'other inhumane acts' was deemed 'a residual category, as it was felt undesirable for this category to be exhaustively enumerated. An exhaustive categorization would merely create opportunities for evasion of the letter of the prohibition'.⁵⁰² Pre-Trial Chamber II has confirmed that 'other inhumane acts is a residual category within the system of article 7(1) of the Statute'.⁵⁰³ The residual nature of the provision is manifested in decisions of the Court. In her dissenting opinion in *Mbarushimana*, Judge Monageng rejected the description of certain acts as torture in the case of a woman who had been repeatedly raped and beaten, had her eyes pierced and her throat and stomach cut, causing a moving foetus to fall out, following which her body was dismembered and the parts were scattered around, because she had not been in the 'custody or under the control of', as required by article 7(1)(f).⁵⁰⁴ Nevertheless, she considered that these were 'other inhumane acts', given that '[t]here is no requirement that the inhumanely treated person be in the control or custody of the perpetrator for this provision'.⁵⁰⁵ In one of the Kenyan cases, the Pre-Trial Chamber did not accept the charge of sexual violence with respect to forcible circumcision and penile amputation, because it said this conduct was not 'of a sexual nature', but it acknowledged that it fitted within the designation of 'other inhumane acts'.⁵⁰⁶ In its authorization of the investigation in Côte d'Ivoire, the Pre-Trial Chamber said there was a reasonable basis to conclude that acts of inhumane acts as well as torture had been committed, although it did not distinguish between the two crimes.⁵⁰⁷ In proceedings against Charles Blé Goudé with respect to the suppression of anti-government demonstrations and protests in 2011, a Pre-Trial Chamber also confirmed charges of 'attempted murder', describing them in the alternative as murder under article 7(1)(a) and other inhuman acts under article 7(1)(k).⁵⁰⁸

Given the residual nature of 'other inhumane acts', the same conduct cannot also be prosecuted under one of the other headings of article 7. In *Katanga*, other inhumane acts was charged with respect to indiscriminate gunfire and machete blows on civilians who suffered serious and potentially life-threatening injuries.⁵⁰⁹ Pre-Trial Chamber I refused to confirm (p. 209) the charge, however, because it held that these were also attempted murders, and that alleged acts cannot be simultaneously prosecuted as murder and as 'other inhumane acts'.⁵¹⁰ However, serious physical and mental injury falling short of murder can be prosecuted as 'other inhumane acts'.⁵¹¹ Criminal behaviour deemed to fall within 'other inhumane acts' has included mutilation and other types of severe bodily harm,⁵¹² beatings, brutal killings and mutilations in front of the eyes of the victims' family members,⁵¹³ severely injuring peaceful protesters and threatening them with execution, beating students with bricks and slashing them with machetes, injuring demonstrators with

shellfire and shelling a densely populated market area,⁵¹⁴ forced disappearance,⁵¹⁵ sniping at civilians,⁵¹⁶ and forced marriage.⁵¹⁷ There has been debate in the case law of the ad hoc tribunals about whether forced displacement should fall under 'other inhumane acts'.⁵¹⁸ Within the framework of the *Rome Statute*, forced displacement is set out in article 7(1)(d). Referring to article 7(1)(k) of the *Rome Statute*, the Supreme Court of Venezuela has considered that drug trafficking,⁵¹⁹ terrorism,⁵²⁰ and child prostitution⁵²¹ may constitute crimes against humanity. A Pre-Trial Chamber has accepted the application of inhumane acts to the destruction of property, but only to the extent that there is evidence that it causes extreme mental suffering.⁵²²

Gender (Art. 7(3))

Article 7(3) defines the term 'gender' with respect to the crimes against humanity provision, but also with respect to some other provisions of the *Rome Statute* (arts 21(3), 54(1)(b), 68(1)) that repeat the phrase 'gender, as defined in article 7, paragraph 3'. The paragraph was added at the Rome Conference so as to respond to concerns that the word 'gender' might appear to endorse homosexuality.⁵²³ Until the final moments of the Rome Conference, the issue was considered in the context of the provision on applicable law (art. 21).

(p. 210) The UN Charter speaks of 'fundamental freedoms for all without distinction as to race, sex, language, or religion'.⁵²⁴ The Universal Declaration of Human Rights, adopted in 1948, recognizes an entitlement to 'rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion'.⁵²⁵ The Convention on the Elimination of All Forms of Discrimination against Women states that 'the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex'.⁵²⁶ The term was still being used in 1989, when the Convention on the Rights of the Child was adopted.⁵²⁷ The changing usage emerged in the 1990s. The term 'gender' largely replaced the reference to 'sex' in international human rights law instruments. The Vienna Declaration and Programme of Action of 1993 used both terms in a paragraph dealing with the human rights of women calling for 'the eradication of all forms of discrimination on grounds of sex',⁵²⁸ but also condemning '[g]ender-based violence'. Elsewhere, again dealing with the rights of women, it spoke of 'the elimination of gender bias'.⁵²⁹

The Beijing Declaration adopted at the Fourth World Conference on Women in 1995 eschewed the word 'sex' and instead referred to 'gender'. For example, it resolved to '[t]ake all necessary measures to eliminate all forms of discrimination against women and the girl child and remove all obstacles to gender equality and the advancement and empowerment of women'.⁵³⁰ The President of the Conference issued a statement on the 'commonly understood meaning' of the term. She noted that '(1) the word "gender" had been commonly used and understood in its ordinary, generally accepted usage in numerous other UN forums and conferences; (2) there was no indication that any new meaning or connotation of the term, different from accepted prior usage, was intended in the Platform for Action'. Furthermore, 'the word "gender" as used in the Platform for Action of the Fourth World Conference on Women was intended to be interpreted and understood as it was in ordinary, generally accepted usage'.⁵³¹

On a conservative interpretation, the term 'gender' should be taken as a synonym for the term 'sex'. It seems an absurd construction to view 'gender' as being in some sense narrower than 'sex', given that the entire thrust of human rights law has been to enlarge and expand the protections that it offers. It is of interest that the UN Human Rights Committee, in a 1990 decision concerning discriminatory legislation in Australia, held that 'the reference to "sex" in articles 2, paragraph 1, and 26 [of the International Covenant on Civil and Political Rights] is to be taken as including sexual orientation'.⁵³²

The Office of the Prosecutor has noted that '[g]ender-based crimes are not always manifested as a form of sexual violence. They may include non-sexual attacks on women (p. 211) and girls, and men and boys, because of their gender.' Moreover, a 'gender perspective' requires 'an understanding of differences in status, power, roles, and needs between males and females, and the impact of gender on people's opportunities and interactions'. As for 'gender analysis', the Office has said this 'examines the underlying differences and inequalities between women and men, and girls and boys, and the power relationships and other dynamics which determine and shape gender roles in a society, and give rise to assumptions and stereotypes. In the context of the work of the Office, this involves a consideration of whether, and in what ways, crimes, including sexual and gender-based crimes, are related to gender norms and inequalities.'⁵³³

Bibliography

Kai Ambos, *Los crímenes del nuevo derecho penal internacional*, Bogotá: Ediciones Jurídicas Gustavo Ibañez, 2004, pp. 51-79, 111-226.

— 'Crimes against Humanity and the International Criminal Court', in Leila Nadya Sadat (ed.), *Forging a Convention for Crimes against Humanity*, New York: Cambridge University Press, 2011, pp. 279-304.

— *Treatise on International Criminal Law*, Vol. II: *The Crimes and Sentencing*, Oxford: Oxford University Press, 2014.

M. Cherif Bassiouni, *Crimes against Humanity, Historical Evolution and Contemporary Application*, Cambridge: Cambridge University Press, 2011.

Gideon Boas, James L. Bischoff, and Natalie L. Reid, *Elements of Crimes under International Law*, Cambridge: Cambridge University Press, 2009, pp. 14-137.

Michael Bohlander, 'Criminalizing LGBT Persons under National Criminal Law and Article 7(1)(h) and (3) of the ICC Statute' (2014) 5 *Global Policy* 401.

Kristen Boon, 'Rape and Forced Pregnancy under the ICC Statute: Human Dignity, Autonomy and Consent' (2001) 32 *Columbia Human Rights LR* 625.

Machteld Boot, *Genocide, Crimes against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*, Antwerp: Intersentia, 2002.

Antonio Cassese, 'Crimes against Humanity', in Cassese, *Rome Statute*, pp. 353-78.

Simon Chesterman, 'An Altogether Different Order: Defining the Elements of Crimes Against Humanity' (2000) 10 *Duke J Comp & Int'l L* 307.

Roger S. Clark, 'Crimes against Humanity and the Rome Statute of the International Criminal Court', in Politi and Nesi, *The Rome Statute*, pp. 75-94.

M. Cupido, 'The Policy Underlying Crimes against Humanity: Practical Reflections on a Theoretical Debate' (2011) 22 *Criminal Law Forum* 275.

Philippe Curat, *Les crimes contre l'humanité dans le Statut de la Cour pénale internationale*, Geneva/Brussels/Paris: Schulthess, Bruylant, LGDJ, 2006.

David Donat-Cattin, 'Crimes against Humanity', in Lattanzi, *The International Criminal Court*, pp. 49-78.

Chile Eboe-Osuji, 'Crimes against Humanity: Directing Attacks against a Civilian Population' (2008) 2 *African J Legal Studies* 118.

Mohamed Elewa Badar, 'From the Nuremberg Charter to the Rome Statute: Defining the Elements of Crimes against Humanity' (2004) 5 *San Diego Int'l LJ* 73.

Leonardo G. Filippini, 'Los crímenes del artículo 7 del Estatuto de Roma', in Guevara and Del Maso, *La Corte penal*, pp. 209–59.

Christopher K. Hall, Kai Ambos, Carsten Stahn, Niamh Hayes, Larissa van den Herik, and Joseph Powderly, 'Article 7', in Triffterer and Ambos, *Commentary*, pp. 144–294.

(p. 212) M. Halling, 'Push the Envelope—Watch It Bend: Removing the Policy Requirement and Extending Crimes against Humanity' (2010) 23 *Leiden JIL* 827.

Niamh Hayes, '*La lutte continue*: Investigating and Prosecuting Sexual Violence at the ICC', in Stahn, *Law and Practice*, pp. 801–39.

Herman von Hebel and Darryl Robinson, 'Crimes within the Jurisdiction of the Court', in Lee, *The Making of the Rome Statute*, pp. 79–126.

Phyllis Hwang, 'Dedicated to the Adoption of the Rome Statute of the International Criminal Court: Defining Crimes against Humanity: The Rome Statute of the International Criminal Court' (1998) 22 *Fordham Int'l LJ* 457.

Yann Jurovics, 'Article 7', in Fernandez and Pacreau, *Statut de Rome*, pp. 417–80.

S. Kirsch, 'Two Kinds of Wrong: On the Context Element of Crimes against Humanity' (2009) 22 *Leiden JIL* 525.

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' (2010) 23 *Leiden JIL* 855.

Brian Kritz, 'The Global Transgender Population and the International Criminal Court' (2014) 17 *Yale Human Rights & Development LJ* 36.

Margaret McAuliffe deGuzman, 'The Road from Rome: The Developing Law of Crimes against Humanity' (2000) 22 *Human Rights Quarterly* 335.

— 'The Elusive Essence of Crimes against Humanity', in Linton, *Future Generations*, pp. 298–310.

Timothy L. H. McCormack, 'Crimes against Humanity', in McGoldrick, *The Permanent Court*, pp. 179–202.

Stephan Meseke, *Der Tatbestand der Verbrechen gegen die Menschlichkeit nach dem Römischen Statut des Internationalen Strafgerichtshofes: Eine völkerstrafrechtliche Analyse*, Berlin: Berliner Wissenschafts-Verlag, 2004.

Guénaél Mettraux, 'The Definition of Crimes against Humanity and the Question of a "Policy" Element', in Leila Nadya Sadat (ed.), *Forging a Convention for Crimes against Humanity*, New York: Cambridge University Press, 2011, pp. 142–76.

Alda Facio Montejo and Teresa Ulloa Ziaurriz, 'Violación y violencia sexual: Crímenes de Guerra y de lesa humanidad', in Guevara and Del Maso, *La Corte penal*, pp. 309–69.

B. S. Moshan, 'Women, War, and Words: The Gender Component in the Permanent International Criminal Court's Definition of Crimes against Humanity' (1998) 22 *Fordham Int'l LJ* 154.

Pablo Parenti, 'Crímenes contra la humanidad, Origen y evolución de la figura y análisis de sus elementos centrales en el Estatuto de Roma', in Guevara and Del Maso, *La Corte penal*, pp. 165–208.

V. J. Proulx, 'Rethinking the Jurisdiction of the International Criminal Court in the Post-September 11th Era: Should Acts of Terrorism Qualify as Crimes against Humanity?' (2004) 19 *American University Int'l LR* 1009.

Joseph Rikhof, 'Article 7', in De Hert, *Code*, pp. 30-54.

Darryl Robinson, 'Crimes against Humanity: Reflections on State Sovereignty, Legal Precision and the Dictates of the Public Conscience', in Lattanzi and Schabas, *Essays*, Vol. I, 1999, pp. 139-70.

— 'Defining "Crimes against Humanity" at the Rome Conference' (1999) 93 *AJIL* 43.

— 'The Elements of Crimes against Humanity', in Lee, *Elements and Rules*, 2001, pp. 57-108.

— 'Crimes against Humanity, A Better Policy on "Policy" ', in Stahn, *Law and Practice*, pp. 795-831.

K'Shaani O. Smith, 'Prosecutor v. Lubanga: How the International Criminal Court Failed the Women and Grils of the Congo' (2011) 54 *Howard LJ* 488.

