Chapter 3

Max du Plessis

ICC Crimes

1 Introduction

Having outlined the institutional framework of the International Criminal Court (ICC) and described the complementarity regime in preceding chapters, in this chapter we analyse those international crimes that might be prosecuted before the ICC or in domestic courts exercising complementary jurisdiction.

We deal in turn with genocide, crimes against humanity and war crimes. The crime of aggression is not dealt with here, notwithstanding the fact that is included as a potential ICC crime in the Rome Statute,[1] as its definition is still in the process of being finalised.[2]

2 Genocide

2.1 History

Genocide involves the intentional mass destruction of entire groups or members of a group. The crime of genocide has been committed throughout history, the twentieth century being no exception. We think especially of the Jews decimated by the Nazis, the Cambodians destroyed by the Khmer Rouge and, more recently, the genocide inflicted by the Hutus on the Tutsis in Rwanda and the genocidal aims of Serbs against Kosovar Albanians in the Former Yugoslavia. The term 'genocide' is a combination of the Latin words *genus* (kind, type, race) and *cide* (to kill) and was coined by Raphael Lemkin writing in response to the events of World War II.[3]

The first criminal prosecution of genocide took place at the International Military Tribunal at Nuremberg, although strictly speaking the Germans were being tried for 'crimes against humanity' under the Nuremberg Charter. There was no reference to the crime of genocide in the Charter or the judgment of the tribunal, even though it did appear in the indictment and was referred to by the prosecution from time to time. It took almost half a decade, with the establishment of the International Criminal Tribunal for the former Yugoslavia

1 See Article 5(1)(d) and Article 5(2) of the ICC Statute.

2 See William Schabas, 'The Unfinished Work of Defining Aggression: How Many Times Must the Cannonballs Fly Before They Are Forever Banned' in Dominic McGoldrick et al (eds), *The Permanent International Criminal Court – Legal and Policy Issues* (2004).

3 See Ralph Lemkin, *Axis Rule in Occupied Europe* (1944), pp 79-95, cited in Cassese, 'Genocide' in Cassese et al, *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I (2002), p 335; and Ralph Lemkin, 'Genocide as a Crime Under International Law', 41 *American Journal of International Law* (*AJIL)* 145 (1947). See also Kittichaisaree, '*International Criminal Law"* (2001), p 67.

(ICTY) and International Criminal Tribunal for Rwanda (ICTR), before genocide came to be prosecuted again at the international level.[4]

Notwithstanding the small incidence of genocide prosecutions prior to the 1990s, the strengthening of the normative prohibition of genocide, beginning with the Genocide Convention of 1948,[5] has now reached the point where genocide has become regarded as a crime under customary international law[6] and a norm of *jus cogens* (in the sense that the rules prohibiting genocide cannot be derogated from), which imposes *erga omnes* obligations (that is, obligations are laid down on all member States of the international community, and all member States of that community have the right to require that acts of genocide be discontinued).

2.2 Definition

Article 2 of the Genocide Convention of 1948 defines genocide as "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- Killing members of the group;
- Causing serious bodily or mental harm to members of the group;
- Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- Imposing measures intended to prevent births within the group;
- Forcibly transferring children of the group to another group."

What this definition reflects is a preoccupation among the drafters of the Convention with the Nazi extermination of the Jews in World War II. Notwithstanding this preoccupation, the definition is no anachronism (at least in formal terms) since it has been replicated in Article 4(2) of the ICTY Statute, Article 2(2) of the ICTR Statute and Article 6 of the ICC Statute.

Genocide is the most serious crime against humanity, as evidenced in the high threshold set for the mental element required for proof of genocide. While other crimes against humanity require the intent to commit the underlying offence (for example, murder, torture or rape), together with the knowledge that the offence is being committed within the context of the targeting of the civilian population as part of a widespread or systematic attack, genocide requires the specific intent to destroy, in whole or in part, a national, ethnic, racial or religious group of persons.

---

4 See Kittichaisaree, loc cit. There was at least one *national* prosecution of genocide prior to the ICTY and ICTR's existence, namely, the prosecution of *Eichmann* before the District Court of Jerusalem (1968). Eichmann was tried for crimes against the Jewish people, an offence under Israeli law that incorporated all the elements of the definition of genocide – Cassese, *International Criminal Law* (2003), p 97.

5 UN Convention on the Prevention and Punishment of the Crime of Genocide, 1948 – Article 1 provides that "genocide, whether committed in time of peace or time of war, is a crime under international law".

6 See the International Court of Justice's Advisory Opinion on *Reservations to the Convention on Genocide,* 28 May 1951, *ICJ Reports 1951*, 15, where the Court found that "the principles underlying the Convention are principles which are recognised by civilized nations as binding on States, even without any conventional obligation" (p 24).

2.3 *Actus reus* – genocide

Article 6 of the Rome Statute, following Article 4 of the Genocide Convention, defines the various classes of *actus reus* (wrongful act) falling under the crime of genocide, each of which was helpfully elaborated upon by the ICTR Trial Chamber in *Akayesu*. The classes are as follows:

(i) killing members of a national or ethnic, racial, or religious group (meaning their 'murder', i.e., intentional, voluntary killing[7]);

(ii) causing serious bodily or mental harm to members of the group (these terms "do not necessarily mean that the harm is permanent or irremediable"[8]);

(iii) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction (including, inter alia, "subjecting a group of people to a subsistence diet, systematic expulsion from homes and the reduction of essential medical services below minimum requirement[s]" [9]);

(iv) imposing measures intended to prevent birth within the group (such measures would consist of "sexual mutilation, the practice of sterilisation, forced birth control [and the] separation of the sexes and prohibition of marriage"[10]); or

(v) forcibly transferring children of the group to another group.

From this list it will be clear that genocide need not actually result in the extermination of the group. It is enough that one of the defined acts is committed with the broader intention that the group be destroyed.

Genocide can be committed by act or omission (or what might be described as a deliberate failure to act). For example, in *Kambanda*[11] the ICTR found the accused guilty of genocide for his failure to fulfil his duty as Prime Minister of Rwanda to take action to stop ongoing massacres he was aware of, and for his failure to protect children and the population from being massacred after he had been personally asked to do so.

Note also that it is not necessary that the prosecutor be able to establish the exact number of deaths attributable to an act of genocide before the accused can be found guilty of this crime.[12]

It is also clear that genocide may be perpetrated in a limited geographic zone. As the ICTY Trial Chamber concluded in *Krstic,*[13] "the intent to eradicate a group within a geographical area such as the region of a country or even a municipality"[14] could amount to genocide.

---

7 *Akayesu* ICTR Trial Chamber, judgment of 2 September 1998 (case no. ICTR 96-4-T), paras. 500-501.

8 Ibid, paras. 502-504.

9 Ibid, paras. 505-506.

10 Ibid, para. 507.

11 *Kambanda*, ICTR Trial Chamber, judgment and sentence of 4 September 1998 (case no. ICTR 97-23-S), para, 40(1)-(4).

12 *Jelisic*, ICTY Trial Chamber, judgment of 14 December 1999 (case no. IT-95-10), para. 60.

13 *Krstic,* ICTY Trial Chamber, decision of 2 August 2001 (case no. IT-98-33-T).

14 Ibid, para. 589.

2.3.1 The victim as group

The victim of the crime of genocide is the group itself and not the individual.[15] What, then, is to be understood by the notion of 'group'? The definition of genocide in the Rome Statute of the ICC provides that genocide is any one of the enumerated acts (see above) committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. The common criterion in the four types of groups protected under the Genocide Convention (national, ethnic, racial or religious) is that "membership in such groups would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner".[16] In other words, they do not have a choice in the matter of whether they belong to a particular group or not. As such, "more 'mobile' groups which one joins through individual voluntary commitment, such as political and economic groups"[17] are not groups that are protected under the rules against genocide.

The prohibition on genocide, therefore, would not cover a group comprised of, say, homosexuals or members of a political or social organisation – unless membership was confined to a particular tribe, race or nationality, which would mean that the protection for the defined groups under the Genocide Convention would be triggered.