Markus Wagner, 'The ICC and its Jurisdiction: Myths, Misperceptions and Realities' (2003) 7 *Max Planck Yearbook of UN Law* 409.

Gerhard Werle and B. Burghardt, 'Do Crimes against Humanity Require the Participation of a State or a "State-like" Organization?' (2012) 10 *JICJ* 1151.

Footnotes:

¹ English translation in: UN War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, London: His Majesty's Stationery Office, 1948, p. 35.

² Voltaire, *A Philosophical Dictionary: From the French of M. De Voltaire*, 1793, repr., London: W. Dugale, 1843, p. 293; Cesare Beccaria, *Dei delitti e delle pene: coi commentarij divarii insigni scrittori*, 1764, p. 240.

³ 'Minutes of Conference Session of August 2, 1945', in *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials*, Washington, DC: US Government Printing Office, 1949, pp. 399-419, at p. 416.

⁴ Charter of the International Military Tribunal (IMT), (1951) 82 UNTS 279, Annex, art. VI(c): '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 court where perpetrated.'

⁵ Report by J. Spiropoulos, Special Rapporteur, UN Doc. A/CN.4/25, para. 64.

⁶ Report of the International Law Commission on the work of its thirty-eighth session, 5 May-11 July 1986, UN Doc. A/41/10, pp. 43-6.

⁷ Report of the International Law Commission on the work of its forty-first session, 2 May-21 July 1989, UN Doc. A/44/10, para. 163.

⁸ GA Res. 2184 (XXI); GA Res. 2202 (XXI); Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity, (1970) 754 UNTS 73, art. I(b); International Convention on the Suppression and Punishment of the Crime of Apartheid, (1976) 1015 UNTS 243, art. 1(1).

- ⁹ *Yearbook ... 1991*, UN Doc. A/CN.4/SER.A/1991/Add.I (Part 2), pp. 103–4.
- ¹⁰ Tenth report on the draft Code of Crimes against the Peace and Security of Mankind, by Mr Doudou Thiam, Special Rapporteur, UN Doc. A/CN.4/442, para. 36.
- ¹¹ *Yearbook ... 1992*, UN Doc. A/CN.4/SER.A/1992/Add.I (Part 1), p. 57.
- ¹² Report of the International Law Commission on the work of its forty-fifth session (3 May–23 July 1993), in *Yearbook ... 1993*, UN Doc. A/CN.4/SER.A/1993/Add.I (Part 2), p. 110.
- ¹³ *Ibid.*
- ¹⁴ ILC 1994 Final Report, p. 38.
- ¹⁵ *Ibid.*
- ¹⁶ Statute of the International Criminal Tribunal for the former Yugoslavia, UN Doc. S/RES/827 (1993), Annex, art. 5; Statute of the International Criminal Tribunal for Rwanda, UN Doc. S/RES/955 (1994), Annex, art. 4.
- ¹⁷ *Tadić* (IT-94-1-T), Decision on the Defence Motion on Jurisdiction, 10 August 1995.
- ¹⁸ ‘Crimes against Humanity’ Must be Precisely Defined Say Speakers in Preparatory Committee for International Court, Press Release L/2763/Rev.1, 26 March 1996.
- ¹⁹ Ad Hoc Committee Report, para. 77.
- ²⁰ Preparatory Committee 1996 Report, Vol. II, pp. 65–7.
- ²¹ Preparatory Committee 1996 Report, Vol. I, para. 85.
- ²² Preparatory Committee on Establishment of International Criminal Court Begins First Session, Press Release L/2761, 25 March 1996; Preparatory Committee for Establishment of International Criminal Court Discusses Definitions of ‘Genocide’, ‘Crimes Against Humanity’, Press Release L/2762, 25 March 1996; ‘Crimes Against Humanity’ Must be Precisely Defined Say Speakers in Preparatory Committee for International Court, Press Release L/2763/Rev.1, 26 March 1996.
- ²³ US Delegation, Proposed Article on Crimes against Humanity with Proposed Elements, 22 March 1996. Also: Discussion Draft, US Delegation, for Annex to Statute. Elements Related to Article on Crimes Against Humanity, 2 April 1996.
- ²⁴ Chairman’s Informal Text No. 2, 29 March 1996.
- ²⁵ Definition of core crimes, Chairman’s informal texts and compilation of proposals and suggestions with regard to the definition of core crimes, UN Doc. A/AC.249/CRP.9/Add.4, pp. 11–16.
- ²⁶ UN Doc. A/AC.249/CRP.2/Add.3/Rev.1.
- ²⁷ *Ibid.*, para. 4. Also: Preparatory Committee 1996 Report, Vol. I, para. 85.
- ²⁸ *Ibid.*, para. 8. Also: Preparatory Committee 1996 Report, Vol. I, para. 89.
- ²⁹ Draft Composite Text Submitted by the Chairman, Crimes against Humanity, UN Doc. A/AC.249/1997/WG.1/CRP.3.
- ³⁰ Proposal for a definition of crimes against humanity submitted by the delegation of France, UN Doc. A/AC.249/1997/WG.1/DP.4.
- ³¹ Crimes against Humanity, UN Doc. A/AC.249/1997/WG.1/CRP.5 and Corr.1.
- ³² Discussion Paper, Bureau, UN Doc. A/CONF.183/C.1/L.53.
- ³³ *Ibid.*

- ³⁴ UN Doc. A/CONF.183/C.1/L.76/Add.2 and Corr.l.
- ³⁵ UN Doc. A/CONF.183/C.1/SR.3, paras 21 (Germany), 35 (Czech Republic), 50 (Brazil), 53 (Costa Rica), 54–5 (Denmark), 57 (Lesotho), 61 (Greece), 66 (Malawi), 77 (Republic of Korea), 81 (Poland), 87 (Australia), 93 (Argentina), 109 (Slovenia), 112 (Norway), 117 (South Africa), 124 (Mexico), 130 (Finland), 148 (Spain), 150 (Romania), 162 (Italy), 166 (Ireland); UN Doc. A/CONF.183/C.1/SR.4, paras 3 (Canada), 7 (Switzerland), 8 (Sweden), 11 (Portugal), 13 (Vietnam), 14 (Netherlands), 18 (Bangladesh), 20 (Austria), 23 (Sierra Leone), 27 (Chile).
- ³⁶ UN Doc. A/CONF.183/C.1/SR.3, paras 44 (India), 90 (United Kingdom), 95 (France), 108 (Thailand), 136 (Iran), 144 (Indonesia), 172 (Turkey); UN Doc. A/CONF.183/C.1/SR.4, paras 5 (Russia), 15 (Bahrain), 17 (Japan), 21 (Uruguay).
- ³⁷ UN Doc. A/CONF.183/C.1/SR.36, para. 13 (Democratic Republic of the Congo). Jamaica also criticized the provision because of the reference to State or organizational policy: UN Doc. A/CONF.183/C.1/SR.34, para. 15.
- ³⁸ See also: Bureau proposal concerning part 2, UN Doc. A/CONF.183/C.1/L.59 ('Crimes of sexual violence) Drafting requires further discussion').
- ³⁹ Also: UN Doc. A/CONF.183/C.1/SR.33, para. 4.
- ⁴⁰ UN Doc. A/CONF.183/C.1/SR.34, para. 70 (Cuba); UN Doc. A/CONF.183/C.1/SR.35, para. 64 (Iraq); UN Doc. A/CONF.183/C.1/SR.35, para. 6 (Libya).
- ⁴¹ Elements of Crimes, Crimes against Humanity, Introduction, para. 1.
- ⁴² *Situation in the Republic of Kenya* (ICC-01/09-19), Dissenting Opinion of Judge Hans-Peter Kaul, 31 March 2010, para. 55, fn. 61.
- ⁴³ *Situation in the Republic of Kenya* (ICC-01/09-19), Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, paras 91–3.
- ⁴⁴ But note the reference by the Prosecutor: Office of the Prosecutor, Situation in Honduras, Article 5 Report, October 2015, para. 76.
- ⁴⁵ *Korbely v. Hungary* (App. no. 9174/02), 19 September 2008, Dissenting Opinion of Judge Loucaides; *Streletz, Kessler and Krenz v. Germany* (App. nos 34044/96, 35532/97, and 44801/98), 22 March 2001, Concurring Opinion of Judge Loucaides.
- ⁴⁶ *Katanga* (ICC-01/04-01/07), Judgment pursuant to article 74 of the Statute, 7 March 2014, para. 1100.
- ⁴⁷ Christopher K. Hall and Kai Ambos, 'Article 7', in Triffterer and Ambos, *Commentary*, pp. 144–294, at p. 159.
- ⁴⁸ *Situation in the Republic of Côte d'Ivoire* (ICC-02/11), Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, 3 October 2011, para. 28.
- ⁴⁹ *Ibid.*, para. 29.
- ⁵⁰ Darryl Robinson, 'Crimes against Humanity, A Better Policy on "Policy"', in Stahn, *Law and Practice*, pp. 705–31, at p. 730.
- ⁵¹ *Katanga* (ICC-01/04-01/07), Judgment pursuant to article 74 of the Statute, 7 March 2014, para. 1097.
- ⁵² *Ibid.*, paras 1098–9.
- ⁵³ On this point, see *Vasiljević* (IT-98-32-T), Judgment, 29 November 2002, para. 33.

- ⁵⁴ Statute of the International Criminal Tribunal for the former Yugoslavia, UN Doc. S/RES/827 (1993), Annex, art. 5; Statute of the International Criminal Tribunal for Rwanda, UN Doc. S/RES/955 (1994), Annex, art. 3. The Statute of the Rwanda Tribunal does not include the word ‘directed’ before ‘against’. The distinction has not been treated as significant in the case law of the two tribunals. The Statute of the Yugoslavia Tribunal does not use the word ‘attack’, but this has been read into the definition in the case law: *Kunarac et al.* (IT-96-23/1-A), Judgment, 12 June 2002, para. 85.
- ⁵⁵ Preparatory Committee 1996 Report, Vol. I, para. 86. See also: UN Doc. A/CONF.183/C.1/SR.3, para. 77 (Republic of Korea).
- ⁵⁶ *Gbagbo, Laurent* (ICC-02/11-01/11), Decision on the confirmation of charges against Laurent Gbagbo, 12 June 2014, para. 209.
- ⁵⁷ *Ibid.*
- ⁵⁸ *Ibid.*, para. 210.
- ⁵⁹ Elements of Crimes, Crimes against Humanity, Introduction, para. 3. Also: *Katanga* (ICC-01/04-01/07), Judgment pursuant to article 74 of the Statute, 7 March 2014, para. 1101.
- ⁶⁰ *Vasiljević* (IT-98-32-T), Judgment, 29 November 2002, paras 29, 30; *Kunarac et al.* (IT-96-23/1-A), Judgment, 12 June 2002, para. 86; *Rutaganda* (ICTR-96-3-T), Judgment and Sentence, 6 December 1999, para. 70; *Musema* (ICTR-96-13-T), Judgment and Sentence, 27 January 2000, para. 205; *Semanza* (ICTR-97-20-T), Judgment and Sentence, 15 May 2003, para. 327.
- ⁶¹ Elements of Crimes, Crimes against Humanity, Introduction, para. 3.
- ⁶² *Bemba* (ICC-01/05-01/08), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, 15 June 2009, para. 75.
- ⁶³ *Kunarac et al.* (IT-96-23/1-A), Judgment, 12 June 2002, para. 90; *Šljivančanin* (IT-95-13/1-A), Judgment, 5 May 2009, paras 30–4.
- ⁶⁴ *Blaškić* (IT-95-14-T), Judgment, 3 March 2000, para. 208, fn. 401.
- ⁶⁵ *Kunarac et al.* (IT-96-23/1-A), Judgment, 12 June 2002, para. 103.
- ⁶⁶ *Bemba* (ICC-01/05-01/08), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, 15 June 2009, para. 76; Situation in the Republic of Kenya (ICC-01/09), Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, para. 125. Also: *Kunarac et al.* (IT-96-23/1-A), Judgment, 12 June 2002, para. 92; *Naletilić et al.* (IT-98-34-T), Judgment, 31 March 2003, para. 235; *Fofana et al.* (SCSL-04-14-A), Judgment, 28 May 2008, para. 257.
- ⁶⁷ *Katanga et al.* (ICC-01/04-01/07), Decision on the Confirmation of the Charges, 30 September 2008, para. 399. Also: *Bemba* (ICC-01/05-01/08), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, 15 June 2009, para. 76; *Katanga* (ICC-01/04-01/07), Judgment pursuant to article 74 of the Statute, 7 March 2014, para. 1103.
- ⁶⁸ *Prosecutor v. Ruto et al.* (ICC-01/09-01/11), Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, para. 164.
- ⁶⁹ *Bemba* (ICC-01/05-01/08), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, para. 77. Also: *Situation in the Republic of Côte d’Ivoire* (ICC-02/11), Decision Pursuant to

Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, 3 October 2011, para. 32.

⁷⁰ *Katanga* (ICC-01/04-01/07), Judgment pursuant to article 74 of the Statute, 7 March 2014, para. 1105; *Situation in the Republic of Côte d'Ivoire* (ICC-02/11), Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, 3 October 2011, para. 32.

⁷¹ *Bagilishema* (ICTR-95-1A-T), Judgment, 7 June 2001, para. 80.

⁷² *Katanga* (ICC-01/04-01/07), Judgment pursuant to article 74 of the Statute, 7 March 2014, paras 1104-5.

⁷³ *Kupreškić et al.* (IT-95-16-T), Judgment, 14 January 2000, para. 568.

⁷⁴ *Katanga* (ICC-01/04-01/07), Judgment pursuant to article 74 of the Statute, 7 March 2014, paras 1102, 1105.

⁷⁵ *Blaškić* (IT-95-14-T), Judgment, 3 March 2000, para. 214. Also: *Jelisić* (IT-95-10-T), Judgment, 14 December 1999, para. 54; *Kordić et al.* (IT-95-14/2-T), Judgment, 26 February 2001, para. 180; *Naletilić et al.* (IT-98-34-T), Judgment, 31 March 2003, para. 235; *Akayesu* (ICTR-96-4-T), Judgment, 2 September 1998, para. 582; *Rutaganda* (ICTR-96-3-T), Judgment and Sentence, 6 December 1999, para. 72; *Musema* (ICTR-96-13-T), Judgment and Sentence, 27 January 2000, para. 207; *Kayishema et al.* (ICTR-95-1-T), Judgment and Sentence, 21 May 1999, paras 127-9; *Kupreškić et al.* (IT-95-16-T), Judgment, 14 January 2000, para. 548. See the discussion in Simon Chesterman, 'An Altogether Different Order: Defining the Elements of Crimes against Humanity' (2000) 10 *Duke J Comp & Int'l L* 307, at 322-5.

⁷⁶ *Kayishema et al.* (ICTR-95-1-T), Judgment and Sentence, 21 May 1999, paras 127-9 (emphasis in original). Also: *Bemba* (ICC-01/05-01/08), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, 15 June 2009, para. 78.

⁷⁷ Antonio Cassese, *International Criminal Law*, Oxford: Oxford University Press, 2003, p. 87. Also: *Šljivančanin* (IT-95-13/1-A), Judgment, 5 May 2009, para. 43.

⁷⁸ *Kupreškić et al.* (IT-95-16-T), Judgment, 14 January 2000, paras 547-9; *Jelisić* (IT-95-10-T), Judgment, 14 December 1999, para. 54.

⁷⁹ *Norman et al.* (SCSL-04-14-A), Judgment, 28 May 2008, para. 261.

⁸⁰ *France et al. v. Göring et al.*, (1946) 22 IMT 411.

⁸¹ See, e.g., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, p. 43, para. 172.

⁸² *Situation in the Republic of Kenya* (ICC-01/09-19), Dissenting Opinion of Judge Hans-Peter Kaul, 31 March 2010, para. 63.

⁸³ *Kunarac et al.* (IT-96-23 & IT-96-23/1-A), Judgment, 12 June 2002, fn. 114.

⁸⁴ *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 SCR 100, para. 158. The Supreme Court of Argentina, interpreting article 7(2)(a) of the *Rome Statute*, concluded that the case facts must be linked with a sort of 'policy', understanding this term as directions and guidelines followed by an entity's practice on a determined ground. The Court said such a requirement had existed for fifty years, citing in support post-Second-World-War cases, although the Charter of the International Military Tribunal had no explicit provision. It said that an 'organizational policy' only includes either large magnitude organizations that, in a scenario of struggle for power, are capable of controlling a territory, or insurgent groups involved in the fight for power: *René Jesús Derecho Case* (Supreme

Court of Argentina), Decision about incidental proceeding on the extinguishment of a criminal complaint—docket No. 24079, 11 July 2007, pp. 10–12.

85 For example, it refers to the 1954 draft of the Code of Offences against the Peace and Security of Mankind, adopted by the International Law Commission. The Commission had voted to eliminate the *nexus* with armed conflict (UN Doc. A/CN.4/SR.267, para. 59), but then realized that it needed some contextual element to distinguish crimes against humanity from ordinary crimes. It adopted the following: ‘Inhuman acts such as murder, extermination, enslavement, deportation or persecution, committed against any civilian population on social, political, racial, religious or cultural grounds *by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities.*’ Draft Code of Offences against the Peace and Security of Mankind, in *Yearbook ... 1954*, Vol. II, UN Doc. A/CN.4/SER.A/1954/Add.1, p. 150 (emphasis added). Obviously, the Commission incorporated the State policy *nexus* rather than eliminate it, contrary to the implication of the Appeals Chamber. There are also references to decisions like that of the International Military Tribunal, where State policy was so central to the evidence that the issue was in fact never really considered.

86 For more detailed discussion of this issue, see: William Schabas, ‘Crimes Against Humanity: The State Plan or Policy Element’, in Leila Nadya Sadat and Michael P. Scharf, (eds.), *The Theory and Practice of International Criminal Law*, Leiden: Martinus Nijhoff Publishers, 2008, pp. 347–64; William Schabas, ‘State Policy as an Element of International Crimes’, (2008) 98 *J Criminal L & Criminology* 953.

87 Machteld Boot, Rodney Dixon, and Christopher K. Hall, ‘Article 7’, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observers’ Notes, Article by Article*, 2nd edn, Munich: C. H. Beck; Baden-Baden: Nomos; Oxford: Hart, 2008, pp. 159–273, at p. 236. The third edition is more nuanced: ‘It is controversial whether there is a requirement in customary international law that a crime against humanity be committed pursuant to or in furtherance of a plan or policy’, Christopher K. Hall and Kai Ambos, ‘Article 7’, in Triffterer and Ambos, *Commentary*, pp. 144–294, at p. 244.

88 M. Cherif Bassiouni, *The Legislative History of the International Criminal Court: Introduction, Analysis and Integrated Text*, Vol. I, Ardsley, NY: Transnational, 2005, pp. 151–2. See also: M. Cherif Bassiouni, *Crimes against Humanity*, 2nd rev. edn, The Hague: Martinus Nijhoff, 1999, pp. 243–81.

89 Elements of Crimes, Crimes against Humanity, Introduction, para. 3.

90 Ibid.; *Katanga et al.* (ICC-01/04-01/07), Decision on the Confirmation of the Charges, 30 September 2008, para. 396; *Situation in the Republic of Kenya* (ICC-01/09), Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, para. 83; *Situation in the Republic of Côte d’Ivoire* (ICC-02/11), Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire, 3 October 2011, para. 43.

91 *Katanga et al.* (ICC-01/04-01/07), Decision on the Confirmation of the Charges, 30 September 2008, para. 396. Followed: *Situation in the Republic of Kenya* (ICC-01/09), Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, paras 81, 84, 86; *Gbagbo, Laurent* (02/11-01/11), Decision on the Prosecutor’s Application Pursuant to Article 58 for a warrant of arrest against Laurent Koudou Gbagbo, 30 November 2011, para. 37.

- 92** *Situation in the Republic of Côte d'Ivoire* (ICC-02/11), Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, 3 October 2011, para. 43. Also: *Bemba* (ICC-01/05-01/08), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, para. 81; *Situation in the Republic of Kenya* (ICC-01/09), Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, paras 85, 86.
- 93** Ibid.
- 94** Ibid.
- 95** *Situation in the Republic of Kenya* (ICC-01/09), Dissenting Opinion of Judge Hans-Peter Kaul, 31 March 2010, para. 40.
- 96** *Katanga* (ICC-01/04-01/07), Judgment pursuant to article 74 of the Statute, 7 March 2014, para. 1109.
- 97** *Mbarushimana* (ICC-01/04-01/10), Decision on the confirmation of charges, 16 December 2011, para. 263.
- 98** *Mbarushimana* (ICC-01/04-01/10), Dissenting opinion of Judge Sanji Mmasenono Monageng, 16 December 2011, para. 17.
- 99** *Mbarushimana* (ICC-01/04-01/10 OA 4), Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled 'Decision on the confirmation of charges', 30 May 2012.
- 100** *Gbagbo, Laurent* (ICC-02/11-01/11), Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, 3 June 2013, para. 36.
- 101** Ibid., para. 44.
- 102** *Gbagbo, Laurent* (ICC-02/11-01/11), Dissenting opinion of Judge Silvia Fernández de Gurmendi, 3 June 2013, para. 48. See also: *Gbagbo, Laurent* (ICC-02/11-01/11), Amicus Curiae Observations of Professors Robinson, deGuzman, Jalloh and Cryer, 9 October 2013.
- 103** Office of the Prosecutor, *Situation in Honduras*, Article 5 Report, October 2015, para. 103; also, para. 125.
- 104** Much the same argument is presented by a commentator: Darryl Robinson, 'Crimes against Humanity, A Better Policy on "Policy"', in Stahn, *Law and Practice*, pp. 795-831, at pp. 713-14.
- 105** *Katanga* (ICC-01/04-01/07), Judgment pursuant to article 74 of the Statute, 7 March 2014, para. 1111.
- 106** *Situation in the Republic of Kenya* (ICC-01/09), Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, para. 90. Also: *Muthaura et al.* (ICC-01/09-02/11), Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, para. 112; *Muthaura et al.* (ICC-01/09-02/11), Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 8 March 2011, para. 21.
- 107** *Situation in the Republic of Côte d'Ivoire* (ICC-02/11), Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, 3 October 2011, para. 99.

- 108** *Situation in the Republic of Kenya* (ICC-01/09), Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, para. 90. Also: *Muthaura et al.* (ICC-01/09-02/11), Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, para. 112; *Muthaura et al.* (ICC-01/09-02/11), Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 8 March 2011, para. 21.
- 109** *Ibid.*, para. 91, citing *Yearbook ... 1991*, Vol. II, UN Doc. A/CN.4/SER.A/1991/Add.I (Part 2), p. 103. Also cited in: *Katanga et al.* (ICC-01/04-01/07), Decision on the Confirmation of the Charges, 30 September 2008, para. 396, fn. 507. Note, however, that in 1991 the International Law Commission dropped completely the category of crimes against humanity. It was referring to a new category of international crime that it described as 'Systematic or mass violations of human rights'. In the final version of the Code of Crimes against the Peace and Security of Mankind, adopted in 1996, the Commission dropped the reference to 'organized criminal gangs or groups', replacing it with the following: 'The instigation or direction of a Government or any organization or group, which may or may not be affiliated with a Government, gives the act its great dimension and makes it a crime against humanity.' *Yearbook ... 1991*, Vol. II, UN Doc. A/CN.4/SER.A/1996/Add.I (Part 2), p. 47.
- 110** *Gbagbo, Laurent* (ICC-02/11-01/11), Decision on the confirmation of charges against Laurent Gbagbo, 12 June 2014, para. 217.
- 111** *Situation in the Republic of Kenya* (ICC-01/09), Dissenting Opinion of Judge Hans-Peter Kaul, 31 March 2010, para. 66.
- 112** *Muthaura et al.* (ICC-01/09-02/11), Dissenting Opinion of Judge Hans-Peter Kaul, 23 January 2012, para. 21.
- 113** *Situation in the Republic of Kenya* (ICC-01/09), Dissenting Opinion of Judge Hans-Peter Kaul, 31 March 2010, para. 38.
- 114** *Ibid.*, para. 51 (internal references omitted).
- 115** *Ibid.*, para. 52.
- 116** *Situation in the Republic of Kenya* (ICC-01/09), Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, para. 93.
- 117** *Ibid.* Also: *Prosecutor v. Ruto et al.* (ICC-01/09-01/11), Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, para. 185; *Situation in the Republic of Côte d'Ivoire* (ICC-02/11), Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, 3 October 2011, para. 46; *Katanga* (ICC-01/04-01/07), Judgment pursuant to article 74 of the Statute, 7 March 2014, paras 1119-20.
- 118** *Muthaura et al.* (ICC-01/09-02/11), Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, para. 186.
- 119** *Muthaura et al.* (ICC-01/09-02/11), Dissenting Opinion of Judge Hans-Peter Kaul, 23 January 2012, para. 19; *Muthaura et al.* (ICC-01/09-02/11), Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II's 'Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali', 15 March 2011, para. 32.
- 120** *Prosecutor v. Ruto et al.* (ICC-01/09-01/11), Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, paras 182-6; *Prosecutor v. Ruto et al.* (ICC-01/09-01/11), Decision on the Prosecutor's Application for

Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, 8 March 2011, paras 22–5.

121 *Prosecutor v. Ruto et al.* (ICC-01/09-01/11), Dissenting Opinion of Judge Hans-Peter Kaul, 23 January 2012, para. 13; *Prosecutor v. Ruto et al.* (ICC-01/09-01/11), Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II's 'Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang', 15 March 2011, paras 45–51.

122 *Katanga* (ICC-01/04-01/07), Judgment pursuant to article 74 of the Statute, 7 March 2014, para. 1119.

123 *Ibid.*, para. 1122.

124 *Katanga* (ICC-01/04-01/07), Minority Opinion of Judge Christine Van den Wyngaert, 7 March 2014, para. 269.

125 *Situation in the Republic of Côte d'Ivoire* (ICC-02/11), Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, 3 October 2011, para. 92.

126 UN Doc. S/RES/955 (1994), Annex, art. 3. The French version uses the two terms cumulatively, however: 'Le tribunal international pour le Rwanda est habilité à juger les personnes présumées responsables des crimes suivants lorsqu'ils ont été commis dans le cadre d'une attaque généralisée et systématique ...'. See: *Akayesu* (ICTR-96-4-T), Judgment, 2 September 1998, para. 579, n. 144. The Arabic text is similar to the French. The Spanish, Russian, and Chinese versions are consistent with the English text.

127 *Tadić* (IT-94-1-T), Opinion and Judgment, 7 May 1997, para. 656. Also: Report of the Secretary-General Pursuant to Paragraph (2) of Security Council Resolution 808 (1993), UN Doc. S/25704 (1993), para. 48.

128 Discussion Paper, Bureau, UN Doc. A/CONF.183/C.1/L.53.

129 *Bemba* (ICC-01/05-01/08), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, 15 June 2009, para. 82.

130 *Bashir* (ICC-02/05-01/09), Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, para. 81; *Katanga et al.* (ICC-01/04-01/07), Decision on the Confirmation of the Charges, 30 September 2008, paras 394–7; *Situation in the Republic of Côte d'Ivoire* (ICC-02/11), Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, 3 October 2011, para. 53.

131 *Bashir* (ICC-02/05-01/09), Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, para. 84.