The ICTR Trial Chamber in *Akayesu* has provided the following definition of the four groups that are covered by the genocide definition:

- National group: a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties.
- Ethnical group: one whose members share a common language and culture.
- Racial group: a group distinguished from others by hereditary physical traits frequently identified with geographical areas, irrespective of linguistic, cultural, national or religious factors.
- Religious group: a group whose members share the same religion, denomination or mode of worship, or common beliefs.

What about other 'groups'? The ICTR in *Akayesu* posited that the groups protected against genocide should not be limited to the four groups recognised in the definition of genocide under the Genocide Convention but should include "any stable and permanent group".[18.] On this basis one might include a 'cultural group', since it too could be regarded as a stable and permanent group, membership of which is often not chosen but an automatic consequence of birth. However, as one commentator notes, the pronouncement in *Akayesu* is "likely to have limited impact",[19] since the framers of the Genocide Convention appear to have made exhaustive provision for which types of groups they were thinking of, and those include national, ethnic, racial and religious only.

15 Kittichaisaree, note 3 above, p 69.

16 *Akayesu,* ICTR Trial Chamber, judgment of 2 September 1998 (case no. ICTR 96-4-T), para. 511.

17 Ibid, para. 511.

18 Ibid, para. 516.

19 Kittichaisaree, note 3 above, p 70.

In respect of the Rome Statute, the drafters have evinced a clear intention to limit the groups to the four identified by the Genocide Convention. The idea of including a 'cultural group' in the ICC Statute was rejected at the Rome Conference. The drafters were quick to point out that the Genocide Convention was aimed at preventing physical destruction of a group, not cultural destruction. The same view has been expressed by the ICTY Trial Chamber in its ruling in *Krstic*. There it was confirmed that "customary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of a group",[20] with the result that an "enterprise attacking only the cultural or sociological characteristics of a human group in order to annihilate these elements which give to that group its own identity distinct from the rest of the community would not fall under the definition of genocide".[21]

Genocide appears therefore to be limited to material destruction of a group, rather than the destruction of the national, linguistic, religious, cultural or other identity of that group. It is for this reason that the Australian courts have held that degradation of Aboriginal people through confiscation of traditional lands cannot amount to genocide by the responsible ministers, since the confiscation was not aimed at material destruction of the group as such.[22]

How is membership of the group determined? In proving to a court that persons belonged to a protected group, two approaches are discernible in the international criminal law jurisprudence. The first approach is objective, in that the court will be concerned with whether it has been shown that in fact the victims belong to one of the protected groups. In their decision in *Rutaganda*,[23] the ICTR Trial Chamber relied on a number of objective factual indicators to find that the Tutsi population at issue in the case was an ethnic group with a distinct identity: every Rwandan citizen was required to carry an identity card proving their ethnic identity as either Hutu, Tutsi or Twa; the Rwandan Constitution and laws in force at the relevant time identified Rwandans by reference to their ethnic group; and there was customary determination of membership of an ethnic group in Rwanda through patrilineal lines.[24]

The second approach is subjective, in that the court considers whether the victims concerned considered themselves, or whether the perpetrator concerned considered the victims, as belonging to one of the protected groups.[25] For example, in *Akayesu*, the ICTR Trial Chamber, in finding that the Tutsi population constituted a protected ethnic group, commented that "all the Rwandan witnesses who appeared before it invariably answered spontaneously and without hesitation the questions of the Prosecutor regarding their ethnic identity".[26]

---

20 *Krstic,* para. 580.

21 Ibid.

22 Geoffrey Robertson, *Crimes Against Humanity* (2000), p 230.

23 *Rutaganda*, ICTR Trial Chamber, judgment of 6 December 1999 (case no. ICTR-96-3).

24 Ibid, paras 400-1. See also the objective approach followed by the ICTR Trial Chamber in *Akayesu*, para. 702.

25 As the ICTR Trial Chamber made clear in *Rutuganda*, either the victim is perceived by the perpetrator of genocide as belonging to a group slated for destruction, or the victim may perceive himself as belonging to the said group. See para. 57.