132 *Bemba* (ICC-01/05-01/08), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, 15 June 2009, para. 83. Also: *Katanga et al.* (ICC-01/04-01/07), Decision on the Confirmation of the Charges, 30 September 2008, paras 395, 398; *Akayesu* (ICTR-96-4-T), Judgment, 2 September 1998, para. 580; *Ntakirutimana et al.* (ICTR-96-10 and ICTR-96-17-T), Judgment, 21 February 2003, para. 804.

133 *Ibid.* Also: Office of the Prosecutor, Situation in Honduras, Article 5 Report, October 2015, para. 106.

- 134** *Situation in the Republic of Côte d'Ivoire* (ICC-02/11), Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, 3 October 2011, para. 53.
- 135** Ibid.
- 136** Ibid., para. 395.
- 137** *Bashir* (ICC-02/05-01/09), Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, para. 81; *Katanga et al.* (ICC-01/04-01/07), Decision on the Confirmation of the Charges, 30 September 2008, paras 394–7.
- 138** *Gbagbo, Laurent* (ICC-02/11-01/11), Decision on the confirmation of charges against Laurent Gbagbo, 12 June 2014, para. 223; *Katanga* (ICC-01/04-01/07), Judgment pursuant to article 74 of the Statute, 7 March 2014, para. 1123; *Situation in the Republic of Côte d'Ivoire* (ICC-02/11), Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, 3 October 2011, para. 54.
- 139** *Bashir* (ICC-02/05-01/09), Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, para. 85.
- 140** *Katanga et al.* (ICC-01/04-01/07), Decision on the Confirmation of the Charges, 30 September 2008, paras 397–8.
- 141** Kai Ambos, ' "Verbrechenselemente" sowie Verfahrens- und Beweisregeln des Internationalen Strafgerichtshofs' (2001) 6 *Neue Juristische Wochenschrift* 405, at 406–7.
- 142** Stephan Meseke, *Der Tatbestand der Verbrechen gegen die Menschlichkeit nach dem Römischen Statut des Internationalen Strafgerichtshofes: Eine völkerstrafrechtliche Analyse*, Berlin: Berliner Wissenschafts-Verlag, 2004, at p. 144.
- 143** *Kunarac et al.* (IT-96-23/1-A), Judgment, 12 June 2002, para. 95; *Jelisić* (IT-95-10-T), Judgment, 14 December 1999, para. 53.
- 144** *Blaškić* (IT-95-14-T), Judgment, 3 March 2000, para. 203; *Kunarac et al.* (IT-96-23/1-A), Judgment, 12 June 2002, para. 95; *Jelisić* (IT-95-10-T), Judgment, 14 December 1999, para. 53.
- 145** *Kordić et al.* (IT-95-14/2-A), Judgment, 17 December 2004, para. 94; *Blaškić* (IT-95-14-A) Judgment, 29 July 2004, para. 101, referring to *Kunarac et al.* (IT-96-23/1-A), Judgment, 12 June 2002, para. 96.
- 146** *Bemba* (ICC-01/05-01/08), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, 15 June 2009, para. 151.
- 147** *Bemba* (ICC-01/05-01/08), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, 15 June 2009, paras 84–6, 139. Also: *Tadić* (IT-94-1-A), Judgment, 15 July 1999, paras 251, 271; *Naletilić et al.* (IT-98-34-T), Judgment, 31 March 2003, para. 234; *Kordić et al.* (IT-95-14/2-T), Judgment, 26 February 2001, para. 33.
- 148** *Katanga et al.* (ICC-01/04-01/07), Decision on the Confirmation of the Charges, 30 September 2008, para. 400.
- 149** *Gbagbo, Laurent* (ICC-02/11-01/11), Decision on the confirmation of charges against Laurent Gbagbo, 12 June 2014, para. 212.

- 150** *Situation in the Republic of Côte d'Ivoire* (ICC-02/11), Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, 3 October 2011, para. 89.
- 151** *Kunarac et al.* (IT-96-23-T & IT-96-23/1-T), Judgment, 22 February 2001, para. 431.
- 152** *Kupreškić et al.* (IT-95-16-T), Judgment, 14 January 2000, para. 550; *Kordić et al.* (IT-95-14/2-T), Judgment, 26 February 2001, para. 178; *Mrksić et al.* (IT-95-13-R61), Review of Indictment Pursuant to Rule 61, 3 April 1996, para. 30.
- 153** *Gbagbo, Laurent* (ICC-02/11-01/11), Decision on the Confirmation of Charges against Laurent Gbagbo, 12 June 2014, para. 212.
- 154** *Kunarac et al.* (IT-96-23/1-A), Judgment, 12 June 2002, paras 102, 410; *Tadić* (IT-94-1-A), Judgment, 15 July 1999, para. 271; *Kordić et al.* (IT-95-14/2-A), Judgment, 17 December 2004, paras 99–100; *Limaj* (IT-03-66-T), Judgment, 30 November 2005, para. 190.
- 155** *Tadić* (IT-94-1-A), Judgment, 15 July 1999, para. 271.
- 156** Discussion Paper, Bureau, UN Doc. A/CONF.183/C.1/L.53.
- 157** See: Arnd Koch, 'Über den Wert der Verbrechenselemente ("Elements of Crimes") gem. Art. 9 IStGH-Statut' (2007) 4 *Zeitschrift für Internationale Strafrechtsdogmatik* 150, at 153–4.
- 158** Elements of Crimes, Crimes against Humanity, Introduction, para. 3.
- 159** *Katanga et al.* (ICC-01/04-01/07), Decision on the Confirmation of the Charges, 30 September 2008, paras 401–2. Also: *Bashir* (ICC-02/05-01/09), Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, para. 87; *Bemba* (ICC-01/05-01/08), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, 15 June 2009, para. 88.
- 160** *Ibid.*
- 161** *Blaškić* (IT-95-14-A) Judgment, 29 July 2004, paras 125–6.
- 162** *Blaškić* (IT-95-14-T), Judgment, 3 March 2000, paras 258–9.
- 163** *Kunarac et al.* (IT-96-23/1-A), Judgment, 12 June 2002, para 102; *Krnojelac* (IT-97-25-T), Judgment, 15 March 2002, para. 59.
- 164** *Gbagbo, Laurent* (ICC-02/11-01/11), Decision on the Confirmation of Charges against Laurent Gbagbo, 12 June 2014, para. 214.
- 165** *Muthaura et al.* (ICC-01/09-02/11), Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, para. 223.
- 166** *Kordić et al.* (IT-95-14/2-T), Judgment, 26 February 2001, para. 185.
- 167** *Tadić* (IT-94-1-A), Judgment, 15 July 1999, paras 270, 272. Also: *Kunarac et al.* (IT-96-23/1-A), Judgment, 12 June 2002, para. 103; *Kordić et al.* (IT-95-14/2-T), Judgment, 26 February 2001, para. 187. See the interesting discussion of this in Simon Chesterman, 'An Altogether Different Order: Defining the Elements of Crimes against Humanity' (2000) 10 *Duke J Comp & Int'l L* 307, at 318–21.
- 168** *Kunarac et al.* (IT-96-23/1-A), Judgment, 12 June 2002, para. 103.
- 169** *Ibid.*
- 170** See the review of this issue in: Report of the International Law Commission, Sixty-seventh session (4 May–5 June and 6 July–7 August 2015), A/70/10, pp. 54–6.

- 171** Charter of the International Military Tribunal (IMT), (1951) 82 UNTS 279, Annex, art. VI(c).
- 172** See, e.g., ‘Minutes of Conference Session of 23 July 1945’, in *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials*, Washington, DC: US Government Printing Office, 1949, pp. 328–47; ‘Minutes of Conference Session of 24 July 1945’, *ibid.*, pp. 360–72.
- 173** Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal, GA Res. 95 (I) (emphasis in the original).
- 174** Report of the International Law Commission covering its second session, 5 June–29 July 1950, UN Doc. A/1316, p. 375. See also the discussion of this principle: Formulation of Nürnberg Principles, Report by J. Spiropoulos, Special Rapporteur, UN Doc. A/CN.4/22, pp. 194–5.
- 175** Draft Code of Offences against the Peace and Security of Mankind, in *Yearbook ... 1954*, Vol. II, UN Doc. A/CN.4/SER.A/1954/Add.I, p. 150.
- 176** Statute of the International Criminal Tribunal for the former Yugoslavia, UN Doc. S/RES/827 (1993), Annex.
- 177** See the Secretary-General’s report: ‘Crimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character.’ Report of the Secretary-General Pursuant to Paragraph (2) of Security Council Resolution 808 (1993), UN Doc. S/25704 (1993), para. 47.
- 178** Statute of the International Criminal Tribunal for Rwanda, UN Doc. S/RES/955 (1994), Annex, art. 4.
- 179** Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955 (1994), UN Doc. S/1995/134, para. 12.
- 180** Ad Hoc Committee Report, para. 77.
- 181** *Ibid.*, para. 79. The reference was to *Tadić* (IT-94-1-T), Decision on the Defence Motion on Jurisdiction, 10 August 1995, paras 73–83.
- 182** *Tadić* (IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 141.
- 183** *Šešelj* (IT-03-67-AR72.1), Decision on the Interlocutory Appeal Concerning Jurisdiction, 31 August 2004, para. 13. See: Larry D. Johnson, ‘Ten Years Later: Reflections on the Drafting’ (2004) 2 *JICJ* 368, at 372.
- 184** Preparatory Committee 1996 Report, Vol. I, paras 88–90.
- 185** ‘Crimes against Humanity’ Must be Precisely Defined Say Speakers in Preparatory Committee for International Criminal Court, UN Doc. L/2763/Rev.1, 26 March 1996.
- 186** *Ibid.*, para. 7. Also: Preparatory Committee 1996 Report, Vol. I, para. 88.
- 187** *Ibid.*, para. 8. Also: Preparatory Committee 1996 Report, Vol. I, para. 89.
- 188** US Delegation, Crimes against Humanity, Lack of a Requirement for a Nexus to Armed Conflict, 26 March 1996.
- 189** Preparatory Committee 1996 Report, Vol. II, p. 66.
- 190** Preparatory Committee Draft Statute, pp. 25–7.
- 191** UN Doc. A/CONF.183/C.1/SR.3, paras 22 (Syria), 24 (United Arab Emirates), 26 (Bahrain), 28 (Jordan), 29 (Lebanon), 30 (Belgium), 31 (Saudi Arabia), 34 (Tunisia), 38

(Morocco), 40 (Malta), 41 (Algeria), 53 (Costa Rica), 66 (Malawi), 68 (Sudan), 77 (Republic of Korea), 85 (Iraq); UN Doc. A/CONF.183/C.1/SR.4, paras 5 (Russia), 9 (Ukraine).

192 UN Doc. A/CONF.183/C.1/SR.3, paras 21 (Germany), 30 (Belgium), 35 (Czech Republic), 40 (Malta), 51 (Brazil), 54–5 (Denmark), 57 (Lesotho), 81 (Poland), 84 (Trinidad and Tobago), 87 (Australia), 89 (United Kingdom), 92 (Argentina), 95 (France), 101 (Cuba), 108 (Thailand), 109 (Slovenia), 112 (Norway), 114 (Côte d’Ivoire), 117 (South Africa), 120 (Egypt), 124 (Mexico), 133 (Colombia), 136 (Iran), 138 (United States of America), 147 (Spain), 149 (Romania), 152 (Senegal), 158 (Venezuela), 162 (Italy), 166 (Ireland); UN Doc. A/CONF.183/C.1/SR.4, paras 2 (Canada), 4 (Guinea), 7 (Switzerland), 8 (Sweden), 11 (Portugal), 12 (Yemen), 13 (Vietnam), 14 (Netherlands), 15 (Bahrain), 16 (Benin), 17 (Japan), 18 (Bangladesh), 19 (Niger), 20 (Austria), 21 (Uruguay), 23 (Sierra Leone), 25 (Israel), 27 (Chile), 29 (Kenya).

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

194 UN Doc. A/CONF.183/C.1/SR.34, para. 15 (Jamaica).

195 Statute of the International Criminal Tribunal for Rwanda, UN Doc. S/RES/955 (1994), Annex, art. 4.

196 Report of the Secretary-General Pursuant to Paragraph (2) of Security Council Resolution 808 (1993), UN Doc. S/25704 (1993), para. 48.

197 UN Doc. S/PV.3217 (25 May 1993).

198 *Tadić* (IT-94-1-A), Judgment, 15 July 1999, para. 297. Also: *Akayesu* (ICTR-96-4-A), Judgment, 1 June 2001, para. 464.

199 Preparatory Committee 1996 Report, Vol. I, para. 87.

200 Preparatory Committee Draft Statute, p. 26.

201 Discussion Paper, Bureau, UN Doc. A/CONF.183/C.1/L.53.

202 Elements of Crimes, Crimes against Humanity, art. 7(1)(a), para. 1.

203 *Bemba* (ICC-01/05-01/08), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, 15 June 2009, para. 138; *Katanga* (ICC-01/04-01/07), Judgment pursuant to article 74 of the Statute, 7 March 2014, para. 781.

204 *Ibid.*, para. 138, referring to *Delalić et al.* (IT-96-21-T), Judgment, 16 November 1998, para. 903.

205 *Katanga et al.* (ICC-01/04-01/07), Decision on the Confirmation of the Charges, 30 September 2008, para. 423.

206 *Bemba* (ICC-01/05-01/08), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, 15 June 2009, para. 132; *Katanga et al.* (ICC-01/04-01/07), Decision on the Confirmation of the Charges, 30 September 2008, para. 421.

207 *Ibid.*, para. 132; *Katanga et al.* (ICC-01/04-01/07), Decision on the Confirmation of the Charges, 30 September 2008, para. 287.