26 *Akayesu*, note 16 above, para. 702. See also the decisions of the ICTY in *Jelisic*, ICTY Trial Chamber, judgment of 14 December 1999 (case no. IT-95-10), para 70-1; and *Krstic*, ICTY Trial Chamber, decision of 2 August 2001 (case no. IT-98-33-T), paras. 556-557 and 559-560.

In practice a combination of the objective and subjective approaches to determine the membership of the group is often relied on.[27]

Is it possible for genocide to include the killing or harming, with the required intent, of only a single individual of a protected group? The ICTR Trial Chamber in *Akayesu* has held that genocide is committed if one of the prohibited acts (killing, causing serious bodily injury, etc) is committed against even one member of a group.[28] While this view does not satisfactorily accord with the text of the norm enunciated in the Genocide Convention,[29] it does nonetheless accord with the Elements of Crimes adopted by the Preparatory Commission for the International Criminal Court in 1999. These guidelines, which "shall assist the Court in the interpretation and application of Articles 6, 7 and 8", stipulate that genocide is committed by the perpetrator performing any of the genocidal acts against "one or more persons", so long as the conduct "took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction".[30]

As such it appears open to a prosecutor to charge a perpetrator with genocide where the act proscribed by Article 6 of the ICC Statute was directed only against one person but the act took place within a manifest pattern of genocidal conduct.

2.4 *Mens rea* - genocide

The mental element (*mens rea*, or guilty mind) of the crime of genocide is what most distinguishes it from other crimes, including crimes against humanity.[31] In the *Jelisic* case the ICTY explained that, "it is in fact the *mens rea* which gives genocide its speciality and distinguishes it from an ordinary crime and other crimes against international humanitarian law".[32]

What type of intention is required? Both customary and conventional genocide require a prosecutor to establish a form of aggravated criminal intention, or specific intent (*dolus specialis*), in addition to the criminal intent accompanying the underlying offence. The accused must commit the underlying offence with the intent to produce the result charged; that is, the intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such. Genocide is therefore a crime perpetrated against a 'depersonalised'

---

27 See for example, *Kayishema and Ruzindana,* ICTR Trial Chamber II, judgment of 21 May 1999 (case no. ICTR-95-1-T), para. 98.

28 Para. 521.

29 The definition of genocide in that Convention, and now taken up in the Rome Statute, is that genocide involves "killing members" or "causing serious bodily or mental harm to members" (hence more than one member) of a protected group.

30 See Elements of Crimes, Article 6(a) and 6(b).

31 A good example of the difference is provided by the crime against humanity of persecution. What distinguishes persecution from genocide is that the perpetrator of persecution selects his victims by reason of their belonging to a specific community, but he does not necessarily seek the destruction of that community as such (Kittichaisaree, note 3 above, p 72). The mental element required for both persecution and genocide may involve discriminatory targeting of victims, but for this targeting to amount to genocide the perpetrator must hold the additional special intent of targeting the victims so as to destroy the group to which they belong.

32 *Jelisic,* para. 66.

victim and carried out for no other reason than that he or she is a member of this specific group. It should thus be clear that the specific intention of destroying all or part of the group must have been formed by the accused prior to the commission of the genocidal act. Put differently, the underlying genocidal act should be done to further the genocidal goal of ensuring the group's destruction.[33]

That the mental element required for genocide will be strictly interpreted by a court or tribunal is well evidenced by the ICTY decision in *Jelisic*.[34] In that case the Prosecutor submitted that "an accused need not *seek* the destruction in whole or in part of a group" and that "it suffices that he *knows* that his acts will inevitably, or even only probably, result in the destruction of the group in question".[35] The Trial Chamber rejected this attempt to smuggle in constructive knowledge as a form of intention for genocide. The Chamber stressed that the prosecutor must prove that the accused had 'specific intention' to commit genocide, and that an accused cannot be found guilty of this crime if he himself did not share the goal of destroying in whole or in part a group, even if he knew that he was contributing to or through his acts might be contributing to the partial or total destruction of the group.[36] The Prosecutor attempted to rerun this argument in *Krstic*, but the Trial Chamber once again rejected the argument.