208 *Bemba*, para. 132.

209 *Katanga* (ICC-01/04-01/07), Judgment pursuant to article 74 of the Statute, 7 March 2014, para. 768.

- 210** *Bemba* (ICC-01/05-01/08), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, 15 June 2009, para. 133.
- 211** *Katanga* (ICC-01/04-01/07), Judgment pursuant to article 74 of the Statute, 7 March 2014, paras 856–79.
- 212** *Blé Goudé* (ICC-02/11-02/11), Decision on the confirmation of charges against Charles Blé Goudé, 11 December 2014, paras 115–16.
- 213** *Ibid.*, para. 121.
- 214** *Kony* (ICC-02/04), Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005, pp. 14–16, 18; *Odiambo* (ICC-02/04), Warrant of Arrest for Okot Odiambo, 8 July 2005, pp. 10–11; *Otti* (ICC-02/04), Warrant of Arrest for Vincent Otti, 8 July 2005, pp. 14, 16–18; *Ongwen* (ICC-02/04), Warrant of Arrest for Dominic Ongwen, 8 July 2005, p. 9; *Bashir* (ICC-02/05-01/09), Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, para. 96.
- 215** *Ntakirutimana et al.* (ICTR-96-10-A and ICTR-96-17-A), Judgment, 13 December 2004, para. 542; *Brđanin* (IT-99-36-T), Judgment, 1 September 2004, para. 388.
- 216** Preparatory Committee Draft Statute, p. 26.
- 217** Discussion Paper, Bureau, UN Doc. A/CONF.183/C.1/L.53.
- 218** Elements of Crimes, Crimes against Humanity, art. 7(1)(b).
- 219** Simon Chesterman, ‘An Altogether Different Order: Defining the Elements of Crimes against Humanity’ (2000) 10 *Duke J Comp & Int’l L* 307, at 336–7.
- 220** UN Doc. S/PV.6135, p. 3.
- 221** Cuba: proposal regarding article 5, UN Doc. A/CONF.183/C.1/L30.
- 222** *Krstić* (IT-98-33-T), Judgment, 2 August 2001, para. 499. Also: *Rutaganda* (ICTR-96-3-T), Judgment and Sentence, 6 December 1999, paras 83–4; *Musema* (ICTR-96-13-T), Judgment and Sentence, 27 January 2000, para. 218; *Ntakirutimana et al.* (ICTR-96-10 and ICTR-96-17-T), Judgment, 21 February 2003, paras 812–13; *Kayishema et al.* (ICTR-95-1-T), Judgment and Sentence, 21 May 1999, para. 144; *Niyitegeka* (ICTR-96-14-T), Judgment and Sentence, 16 May 2003, para. 450.
- 223** *Ntakirutimana et al.* (ICTR-96-10-A and ICTR-96-17-A), Judgment, 13 December 2004, para. 542.
- 224** *Krstić* (IT-98-33-T), Judgment, 2 August 2001, para. 503.
- 225** *Semanza* (ICTR-97-20-T), Judgment and Sentence, 15 May 2003, para. 340.
- 226** *Ntakirutimana et al.* (ICTR-96-10-A and ICTR-96-17-A), Judgment, 13 December 2004, paras 518, 521.
- 227** *Blagojević* (IT-02-60-T), Judgment, 17 January 2005, para. 573.
- 228** *Bashir* (ICC-02/05-01/09), Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, para. 97.
- 229** *Hussein* (ICC-02/05-01/12), Public redacted version of ‘Decision on the Prosecutor’s application under article 58 relating to Abdel Raheem Muhammad Hussein’, 1 March 2012, para. 11.
- 230** Preparatory Committee 1996 Report, Vol. I, para. 94.
- 231** Discussion Paper, Bureau, UN Doc. A/CONF.183/C.1/L.53.

- ²³² UN Doc. A/CONF.183/C.1/SR.34, para. 74 (Jordan).
- ²³³ Elements of Crimes, Crimes against Humanity, art. 7(1)(c).
- ²³⁴ Darryl Robinson, 'The Elements of Crimes against Humanity', in Lee, *Elements and Rules*, pp. 57–108, at p. 85. See also: Carmen M. Argibay, 'Sexual Slavery and the "Comfort Women" of World War II' (2003) 21 *Berkeley J Int'l L* 375, at 388.
- ²³⁵ Elements of Crimes, Crimes against Humanity, art. 7(1)(c), fn. 11.
- ²³⁶ Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, (1957) 266 UNTS 3, art. 1.
- ²³⁷ *Katanga* (ICC-01/04-01/07), Judgment pursuant to article 74 of the Statute, 7 March 2014, para. 976.
- ²³⁸ *Krnojelac* (IT-97-25-T), Judgment, 15 March 2002, para. 64. The Trial Chamber referred to the discussion in *Kunarac* about the customary nature of the prohibition of enslavement as a crime against humanity.
- ²³⁹ Convention to Suppress the Slave Trade and Slavery, (1955) 212 UNTS 17.
- ²⁴⁰ *Kunarac et al.* (IT-96-23/1-A), Judgment, 12 June 2002, para. 118.
- ²⁴¹ *Kunarac et al.* (IT-96-23-T and IT-96-23/1-T), Judgment, 22 February 2001, para. 539. Also *Krnojelac* (IT-97-25-T), Judgment, 15 March 2002, para. 350.
- ²⁴² *Kunarac et al.* (IT-96-23/1-A), Judgment, 12 June 2002, para. 117.
- ²⁴³ Convention Relative to the Protection of Civilian Persons in Time of War, (1950) 75 UNTS 287, art. 51.
- ²⁴⁴ Protocol Additional to the 1949 Geneva Conventions and Relating to the Protection of Victims of Non-International Armed Conflicts, (1979) 1125 UNTS 609, art. 5.
- ²⁴⁵ *Kunarac et al.* (IT-96-23-T and IT-96-23/1-T), Judgment, 22 February 2001, paras 542–3.
- ²⁴⁶ *Ibid.*, para. 542.
- ²⁴⁷ *Ibid.*
- ²⁴⁸ *Kunarac et al.* (IT-96-23/1-A), Judgment, 12 June 2002, para. 120.
- ²⁴⁹ *Ibid.*, para. 121.
- ²⁵⁰ *Katanga* (ICC-01/04-01/07), Judgment pursuant to article 74 of the Statute, 7 March 2014, para. 976. See also: *Kunarac et al.* (IT-96-23/1-A), Judgment, 12 June 2002, para. 119.
- ²⁵¹ *Kony* (ICC-02/04), Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005, pp. 13, 14, 16, 18; *Lukwaya* (ICC-02/04), Warrant of Arrest for Raska Lukwaya, 8 July 2005, p. 9; *Odhiambo* (ICC-02/04), Warrant of Arrest for Okot Odhiambo, 8 July 2005, p. 10; *Otti* (ICC-02/04), Warrant of Arrest for Vincent Otti, 8 July 2005, pp. 13, 15, 17, 19; *Ongwen* (ICC-02/04), Warrant of Arrest for Dominic Ongwen, 8 July 2005, p. 9.
- ²⁵² *Ntaganda* (ICC-01/04-02/06), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Bosco Ntaganda, 9 June 2014, para. 53; *Katanga* (ICC-01/04-01/07), Judgment pursuant to article 74 of the Statute, 7 March 2014, para. 976.
- ²⁵³ Charter of the International Military Tribunal (IMT), (1951) 82 UNTS 279, Annex, art. VI(c).
- ²⁵⁴ *Krnojelac* (IT-97-25-A), Judgment, 17 September 2003, para. 218.

- ¹² The term ‘forcibly’ is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment.
- ¹³ ‘Deported or forcibly transferred’ is interchangeable with ‘forcibly displaced’.
- ²⁵⁵ Preparatory Committee 1996 Report, Vol. I, para. 95.
- ²⁵⁶ Preparatory Committee Draft Statute, p. 26.
- ²⁵⁷ Ibid., p. 27.
- ²⁵⁸ Nepal: proposal regarding article 5, UN Doc. A/CONF.183/C.1/L35.
- ²⁵⁹ UN Doc. A/CONF.183/C.1/SR.3, para. 25 (United Arab Emirates); UN Doc. A/CONF.183/C.1/SR.4, paras 17 (Japan), 36 (Israel).
- ²⁶⁰ Discussion Paper, Bureau, UN Doc. A/CONF.183/C.1/L.53.
- ²⁶¹ *Ruto et al.* (ICC-01/09-01/11), Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, para. 244.
- ²⁶² *Stakić* (IT-97-24-T), Judgment, 31 July 2003, para. 680; cited but not followed in *Milošević* (IT-02-54-T), Decision on Motion for Judgment of Acquittal, 16 June 2004, para. 61.
- ²⁶³ *Brđanin* (IT-99-36-T), Judgment, 1 September 2004, para. 543; *Krnojelac* (IT-97-25-A), Judgment, 17 September 2003, para. 229.
- ²⁶⁴ *Blagojević* (IT-02-60-T) Judgment, 17 January 2005, para. 596.
- ²⁶⁵ *Krnojelac* (IT-97-25-A), Judgment, 17 September 2003, para. 229; *Blagojević* (IT-02-60-T) Judgment, 17 January 2005, para. 596.
- ²⁶⁶ *Muthaura et al.* (ICC-01/09-02/11), Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, para. 244.
- ²⁶⁷ *Bashir* (ICC-02/05-01/09), Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, para. 100.
- ²⁶⁸ *Situation in Georgia* (ICC-01/15), Request for authorization of an investigation pursuant to article 15, 13 October 2015, para. 270.
- ²⁶⁹ Convention Relative to the Protection of Civilian Persons in Time of War, (1950) 75 UNTS 287, art. 49(2); Additional Protocol to the 1949 Geneva Conventions and Relating to the Protection of Victims of Non-International Armed Conflicts, (1979) 1125 UNTS 609, art. 17(1).
- ²⁷⁰ *Blagojević* (IT-02-60-T) Judgment, 17 January 2005, para. 597.
- ²⁷¹ Ibid., paras 597–600.
- ²⁷² Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, 20 December 1945, Official Gazette of the Control Council for Germany, No. 3, Berlin, 31 January 1946, pp. 50–5, art. 6(c).
- ²⁷³ Elements of Crimes, Crimes against Humanity, Article 7(1)(e).
- ²⁷⁴ Preparatory Committee 1996 Report, Vol. I, para. 96.
- ²⁷⁵ E.g. *United States of America v. Alstötter et al.* (‘The Justice case’), (1948) 3 TWC 954.
- ²⁷⁶ Preparatory Committee Draft Statute, p. 26.

- 277** UN Doc. A/CONF.183/C.1/SR.3, paras 75 (China), 97 (France); UN Doc. A/CONF.183/C.1/SR.4, paras 4 (Guinea), 17 (Japan).
- 278** Discussion Paper, Bureau, UN Doc. A/CONF.183/C.1/L.53.
- 279** *Kordić et al.* (IT-95-14/2-T), Judgment, 26 February 2001, para. 302; *Kordić et al.* (IT-95-14/2-A), Judgment, 17 December 2004, para. 116.
- 280** *Harun et al.* (ICC-02/05-01/07), Decision on the Prosecution Application under article 58(7) of the Statute, 27 April 2007, para. 70; *Hussein* (ICC-02/05-01/12), Public redacted version of 'Decision on the Prosecutor's application under article 58 relating to Abdel Raheem Muhammad Hussein', 1 March 2012, para. 13.
- 281** Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, 20 December 1945, Official Gazette of the Control Council for Germany, No. 3, Berlin, 31 January 1946, pp. 50-5, art. 6(c).
- 282** *Furundžija* (IT-95-17/1-T), Judgment, 10 December 1998, para. 138.
- 283** *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, ICJ Reports 2012, p. 422, para. 99.
- 284** Elements of Crimes, Crimes against Humanity, art. 7(1)(f).
- 285** Preparatory Committee Draft Statute, p. 27. See also: Preparatory Committee 1996 Report, Vol. I, para. 97.
- 286** Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (1987) 1465 UNTS 85, art. 1. Cited by Pre-Trial Chamber III in *Bemba* (ICC-01/05-01/08), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, 15 June 2009, para. 193, fn. 268.
- 287** Discussion Paper, Bureau, UN Doc. A/CONF.183/C.1/L.53.
- 288** *Kunarac et al.* (IT-96-23/1-A), Judgment, 12 June 2002, paras 142, 155.
- 289** *Delalić et al.* (IT-96-21-T), Judgment, 16 November 1998, para. 470; *Kvočka et al.* (IT-98-30/1-T), Judgment, 2 November 2001, para. 153.
- 290** *Kvočka et al.* (IT-98-30/1-T), Judgment, 2 November 2001, para. 140.
- 291** *Krnojelac* (IT-97-25-T), Judgment, 15 March 2002, para. 180.
- 292** *Kvočka et al.* (IT-98-30/1-T), Judgment, 2 November 2001, para. 153; *Kunarac et al.* (IT-96-23-T and IT-96-23/1-T), Judgment, 22 February 2001, para. 486.
- 293** *Bemba* (ICC-01/05-01/08), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, 15 June 2009, para. 195.
- 294** *Mbarushimana* (ICC-01/04-01/10), Dissenting opinion of Judge Sanji Mmasenono Monageng, 16 December 2011, para. 29.
- 295** *Delalić et al.* (IT-96-21-T), Judgment, 16 November 1998, paras 494-6. Also: *Furundžija* (IT-95-17/1-T), Judgment, 10 December 1998, para. 162; *Furundžija* (IT-95-17/1-A), Judgment, 21 July 2000, para. 111; *Akayesu* (ICTR-96-4-T), Judgment, 2 September 1998, paras 593-5, 681.
- 296** *Kunarac et al.* (IT-96-23/1-A), Judgment, 12 June 2002, para. 148; *Krnojelac* (IT-97-25-T), Judgment, 15 March 2002, para. 188.