The conclusion therefore seems inescapable: the accused must have committed the underlying offence (killing, causing serious bodily or mental harm, etc) against the victims, with nothing less than the goal of destroying all or part of the group to which the victims belong.[37] Other categories of mental element such as recklessness (*dolus eventualis*) and gross negligence will therefore not suffice to establish genocide.[38]

What does a group 'in whole or in part' mean? Genocide can be committed through the destruction of a large number of the group (i.e. a quantitative attempt at destruction) or the destruction of a limited number of the group who are targeted because of the potential impact of their destruction on the survival of the group as a whole (i.e. a qualitative attempt at destruction).

An example of the latter would be the act of destroying young fertile women in a group who are of childbearing age. A further example is provided by the decision of the ICTY Trial Chamber in *Krstic*, where it found that the defendant's planning and participation in the massacre of Bosnian Muslim men, all of military age, amounted to genocide. According to the tribunal, genocide was proved because, while the rest of the Bosnian Muslim population was being transferred out of the area of Srebrenica, the Bosnian Serb forces "had to be aware of the catastrophic impact that the disappearance of two or three generations of men would have on the survival of a traditionally patriarchal society", and "that the combination of those killings with the forcible transfer of the women, children

33 *Kayishema and Ruzindana*, ICTR Trial Chamber, judgment of 21 May 1999 (case no. 96-1-T), para. 91.

34 *Jelisic*, ICTY Trial Chamber, sentencing judgment of 14 December 1999 (case no. IT-95-10-A).

35 Ibid, para. 85.

36 Ibid, para. 86.

37 See *Krstic*, para. 571.

38 Cassese, *International Criminal Law* (2003), p 103.

and elderly would inevitably result in the physical disappearance of the Bosnian Muslim population in Srebrenica".[39]

How does one prove the element of intent? The ICTY Appeals Chamber in *Jelisic*[40] has noted that proof of specific intent in the context of genocide "may, in the absence of direct explicit evidence, be inferred from a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of the atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts".[41]

In this regard it is important to take into account the decision of the ICTR Trial Chamber in *Akayesu*. There the tribunal found that the accused had the requisite *mens rea* to commit genocide and had exhibited that aggravated criminal intention through, *inter alia*, the systematic rape of Tutsi women. According to the ICTR, this systematic rape was part of the campaign to mobilise the Hutus against the Tutsis, and the sexual violence was aimed at destroying the spirit, will to live or will to procreate of the Tutsi group.[42]

This approach – of inferring specific intent from words and deeds and of demonstrating it by reference to a pattern of purposeful action – has been affirmed in the ICTR Appeals Chamber decision of *Kayishema and Ruzindana*.[43] The Chamber recognised that "in order to prevent perpetrators from escaping convictions simply because [explicit] manifestations [of criminal intent] are absent, the requisite intent may normally be inferred from relevant facts and circumstances".[44] The Appeals Chamber also made it clear that personal motive – such as, for example, financial gain or vengeance – does not exclude criminal responsibility for genocide if the requisite intention is proved to have existed.[45]

3 Crimes Against Humanity

3.1 History

The notion of 'crimes against humanity' is sweeping and, as we shall see, captures many concerns traditionally associated with international human rights law, including the protection of life, the right not to be tortured and the rights to liberty and bodily integrity. The term was first used in its contemporary sense to condemn as a crime against humanity

39 *Krstic,* paras. 595-596.

40 *Jelisic (Appeal),* ICTY Appeals Chamber, judgment of 5 July 2001 (case no. IT-95-10-A).

41 Ibid, para. 47. In *Jelisic*, the ICTY Trial Chamber (judgment of 19 Oct 1999, case no. IT-95-10) held that the requisite intent was found to be lacking, even though the accused had killed Muslim detainees at a detention camp and boasted that he would sterilise Muslim women and prevent Muslim men from procreating. On the facts, Jelisic killed people at the camp randomly, allowed some Muslims (on one occasion an eminent Muslim) to leave the camp and arranged travel passes for others. Therefore, it could not be shown that he had "an affirmed resolve to destroy in whole or in part a group as such" (para. 58).

42 *Akayesu*, para. 732.

43 *Kayishema and Ruzindana,* ICTR Appeals Chamber, judgment of 1 June 2001 (case no. ICTR 95-1-A); see the related discussion by Roman Boed, 'Current Developments in the Jurisprudence of the International Criminal Tribunal for Rwanda', 2 *International Criminal Law Review*, 288-289 (2002).

44 *Kayishema and Ruzindana,* para 159.

45 Ibid, para. 161.

the atrocities committed by the Turkish forces against their own Greek and Armenian subjects during World War I in 1915. Although no prosecutions ultimately took place, the immediate response of the Allied powers to the massacres was for France, Russia and the UK to proclaim enthusiastically that all members of the Turkish government would be held responsible together with its agents for the "crimes against humanity and civilisation".[46]

At Nuremberg, the idea of a crime against humanity arose again. The Nuremberg and Tokyo tribunals utilised the technical term 'crime against humanity' to secure, for the first time, the prosecution of individuals for crimes that, by their nature, offended 'humaneness' and thereby became the concern of the international community. It was not at first clear to the Allied prosecutors, however, that such crimes could be prosecuted. Many of those charged with preparing the post-war indictments were unclear whether international law at that time allowed for the prosecution of offences that Germans had perpetrated on their own territory in Germany.[47] After lobbying from Jewish non-governmental organisations (NGOs), however, it was finally agreed that Nazis would be prosecuted for 'internal' atrocities by relying on the notion of crimes against humanity.

This use of the idea of crimes against humanity – to initiate prosecutions against individuals for atrocities committed within their own territories – led to a measure of discomfort for the Allied powers, who were concerned about the ramifications for their treatment of minorities within their own countries and colonies. As a result, the Nuremberg notion of 'crime against humanity' had an important rider attached to it: a crime against humanity was committed if it was *associated or linked* with one of the other crimes under the Tribunal's jurisdiction, being war crimes and crimes against the peace (aggression). What this meant is that there had to be a link between crimes against humanity and *international armed conflict*. In part that is why the Nuremberg trials are spoken of as 'war crimes trials', since the crimes against humanity there could only be tried if they were attendant to either a crime against peace or a war crime.[48]

3.1.1 Developments after World War II

There was a measure of dissatisfaction with the notion of crimes against humanity being limited only to those acts that occurred during an international armed conflict. For example, within weeks of the Nuremberg judgment the UN General Assembly asserted in the Genocide Convention of 1948 that genocide (the most egregious form of crimes against humanity) could be committed during times of war *and peace*.[49]

---

46 After the war there were objections that this was a form of retroactive criminal legislating and no prosecutions took place for the massacre (see Kittichaisaree, note 3 above, pp 85 and 86).

47 In keeping with the classical Westphalian approach to international law, their legal concern was that what a State's armed forces did to its own population was not within the province of international law.

48 William Schabas, *An Introduction to the International Criminal Court* (2001), p 35. In practical terms this nexus meant that only those 'crimes against humanity' were prosecuted that directly affected the interests of other States, either because these criminal acts were connected with a war of aggression or a conspiracy to wage such a war, or because they were bound up with war crimes, namely crimes directed against enemy combatants or enemy civilians (see Antonio Cassese, note 38 above, p 69).

49 On that and other developments that gradually led to the link between crimes against humanity and war being dropped, see Antonio Cassese, 'Crimes against Humanity', p 73 in Cassese et al (eds), *The International Criminal Court: A Commentary*, Vol. I (2002).

Today in international criminal law the nexus between crimes against humanity and war has disappeared, and customary international law prohibits these crimes whether they are committed in time of war or peace.[50] Article 7 of the Rome Statute codifies this position, albeit implicitly (see definition below). There is no mention that the attack must take place in an international armed conflict for it to be a crime against humanity.[51]

3.3 Definition

Article 7(1) of the Rome Statute provides that:

> "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:
>
> - murder;
> - extermination;
> - enslavement;
> - deportation or forcible transfer of population;
> - imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
> - torture;
> - rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation or any other form of sexual violence of comparable gravity;
> - persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognised as impermissible under international law….;
> - enforced disappearances of persons;
> - the crime of apartheid;
> - other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health."