- 297** *Kvočka et al.* (IT-98-30/1-T), Judgment, 2 November 2001, para. 139. Also: *Semanza* (ICTR-97-20-T), Judgment and Sentence, 15 May 2003, paras 342–3. Also: *Kvočka et al.* (IT-98-30/1-A), Judgment, 28 February 2005, paras 280–4.
- 298** *Bemba* (ICC-01/05-01/08), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, 15 June 2009, para. 193.
- 299** *Kvočka et al.* (IT-98-30/1-T), Judgment, 2 November 2001, paras 142–3.
- 300** *Krnojelac* (IT-97-25-T), Judgment, 15 March 2002, para. 182.
- 301** *Kvočka et al.* (IT-98-30/1-T), Judgment, 2 November 2001, para. 148.
- 302** *Ibid.*, para. 149.
- 303** *Bemba* (ICC-01/05-01/08), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, 15 June 2009, para. 194 (references omitted).
- 304** Elements of Crimes, General Introduction, para. 4.
- 305** *Kunarac et al.* (IT-96-23/1-A), Judgment, 12 June 2002, paras 149–51.
- 306** *Delalić et al.* (IT-96-21-T), Judgment, 16 November 1998, para. 494.
- 307** *Bemba* (ICC-01/05-01/08), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, 15 June 2009, para. 204.
- 308** *Mbarushimana* (ICC-01/04-01/10), Decision on the confirmation of charges, 16 December 2011, para. 267.
- 309** *Mbarushimana* (ICC-01/04-01/10), Dissenting opinion of Judge Sanji Mmasenono Monageng, 16 December 2011, para. 30.
- 310** *Situation in the Republic of Côte d’Ivoire* (ICC-02/11), Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire, 3 October 2011, para. 86.
- 311** *Bashir* (ICC-02/05-01/09), Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, para. 104; *Hussein* (ICC-02/05-01/12), Public redacted version of ‘Decision on the Prosecutor’s application under article 58 relating to Abdel Raheem Muhammad Hussein’, 1 March 2012, para. 13(viii).
- 312** Statute of the International Criminal Tribunal for the former Yugoslavia, UN Doc. S/RES/827 (1993), Annex, art. 5(g); Statute of the International Criminal Tribunal for Rwanda, UN Doc. S/RES/955 (1994), Annex, art. 3(g).
- 313** Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, 20 December 1945, Official Gazette of the Control Council for Germany, No. 3, Berlin, 31 January 1945, pp. 50–5, art. 2(a).
- 314** *Rome Statute*, arts 8(2)(b)(xxii), 8(2)(e)(vi).
- 315** Preparatory Committee 1996 Report, Vol. I, para. 98.
- 316** Preparatory Committee 1996 Report, Vol. II, p. 68.
- 317** Rules of Procedure and Evidence, Rule 63(4).
- 318** *Ibid.*, Rule 71.

319 Ibid., Rules 70, 72. These are discussed in this *Commentary* under art. 31.

320 *Bemba* (ICC-01/05-01/08), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, 15 June 2009, para. 162.

321 Ibid., para. 171; Situation in the Republic of Côte d'Ivoire (ICC-02/11), Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, 3 October 2011, para. 68.

322 See generally: Kelly Dawn Askin, 'Women's Issues in International Criminal Law: Recent Developments and the Potential Contribution of the ICC', in Dinah Shelton (ed.), *International Crimes, Peace, and Human Rights: The Role of the International Criminal Court*, Ardsley, NY: Transnational Publishers, 2000, pp. 47-64; Barbara Bedont, 'Gender-Specific Provisions in the Statute of the International Criminal Court', in Lattanzi and Schabas, *Essays on the Rome Statute*, Vol. I, pp. 183-210; Fatou Bensouda, 'Gender and Sexual Violence under the Rome Statute', in Emmanuel Decaux, Adama Dieng, and Malick Sow (eds), *From Human Rights to International Criminal Law, Studies in Honour of an African Jurist, the Late Judge Laïty Kama*, Leiden/Boston: Martinus Nijhoff, 2007, pp. 401-17; Nicole Eva Erb, 'Gender-Based Crimes under the Draft Statute for the Permanent International Criminal Court' (1998) 29 *Columbia Human Rights LR* 401; Doreen M. Koenig and Kelly D. Askin, 'International Criminal Law and the International Criminal Court Statute: Crimes against Women', in Kelly D. Askin and Doreen M. Koenig (eds), *Women and International Human Rights Law*, Ardsley, NY: Transnational Publishers, 1999, pp. 3-29; Donald K. Piragoff, 'Procedural Justice Related to Crimes of Sexual Violence', in Fischer, *International and National Prosecution*, pp. 385-422.

323 Silvia A. Fernández de Gurmendi, 'El Estatuto de Roma de la Corte Penal Internacional: Extensión de los crímenes de guerra a los conflictos armados de carácter no internacional y otros desarrollos relativos al Derecho internacional humanitario', in Gabriel Valladares (ed.), *Derecho internacional humanitario y temas de áreas vinculadas*, Buenos Aires: Lexis Nexis Abeledo Perrot/Comité Internacional de la Cruz Roja, 2003, pp. 391-413, at p. 407.

324 See, e.g., case law of the European Court of Human Rights: *M.C. v. Bulgaria*, no. 39272/98, ECHR 2003-XII; *S.W. v. the United Kingdom*, 22 November 1995, Series A no. 335-B; *C.R. v. the United Kingdom*, 22 November 1995, Series A no. 335-C.

325 *Akayesu* (ICTR-96-4-T), Judgment, 2 September 1998, paras 325-6.

326 Final Report of the Special Rapporteur on the Working Group on Contemporary Forms of Slavery, on systematic rape, sexual slavery and slavery-like practices during armed conflict, UN Doc. E/CN.4/Sub.2/1998/13, para. 24.

327 *Furundžija* (IT-95-17/1-T), Judgment, 10 December 1998, para. 185.

328 *Kunarac et al.* (IT-96-23/1-A), Judgment, 12 June 2002, para. 128.

15 The concept of 'invasion' is intended to be broad enough to be gender-neutral.

16 It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity.

329 *Katanga* (ICC-01/04-01/07), Judgment pursuant to article 74 of the Statute, 7 March 2014, para. 963.

330 Ibid., para. 964.

331 Ibid., para. 965.

- 332** *Ngudjolo* (ICC-01/04-02/12), Judgment pursuant to article 74 of the Statute, 18 December 2012, para. 338.
- 333** *Katanga* (ICC-01/04-01/07), Judgment pursuant to article 74 of the Statute, 7 March 2014, para. 1664.
- 334** *Mbarushimana* (ICC-01/04-01/10), Decision on the confirmation of charges, 16 December 2011, para. 267; *Mbarushimana* (ICC-01/04-01/10), Dissenting opinion of Judge Sanji Mmasenono Monageng, 16 December 2011, para. 28.
- 335** *Bemba* (ICC-01/05-01/08), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, 15 June 2009, paras 168–88; *Kenyatta et al.* (ICC-01/09-02/11), Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, paras 257–9, 415; *Ntaganda* (ICC-01/04-02/06), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Bosco Ntaganda, 9 June 2014, paras 49–52; *Gbagbo, Laurent* (ICC-02/11-01/11), Decision on the Confirmation of Charges against Laurent Gbagbo, 12 June 2014, paras 195–6; *Blé Goudé* (ICC-02/11-02/11), Decision on the confirmation of charges against Charles Blé Goudé, 11 December 2014, paras 117–18, 194.
- 336** *Kony* (ICC-02/04), Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005, p. 12; *Otti* (ICC-02/04), Warrant of Arrest for Vincent Otti, 8 July 2005, p. 13; *Harun et al.* (ICC-02/05-01/07), Decision on the Prosecution Application under Article 58(7) of the Statute, 27 April 2007, paras 97, 100–02; *Bashir* (ICC-02/05-01/09), Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, para. 215; *Hussein* (ICC-02/05-01/12), Public redacted version of ‘Decision on the Prosecutor’s application under article 58 relating to Abdel Raheem Muhammad Hussein’, 1 March 2012, para. 13(ix); *Gbagbo, Simone* (ICC-02/11-01/12), Decision on the Prosecutor’s Application Pursuant to Article 58 for a warrant of arrest against Simone Gbagbo, 2 March 2012, para. 23.
- 337** *Brima et al.* (SCSL-04-16-T), Judgment, 20 June 2007, para. 705.
- 338** *Ibid.*, para. 719.
- 339** *Kvočka et al.* (IT-98-30/1-T), Judgment, 2 November 2001, para. 541, fn. 1333. Also: *Sesay et al.* (SCSL-04-15-T), Judgment, 2 March 2009, para. 155.
- 340** Elements of Crimes, Crimes against humanity, Article 7(1)(g)-2. See: *Brima et al.* (SCSL-04-16-T), Judgment, 20 June 2007, para. 709.
- 341** Elements of Crimes, Crimes against humanity, Article 7(1)(g)-(2). This is discussed in Dörmann, *Elements of War Crimes*, pp. 328–9.
- 342** *Katanga et al.* (ICC-01/04-01/07), Decision on the Confirmation of the Charges, 30 September 2008, para. 431.
- 343** *Katanga* (ICC-01/04-01/07), Judgment pursuant to article 74 of the Statute, 7 March 2014, para. 976.
- 344** *Ibid.*
- 345** *C.N. and V. v. France*, no. 67724/09, § 91, 11 October 2012.
- 346** *Katanga* (ICC-01/04-01/07), Judgment pursuant to article 74 of the Statute, 7 March 2014, para. 977, citing *Taylor* (SCSL-03-01-T), Judgment, 18 May 2012, para. 420.
- 347** *Katanga* (ICC-01/04-01/07), Judgment pursuant to article 74 of the Statute, 7 March 2014, paras 978–9; *Katanga et al.* (ICC-01/04-01/07), Decision on the Confirmation of the Charges, 30 September 2008, paras 431–2.

- 348** *Katanga* (ICC-01/04-01/07), Judgment pursuant to article 74 of the Statute, 7 March 2014, para. 1000.
- 349** *Ibid.*, para. 1001.
- 350** *Ntaganda* (ICC-01/04-02/06), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Bosco Ntaganda, 9 June 2014, para. 53.
- 351** *Katanga* (ICC-01/04-01/07), Judgment pursuant to article 74 of the Statute, 7 March 2014, para. 982.
- 352** *Ngudjolo* (ICC-01/04-12/02), Judgment pursuant to article 74 of the Statute, 18 December 2012; *Katanga* (ICC-01/04-01/07), Judgment pursuant to article 74 of the Statute, 7 March 2014.
- 353** *Katanga* (ICC-01/04-01/07), Judgment pursuant to article 74 of the Statute, 7 March 2014, paras 1008, 1013, 1019–23, 1166–7.
- 354** *Katanga* (ICC-01/04-01/07), Judgment pursuant to article 74 of the Statute, 7 March 2014, para. 1664.
- 355** *Ntaganda* (ICC-01/04-02/06), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Bosco Ntaganda, 9 June 2014, paras 54–7, 74.
- 356** *Kony* (ICC-02/04), Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005, p. 12; *Otti* (ICC-02/04), Warrant of Arrest for Vincent Otti, 8 July 2005, p. 12.
- 357** Elements of Crimes, Crimes against humanity, Article 7(1)(g)-3.
- 358** UN Doc. E/CN.4/Sub.2/1998/13, para. 27.
- 359** Convention Relative to the Protection of Civilian Persons in Time of War, (1950) 75 UNTS 287, art. 27.
- 360** Jean S. Pictet et al. (eds), *Commentary, IV, Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, Geneva: International Committee of the Red Cross, 1958, p. 205.
- 361** Protocol Additional to the 1949 Geneva Conventions and Relating to the Protection of Victims of International Armed Conflicts, (1979) 1125 UNTS 3, art. 75(2)(b); Protocol Additional to the 1949 Geneva Conventions and Relating to the Protection of Victims of Non-International Armed Conflicts, (1979) 1125 UNTS 609, art. 4(e). Article 76(1) of Additional Protocol I refers to ‘forced prostitution’.
- 362** Statute of the International Criminal Tribunal for Rwanda, UN Doc. S/RES/955 (1994), Annex, art. 4(e); Statute of the Special Court for Sierra Leone, (2002) 2178 UNTS 138, Annex, art. 2(g).
- 363** Preparatory Committee 1996 Report, Vol. II, p. 69.
- 364** UN Doc. A/CONF.183/C.1/SR.4, paras 63 (Libya), 66 (United Arab Emirates), 70 (Bahrain); UN Doc. A/CONF.183/C1/SR.5, paras 10 (Kuwait), 16 (Lebanon), 21 (Saudi Arabia), 33 (Egypt), 72 (Iran). See: Cate Steains, ‘Gender Issues’, in Lee, *The Making of the Rome Statute*, pp. 357–90, at pp. 365–9.
- 365** Elements of Crimes, Crimes against humanity, art. 7(1)(g)-4.
- 366** Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23, Part II, para. 38.