It is clear, therefore, that when we speak of crimes against humanity under the Rome Statute the category covers actions that have a common set of features:[52]

1 The offences are particularly egregious in that they constitute a serious attack on human dignity or a grave degradation or humiliation of one or more human beings;

---

50 Cassese, ibid. The most recent developments relate to the ICTR and ICTY. The establishment of the ICTR – to punish those guilty of crimes committed in an internal conflict – in itself reiterates the point that crimes against humanity do not have to be attendant to an international armed conflict. See too the ICTY Appeals Chamber in its decision in *Prosecutor v Tadic* (1997), 105 *International Law Review (ILR)* 453, para. 141.

51 However, as Schabas points out, conceivably the argument could be made that in customary international law a nexus is still required, given the number of delegations at the Rome Conference for the drafting of the ICC Statute who argued vigorously that crimes against humanity could only be committed in times of armed conflict (see Schabas, note 48 above, p 36).

52 Cassese, note 38 above, p 64.

2 They are not isolated or sporadic events, but are acts that form part of governmental policy, or of a widespread or systematic practice of atrocities tolerated, condoned or acquiesced in by a government or de facto authority;

3 Their prohibition extends regardless of whether they are perpetrated in times of war or peace;

4 The victims of the crimes are civilians or, in the case of crimes committed during armed conflict, persons who do not take part (or no longer take part) in armed hostilities.[53]

3.4 *Actus reus* – crimes against humanity

3.4.1 Offences

The *actus reus* of a crime against humanity involves the commission of an attack that is inhumane in nature, causing great suffering or serious injury to body or to mental or physical health. The act must be committed as part of a widespread or systematic attack against members of a civilian population.[54]

The specific acts or classes of offences that make up crimes against humanity under the Rome Statute are set out next:

- *Murder*

Being the intentional killing, whether premeditated or not, of a human being.[55]

- *Extermination*

In it most obvious form, 'extermination' involves mass or large-scale killing.[56] For instance, the ICTR Trial Chamber in *Kayishema and Ruzindana*[57] provides as a hypothetical example a situation where soldiers fire into a crowd of people, killing them all.[58] A real example of extermination as mass or large-scale killing is provided by the ICTY Trial Chamber's decision in *Krstic*:[59]

> "[V]irtually all of the persons killed in the aftermath of the fall of Srebrenica were Bosnian Muslim males of military age. The screening process at Potocari, the gathering of those men at detention sites, their transportation to execution sites, the opportunistic killings of members of the column along the Bratunac-Milici road as they were apprehended, demonstrate beyond any doubt that all of the military aged Bosnian Muslim males that were captured or fell otherwise in the hands of the Serb

53 The position under customary international law is that the victims of crimes against humanity may also be enemy combatants (see Cassese, note 38 above, p 64).

54 Kittichaisaree, note 3 above, pp 90 and 91.

55 Cassese, note 38 above, p 74.

56 In *Vasiljevic*, ICTY Trial Chamber, 29 November 2002, the Tribunal held that for criminal responsibility to attach for extermination, the accused must have been responsible for a "large number of deaths". See Daryl Mundis, 'Current Developments at the *ad hoc* International Criminal Tribunals', 1 *Journal of International Criminal Justice*, 521 (2003).