- 367** Beijing Declaration and Platform for Action, UN Doc. A/CONF. 177/20/Add.1, paras 11, 114, 132, 135, 142.
- 368** *United States of America v. Brandt et al.* ('The Medical case'), (1946-9) 2 TWC 183, pp. 226, 238-9, 250-1, 278-9.
- 369** Elements of Crimes, Crimes against humanity, art. 7(1)(g)-6.
- 370** Preparatory Committee Draft Statute, p. 26.
- 371** Preparatory Committee 1996 Report, Vol. II, pp. 65, 68.
- 372** UN Doc. A/CONF.183/C.1/SR.3, para. 163 (Italy); UN Doc. A/CONF.183/C.1/SR.4, para. 26 (Israel).
- 373** Recommendations of the Coordinator regarding article 5, UN Doc. A/CONF.183/C.1/L. 44: 'Rape or other violent sexual acts, or enforced prostitution [, or enforced pregnancy].'
- 374** *Brima et al.* (SCSL-04-16-T), Judgment, 20 June 2007, para. 720.
- 375** *Ibid.*
- 376** *Kvočka et al.* (IT-98-30/1-T), Judgment, 2 November 2001, paras 175, 180.
- 377** *Kajelijeli* (ICTR-98-44A-T), Judgment and Sentence, 1 December 2003, para. 936; *Niyitegeka* (ICTR-96-14-T), Judgment and Sentence, 16 May 2003, para. 465.
- 378** *Akayesu* (ICTR-96-4-T), Judgment, 2 September 1998, para. 697.
- 379** *Brima et al.* (SCSL 2004-16-A), Judgment, 22 February 2008, para. 186.
- 380** *Muthaura et al.* (ICC-01/09-02/11), Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, paras 260-6. Also: *Muthaura et al.* (ICC-01/09-02/11), Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 8 March 2011, para. 27.
- 381** See the critique by Niamh Hayes, 'Sisyphus Wept: Prosecuting Sexual Violence at the International Criminal Court', in William Schabas, Yvonne McDermott, and Niamh Hayes (eds), *The Ashgate Research Companion to International Criminal Law*, Farnham, UK and Burlington, VT: Ashgate, 2013, pp. 7-44, at p. 41.
- 382** *Gbagbo, Laurent* (ICC-02/11-01/11), Public redacted version of 'Decision on the Prosecutor's Application Pursuant to Article 58 for a warrant of arrest against Laurent Koudou Gbagbo', 30 November 2011, para. 69.
- 383** *Gbagbo, Simone* (ICC-02/11-01/12), Decision on the Prosecutor's Application Pursuant to Article 58 for a warrant of arrest against Simone Gbagbo, 2 March 2012, para. 23.
- 384** *Gbagbo, Laurent* (ICC-02/11-01/11), Document amendé de notification des charges, 13 January 2014.
- 385** *Gbagbo, Laurent* (ICC-02/11-01/11), Decision on the confirmation of charges against Laurent Gbagbo, 12 June 2014.
- 386** Charter of the International Military Tribunal (IMT), (1951) 82 UNTS 279, Annex, art. VI(c).
- 387** Statute of the International Criminal Tribunal for the former Yugoslavia, UN Doc. S/RES/827 (1993), Annex, art. 5(h); Statute of the International Criminal Tribunal for Rwanda, UN Doc. S/RES/955 (1994), Annex, art. 3(h); Statute of the Special Court for Sierra Leone, (2002) 2178 UNTS 138, Annex, art. 2(h). The Statute of the Special Court for Sierra Leone adds 'ethnic' grounds to the list.

388 *Rome Statute*, art. 7(1)(h).

389 Preparatory Committee Draft Statute, p. 26.

390 *Ibid.*, p. 26, fn. 15.

391 Discussion Paper, Bureau, UN Doc. A/CONF.183/C.1/L.53.

392 Preparatory Committee Draft Statute, p. 27.

393 Discussion Paper, Bureau, UN Doc. A/CONF.183/C.1/L.53.

21 This requirement is without prejudice to paragraph 6 of the General Introduction to the Elements of Crimes.

22 It is understood that no additional mental element is necessary for this element other than that inherent in element 6.

394 Darryl Robinson, 'The Elements of Crimes against Humanity', in Lee, *Elements and Rules*, pp. 57–108, at pp. 95–6.

395 Georg Witschel and Wiebke Rückert, 'Article 7(1)(h)—Crime against Humanity of Persecution', in Lee, *Elements and Rules*, pp. 94–7, at p. 96.

396 *Ntaganda* (ICC-01/04-02/06), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Bosco Ntaganda, 9 June 2014, para. 58.

397 *Ibid.*, para. 58, fn. 230.

398 Christopher K. Hall and Joseph Powderly, 'Article 7', in Triffterer and Ambos, *Commentary*, pp. 280–2.

399 *Situation in Georgia* (ICC-01/15), Request for authorization of an investigation pursuant to article 15, 13 October 2015, para. 272.

400 *Kordić et al.* (IT-95-14/2-A), Judgment, 17 December 2004, para. 108; *Blaškić* (IT-95-14-A), Judgment, 29 July 2004, para. 149.

401 *Blaškić* (IT-95-14-A), Judgment, 29 July 2004, para. 146, citing with approval *Kupreškić et al.* (IT-95-16-T), Judgment, 14 January 2000.

402 *Kupreškić et al.* (IT-95-16-T), Judgment, 14 January 2000, para. 631.

403 *Ibid.*, para. 631; *Blaškić* (IT-95-14-A), Judgment, 29 July 2004, para. 146.

404 *Muthaura et al.* (ICC-01/09-02/11), Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, para. 283.

405 *Ibid.*, para. 428.e.

406 *Hussein* (ICC-02/05-01/12), Public redacted version of 'Decision on the Prosecutor's application under article 58 relating to Abdel Raheem Muhammad Hussein', 1 March 2012, para. 13(xi).

407 *Ibid.*, para. 11.

408 *Situation in the Libyan Arab Jamahiriya* (ICC-01/11), 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', 27 June 2011, para. 65.

409 *Ibid.*, paras 42–65.

410 *Ibid.*, para. 60.

411 *Kupreškić et al.* (IT-95-16-T), Judgment, 14 January 2000, para. 621. Also: *Krstić* (IT-98-33-T), Judgment, 2 August 2001, para. 534; *Naletilić et al.* (IT-98-34-T), Judgment, 31 March 2003, para. 634; *Kordić et al.* (IT-95-14/2-A), Judgment, 17 December 2004, para. 101. Also: *Blaškić* (IT-95-14-A) Judgment, 29 July 2004, para. 131; *Krnjelac* (IT-97-25-A), Judgment, 17 September 2003, para. 185; *Vasiljević* (IT-98-32-A), Judgment, 25 February

2004, para. 113; *Nahimana et al.* (ICTR-99-52-T), Judgment and Sentence, 3 December 2003, para. 1071; *Ruggiu* (ICTR-97-32-I), Judgment and Sentence, 1 June 2000, para. 21.

412 E.g. Charter of Fundamental Rights of the European Union, art. 21.

413 Such as the Convention on the Rights of Persons with Disabilities, UN Doc. A/RES/61/106, Annex. But it is more difficult to make the argument that sexual orientation fits within this category of universally prohibited discrimination, although the situation will undoubtedly change with the progressive development of international human rights law.

414 United Kingdom, art. 20 *quater*, Crimes against Humanity, March 1996.

415 *Kupreškić et al.* (IT-95-16-T), Judgment, 14 January 2000, paras 579–81.

416 *Nahimana et al.* (ICTR-99-52-A), Judgment, 28 November 2007, para. 985; *Brđanin* (IT-99-36-A), Judgment, 3 April 2007, para. 296; *Simić* (IT-95-9-A), Judgment, 28 November 2006, para. 177; *Naletilić et al.* (IT-98-34-A), Judgment, 3 May 2006, para. 574; *Kvočka et al.* (IT-98-30/1-A), Judgment, 28 February 2005, para. 321; *Kordić et al.* (IT-95-14/2-A) Judgment, 17 December 2004, para. 102; *Blaškić* (IT-95-14-A) Judgment, 29 July 2004, para. 135; *Krnjelac* (IT-97-25-A), Judgment, 17 September 2003, paras 199, 221.

417 *Nahimana et al.* (ICTR-99-52-A), Judgment, 28 November 2007, paras 985, 988. But see: *Nahimana et al.* (ICTR-99-52-A), Partly Dissenting Opinion of Judge Meron, 28 November 2007.

418 *Harun et al.* (ICC-02/05-01/07), Decision on the Prosecution Application under Article 58(7) of the Statute, 27 April 2007, para. 74.

419 *Ibid.*

420 *Bashir* (ICC-02/05-01/09), Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009.

421 *Ntaganda* (ICC-01/04-02/06), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Bosco Ntaganda, 9 June 2014, para. 58.

422 *Muthaura et al.* (ICC-01/09-02/11), Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, para. 416.

423 *Gbagbo, Laurent* (ICC-02/11-01/11), Decision on the Prosecutor's Application Pursuant to Article 58 for a warrant of arrest against Laurent Koudou Gbagbo, 30 November 2011, para. 67. Also: *Gbagbo, Simone* (ICC-02/11-01/12), Decision on the Prosecutor's Application Pursuant to Article 58 for a warrant of arrest against Simone Gbagbo, 2 March 2012, para. 23.

424 *Ibid.*, para. 68.

425 *Mbarushimana* (ICC-01/04-01/10), Dissenting opinion of Judge Sanji Mmasenono Monageng, 16 December 2011, para. 36.

426 *Ibid.*, para. 37.

427 *Kvočka et al.* (IT-98-30/1-A), Judgment, 28 February 2005, para. 636.

428 *Ibid.*

429 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, p. 43, para. 188.

430 *Bashir* (ICC-02/05-01/09), Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, para. 143.

- 431** Ibid., para. 140.
- 432** *Kvočka et al.* (IT-98-30/1-T), Judgment, 2 November 2001, para. 195.
- 433** Ibid., para. 201.
- 434** *Vasiljević* (IT-98-32-T), Judgment, 29 November 2002, para. 248. Also: *Krnojelac* (IT-97-25-T), Judgment, 15 March 2002, para. 435.
- 435** *Krnojelac*, *ibid.*, para. 435.
- 436** Ibid., para. 435.
- 437** *Vasiljević*, *ibid.*, para. 249.
- 438** Ibid., para. 245; *Krnojelac* (IT-97-25-T), Judgment, 15 March 2002, para. 432.
- 439** Ibid., para. 246; *Blaškić* (IT-95-14-T), Judgment, 3 March 2000, para. 220.
- 440** *Vasiljević*, para. 234.
- 441** Report of the commission of inquiry on human rights in the Democratic People's Republic of Korea, UN Doc. A/HRC/25/63, para. 78; Report of the detailed findings of the commission of inquiry on human rights in the Democratic People's Republic of Korea, UN Doc. A/HRC/25/CRP.1, paras 1115–37.
- 442** *Blaškić* (IT-95-14-T), Judgment, 3 March 2000, para. 227.
- 443** *Kvočka et al.* (IT-98-30/1-A), Judgment, 28 February 2005, paras 324–5.
- 444** *Blaškić* (IT-95-14-T), Judgment, 3 March 2000, para. 233.
- 445** *Nahimana et al.* (ICTR-99-52-A), Judgment, 28 November 2007, para. 985; *Brđanin* (IT-99-36-A), Judgment, 3 April 2007, para. 296; *Kvočka et al.* (IT-98-30/1-A), Judgment, 28 February 2005, para. 323.
- 446** *Kordić et al.* (IT-95-14/2-T), Judgment, 26 February 2001, paras 208–10.
- 447** *Blaškić* (IT-95-14-A), Judgment, 29 July 2004, para. 139.
- 448** The expression *Nacht und Nebel* or 'night and fog' is derived from Albrecht's *Tarnhelm* spell in Richard Wagner's *Das Rheingold*.
- 449** *France et al. v. Göring et al.*, (1946) 22 IMT 411, p. 476.
- 450** *Yearbook ... 1996*, UN Doc. A/CN.4/SER.A/1996/Add.1 (Part 2), p. 47 ('Forced disappearance of persons').
- 451** Ibid., p. 50.
- 452** *Velásquez-Rodríguez v. Honduras*, Series C No. 4, para. 148; *Godínez-Cruz v. Honduras*, Series C No. 5, para. 153; *Castillo-Páez v. Peru*, Series C No. 34, para. 74; *Blake v. Guatemala*, Series C No. 48, para. 76; *Trujillo-Oroza v. Bolivia*, Series C No. 64, paras 2, 36; *Bámaca-Velásquez v. Guatemala*, Series C No. 70, para. 132; *Almonacid-Arellano et al. v. Chile*, Series C No. 154, para. 103; *La Cantuta v. Peru*, Series C No. 162, paras 114–16. There are many national judgments, including: *Amparo Process No. 1190/01-R Case* (Constitutional Tribunal of Bolivia), Judgment, 12 November 2001; *Simón Julio Héctor et al. Case* (Supreme Court of Argentina), Lawsuit No. 17.768, Judgment, 14 June 2005; *Uruguayan Criminal Court of First Instance of the 7th shift*, Judgment No. 2146, 20 December 2006; *Barrios Altos, La Cantuta and SIE Basement Case* (Supreme Court of Peru, Special Criminal Chamber), File No. AV-19-2001, Judgment, 7 April 2009, para. 717.
- 453** UN Doc. A/RES/47/133. Also: Inter-American Convention on the Forced Disappearance of Persons, [1994] OASTS 80.

⁴⁵⁴ International Convention for the Protection of All Persons from Enforced Disappearance, UN Doc. A/61/488 (emphasis in the original).

⁴⁵⁵ Compare with art. 2 of the International Convention for the Protection of All Persons from Enforced Disappearance: ‘For the purposes of this Convention, “enforced disappearance” is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.’

⁴⁵⁶ *Sarma v. Sri Lanka* (No. 950/2000), UN Doc. CCPR/C/78/D/950/2000, para. 9.3; *Yurich v. Chile* (No. 1078/2002), UN Doc. CCPR/C/85/D/1078/2002, para. 6.3; *Kimouche et al. v. Algeria* (No. 1328/2004), UN Doc. CCPR/C/90/D/1328/2004, paras. 7.2, 7.8; *Madoui v. Algeria* (No. 1495/2006), UN Doc. CCPR/C/94/D/1495/2006, para. 7.2; *Grioua v. Algeria* (No. 1327/2004), UN Doc. CCPR/C/90/D/1327/2004, para. 7.2; *El Alwani v. The Libyan Arab Jamahiriya* (No. 1295/2004), UN Doc. CCPR/C/90/D/1295/2004, para. 6.2. But see: *Yurich v. Chile* (No. 1078/2002), UN Doc. CCPR/C/85/D/1078/2002, Individual, Dissenting, Opinion of Committee Members Ms. Christine Chanet, Mr. Rajsoomer Lallah, Mr. Michael O’Flaherty, Ms. Elisabeth Palem and Mr. Hipólito Solari Yirgoyen.

²³ Given the complex nature of this crime, it is recognized that its commission will normally involve more than one perpetrator as a part of a common criminal purpose.

²⁴ This crime falls under the jurisdiction of the Court only if the attack referred to in elements 7 and 8 occurs after the entry into force of the Statute.

²⁵ The word ‘detained’ would include a perpetrator who maintained an existing detention.

²⁶ It is understood that under certain circumstances an arrest or detention may have been lawful.

²⁷ This element, inserted because of the complexity of this crime, is without prejudice to the General Introduction to the Elements of Crimes.

²⁸ It is understood that, in the case of a perpetrator who maintained an existing detention, this element would be satisfied if the perpetrator was aware that such a refusal had already taken place.⁴⁵⁷

⁴⁵⁷ Elements of Crimes, Crimes against humanity, art. 7(1)(i).

⁴⁵⁸ Preparatory Committee 1996 Report, Vol. II, p. 69.

⁴⁵⁹ Preparatory Committee Draft Statute, p. 27.

⁴⁶⁰ *Ibid.*, p. 26.

⁴⁶¹ UN Doc. A/CONF.183/C.1/SR.3, paras 23 (Syria), 86 (Iraq). Also: para. 129 (Libya).

⁴⁶² *Ibid.*, para. 47 (India); UN Doc. A/CONF.183/C.1/SR.4, para. 6 (Russia).

⁴⁶³ *Ibid.*, para. 173 (Turkey).

⁴⁶⁴ *Ibid.*, para. 52 (Costa Rica); UN Doc. A/CONF.183/C.1/SR.4, para. 27 (Chile).

⁴⁶⁵ Discussion Paper, Bureau, UN Doc. A/CONF.183/C.1/L.53.

⁴⁶⁶ *Durić et al. v. Bosnia and Herzegovina* (No. 1956/2010), UN Doc. CCPR/C/111/D/1956/2010, para. 9.3, fn. 21; *Tija Hero et al. v. Bosnia and Herzegovina* (No. 1966/2010), UN Doc. CCPR/C/112/D/1966/2010, para. 9.3, fn. 16.

- 467** *Situation in the Republic of Côte d'Ivoire* (ICC-02/11), Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, 3 October 2011, para. 82.
- 468** Office of the Prosecutor, Report on Preliminary Examination Activities 2014, 2 December 2014, para. 35.
- 469** Elements of Crimes, Crimes against humanity, art. 7(1)(j).
- 470** Convention on the Nonapplicability of Statutory Limitations to War Crimes and Crimes Against Humanity, (1970) 754 UNTS 73.
- 471** GA Res. 3068 (XXVIII).
- 472** (1976) 1015 UNTS 244.
- 473** Second report on the draft Code of Offences against the Peace and Security of Mankind, by Mr Doudou Thiam, Special Rapporteur, UN Doc. A/CN.4/377, paras 44, 45, 47, 50; Fourth report on the draft Code of Offences against the Peace and Security of Mankind, by Mr Doudou Thiam, Special Rapporteur, UN Doc. A/CN.4/398, paras 64–5.
- 474** *Yearbook ... 1991*, UN Doc. A/CN.4/SER.A/1991/Add.1 (Part 2), pp. 102–3.
- 475** *Ibid.*, p. 102.
- 476** *Yearbook ... 1992*, UN Doc. A/CN.4/SER.A/1992/Add.1 (Part 2), p. 57.
- 477** *Yearbook ... 1995*, UN Doc. A/CN.4/SER.A/1995/Add.1 (Part 2), pp. 40–1, 68.
- 478** Preparatory Committee 1996 Report, Vol. I, para. 108. Also: Preparatory Committee 1996 Report, Vol. II, p. 60.
- 479** Preparatory Committee Draft Statute, p. 20.
- 480** Protocol Additional to the 1949 Geneva Conventions and Relating to the Protection of Victims of International Armed Conflicts, (1979) 1125 UNTS 3, art. 85(4)(c).
- 481** Preparatory Committee Draft Statute, p. 26.
- 482** UN Doc. A/CONF.183/C.1/SR.3, para. 125 (Mexico); also para. 178 (chairman).
- 483** UN Doc. A/CONF.183/C.1/SR.4, paras 44 (Syria), 48 (Lebanon), 63 (Libya), 65 (China), 66 (United Arab Emirates), 67 (Greece), 69 (Vietnam), 70 (Bahrain); UN Doc. A/CONF.183/C1/SR.5, paras 9 (Kuwait), 19 (Republic of Korea), 23 (Tunisia), 26 (Thailand), 33 (Egypt), 46 (Brazil), 48 (Algeria), 56 (Japan), 62 (Morocco), 69 (Cuba), 70 (Turkey), 72 (Iran), 83 (Senegal), 97 (South Africa).
- 484** UN Doc. A/CONF.183/C.1/SR.4, paras 62 (Costa Rica), 75 (Sweden); UN Doc. A/CONF.183/C1/SR.5, paras 7 (Belgium), 36 (Russia), 40 (United Kingdom), 58 (Switzerland), 60 (Macedonia), 66 (Italy), 92 (Chile).
- 485** Bangladesh, India, Lesotho, Malawi, Mexico, Namibia, South Africa, Swaziland, Trinidad and Tobago, and United Republic of Tanzania: proposal regarding article 5, UN Doc. A/CONF.183/C.1/L.12.
- 486** Proposal of Botswana, Lesotho, Malawi, South Africa, Tanzania and Zimbabwe, UN Doc. A/AC.249/1997/WG. 1/DP. 16; Lesotho, Malawi, Namibia, South Africa, Swaziland and United Republic of Tanzania: proposal regarding article 5, UN Doc. A/CONF.183/C.1/L.13.
- 487** Discussion Paper, Bureau, UN Doc. A/CONF.183/C.1/L.53.
- 488** Elements of Crimes, Crimes against humanity, art. 7(1)(k), fn. 30.
- 489** *Ibid.*, para. 2.

- 490** *Katanga et al.* (ICC-01/04-01/07), Decision on the Confirmation of the Charges, 30 September 2008, para. 448 (references omitted).
- 491** *Kupreškić et al.* (IT-95-16-T), Judgment, 14 January 2000, para. 565. Also: *Stakić* (IT-97-24-T), Decision on Rule 98bis Motion for Judgment of Acquittal, 31 October 2002, para. 131.
- 492** *Stakić* (IT-97-24-A), Judgment, 22 March 2006, para. 315.
- 493** Preparatory Committee 1996 Report, Vol. I, para. 101.
- 494** United Kingdom, art. 20 *quater*, Crimes against Humanity, March 1996; Preparatory Committee 1996 Report, Vol. I, para. 102; Preparatory Committee 1996 Report, Vol. II, pp. 66, 68.
- 495** Preparatory Committee Draft Statute, p. 26.
- 496** UN Doc. A/CONF.183/C.1/SR.3, paras 125 (Mexico), 133 (Colombia), 155 (Sri Lanka), 177 (chairman); UN Doc. A/CONF.183/C.1/SR.4, paras 22 (Uruguay), 23 (Sierra Leone), 27 (Chile).
- 497** Discussion Paper, Bureau, UN Doc. A/CONF.183/C.1/L.53.
- 498** *Katanga et al.* (ICC-01/04-01/07), Decision on the Confirmation of the Charges, 30 September 2008, para. 450.
- 499** *Muthaura et al.* (ICC-01/09-02/11), Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, para. 269.
- 500** *Katanga et al.* (ICC-01/04-01/07), Decision on the Confirmation of the Charges, 30 September 2008, para. 450.
- 501** *Ibid.*, para. 452. Also: *Muthaura et al.* (ICC-01/09-02/11), Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, para. 269.
- 502** *Kupreškić et al.* (IT-95-16-T), Judgment, 14 January 2000, para. 563; *Stakić* (IT-97-24-A), Judgment, 22 March 2006, para. 315; *Brima et al.* (SCSL-2004-16-A), Judgment, 22 February 2008, para. 198.
- 503** *Muthaura et al.* (ICC-01/09-02/11), Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, para. 269.
- 504** *Mbarushimana* (ICC-01/04-01/10), Decision on the confirmation of charges, 16 December 2011, paras 127, 152, 155.
- 505** *Mbarushimana* (ICC-01/04-01/10), Dissenting opinion of Judge Sanji Mmasenono Monageng, 16 December 2011, para. 30.
- 506** *Muthaura et al.* (ICC-01/09-02/11), Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, paras 270, 280.
- 507** *Situation in the Republic of Côte d'Ivoire* (ICC-02/11), Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, 3 October 2011, para. 86.
- 508** *Blé Goudé* (ICC-02/11-02/11), Decision on the confirmation of charges against Charles Blé Goudé, 11 December 2014, para. 121.
- 509** *Katanga et al.* (ICC-01/04-01/07), Decision on the Confirmation of the Charges, 30 September 2008, para. 456.

- 510** Ibid., para. 461. See, however, *Katanga et al.* (ICC-01/04-01/07), Partly Dissenting Opinion of Judge Anita Ušacka, 30 September 2008, paras 30–7.
- 511** *Blaškić* (IT-95-14-T), Judgment, 3 March 2000, para. 239.
- 512** *Muthaura et al.* (ICC-01/09-02/11), Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, paras 270–3.
- 513** Ibid., para. 277.
- 514** *Gbagbo, Laurent* (ICC-02/11-01/11), Decision on the Prosecutor’s Application Pursuant to Article 58 for a warrant of arrest against Laurent Koudou Gbagbo, 30 November 2011, paras 60–1. Also: *Gbagbo, Simone* (ICC-02/11-01/12), Decision on the Prosecutor’s Application Pursuant to Article 58 for a warrant of arrest against Simone Gbagbo, 2 March 2012, para. 23.
- 515** *Kvočka et al.* (IT-98-30/1-T), Judgment, 2 November 2001, para. 208.
- 516** *Galić* (IT-98-29-A), Judgment, 30 November 2006, para. 158.
- 517** *Brima et al.* (SCSL-2004-16-A), Judgment, 22 February 2008, para. 201.
- 518** *Krstić* (IT-98-33-T), Judgment, 2 August 2001, para. 523. Also: *Kupreškić et al.* (IT-95-16-T), Judgment, 14 January 2000, para. 566; *Blagojević* (IT-02-60-T), Judgment, 17 January 2005, para. 630; *Bagosora et al.* (ICTR-98-41-T), Decision on Motions for Judgment of Acquittal, 2 February 2005, para. 34; *Stakić* (IT-97-24-T), Decision on Rule 98bis Motion for Judgment of Acquittal, 31 October 2002, para. 131.
- 519** Supreme Court of Venezuela, Constitutional Chamber (speaker Cabrera Romero), Judgment No. 1712, 12 September 2001; Supreme Court of Venezuela, Criminal Chamber (speaker Aponte Aponte), Judgment No. 322, 13 July 2006.
- 520** Supreme Court of Venezuela, Criminal Chamber (speaker Angulo Fontiveros), Judgment No. 869, 10 December 2001.
- 521** Supreme Court of Venezuela, Criminal Chamber (speaker Angulo Fontiveros), Judgment No. 487, 25 April 2000.
- 522** *Muthaura et al.* (ICC-01/09-02/11), Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, para. 279.
- 523** Report of the Working Group on Applicable Law, UN Doc. A/CONF.183/C.1/WGAL/L.2/Add.1, p. 1; Note regarding article 5 ter (definition of the term ‘gender’ for the purpose of the Rome Statute) contained in ‘the transmittal letter from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee dated 15 July 1998’, UN Doc. A/CONF.183/13(Vol. III), p. 224. On the debate surrounding the term ‘gender’, see Cate Steains, ‘Gender Issues’, in Lee, *The Making of the Rome Statute*, pp. 357–90, at pp. 365–9, 371–5; Barbara C. Bedont, ‘Gender-Specific Provisions in the Statute of the ICC’, in Lattanzi and Schabas, *Essays*, pp. 183–210, at pp. 198–9. See also: Working paper on article 20, paragraph 3, UN Doc. A/CONF.183/C.1/WGAL/L3; Valerie Oosterveld, ‘The Definition of “Gender” in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?’ (2005) 18 *Harvard Human Rights J* 55.
- 524** Charter of the United Nations, (1945) 1 UNTS XVI, art. 1(3).
- 525** Universal Declaration of Human Rights, GA Res. 217A (III), art. 2.
- 526** Convention on the Elimination of All Forms of Discrimination against Women, (1981) 1249 UNTS 13, art. 1.

- 527** Convention on the Rights of the Child, (1990) 1577 UNTS 3, preamble (recital 3), arts 2(1), 29(1)(d).
- 528** Vienna Convention and Programme of Action, UN Doc. A/CONF.157/23, para. 18.
- 529** Ibid., para. 38.
- 530** Beijing Declaration, UN Doc. A/CONF.177/20, Annex I, para. 24.
- 531** Ibid., Annex IV.
- 532** *Toonen v. Australia*, UN Doc. CCPR/C/50/D/488/1992 (1994), para. 8.7.
- 533** Office of the Prosecutor, Policy Paper on Sexual and Gender-Based Crimes, June 2014, p. 3.