57 See *Prosecutor v Kayishema and Obed Ruzindana*, 21 May 1999 (case no. ICTR-95-1-T).

58 Ibid, para. 147, n. 49.

59 *Krstic*, ICTY Trial Chamber, decision of 2 August 2001 (case no. IT-98-33-T).

forces were systematically executed. The result was that the majority of the military aged Bosnian Muslim males who fled Srebrenica in July 1995 were killed. A crime of extermination was committed at Srebrenica."[60]

In addition to mass or large-scale killing, Article 7(2)(b) of the ICC Statute provides that extermination includes the "intentional infliction of conditions of life, *inter alia*, the deprivation of food and medicine, calculated to bring about the destruction of part of a population". Examples would include the causing of mass death by imprisoning a large number of people and withholding the necessities of life, or by the introduction of a deadly virus into a population and preventing medical care.[61]

In sum then, 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".[62]

- *Enslavement*

According to the ICC Statute, 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." [63] The elements of this crime are best set out in the ICTY Trial Chamber's decision in *Kunarac and others*,[64] and which the Appeals Chamber of the ICTY has confirmed.[65] Indications of enslavement include:

- elements of control and ownership;
- the restriction or control of an individual's autonomy, freedom of choice or freedom of movement (often with the accruing of some gain to the perpetrator);
- the absence of consent or free will on the part of the victim (usually rendered impossible or irrelevant by, for example, fear of violence, deception or false promises, abuse of power, the victim's position of vulnerability, detention or captivity, psychological oppression or socio-economic conditions).

Further indications of enslavement are:

- exploitation;
- the exaction of forced or compulsory labour or service (often without remuneration and involving physical hardship);

60 Ibid, paras. 504-5.

61 Kittichaisaree, note 1 above, pp 105-106.

62 *Krstic,* para. 503.

63 Article 7(2)(c), ICC Statute.

64 *Kunarac and others*, ICTY Trial Chamber III, judgment of 22 February 2001 (case no. IT-96-23-T), paras. 542-543.

65 See *Prosecutor v Kunarac, Kovac and Vukovic*, ICTY Trial Chamber, judgment of 12 June 2002 (case nos. IT-96-23-A and IT-96-23/1-A), para 119.

- sex;
- prostitution;
- human trafficking.

Two important points need to be made in respect of this offence. The first is that the acquisition or disposal of someone for monetary or other compensation, while a prime example of the exercise of the right of ownership over someone who has been rendered 'servile', is not a requirement for enslavement.[66] The central element of the crime is the exploitation of one or more persons through the exercise of the right of ownership. From this we can derive the second, more general, point, that enslavement, even if tempered by humane treatment, is still slavery. As the US Military Tribunal under Control Council Law No. 10 in *Pohl and Others* made clear:

> "Slaves may be well fed and well clothed and comfortably housed, but they are still slaves if without lawful process they are deprived of their freedom by forceful restraint. … There is no such thing as benevolent slavery."[67]

- *Deportation or forcible transfer of population*

Deportation or forcible transfer of population is defined in the Rome Statute as "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".[68] Deportation is generally understood to mean the forcible transfer of persons from one State to the territory of another State.[69] Forcible transfer, however, relates to the forcible transfer of persons to another location within the same State. The ICC Statute's use of the words 'forcible transfer of population' has therefore updated the original term 'deportation' to express condemnation of what in recent years (witness the events in Rwanda and Yugoslavia) has come to be known as 'ethnic cleansing' within a country's borders.[70]

- *Imprisonment or other severe deprivation of physical liberty*

Article 7(1)(e) of the Rome Statute prohibits "[i]mprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law". Imprisonment as a crime against humanity has been defined by the Trial Chamber of the ICTY in *Kordic and Cerkez*[71] as "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

66 *Kunarac*, para. 542.

67 *Trial of Oswald Pohl and Others*, US Military Tribunal, Nuremberg, Germany, 3 November 1947, Trials of War Criminals (TWC), Vol. V, 958, cited in Kittichaisaree, see note 3 above, p 107.

68 See Article 7(2)(d), ICC Statute.

69 *Krstic,* ICTY Trial Chamber, para. 521. In this case the Trial Chamber found that around 25,000 Bosnian Muslim civilians were forcibly bussed outside the enclave of Srebrenica to other territory. Because the other territory was still within the same State of Bosnia and Herzegovina, the Chamber concluded that the civilians were subject to forcible transfer, and not deportation (paras. 527-532).

70 Schabas, note 48 above, p 38.

71 *Kordic and Cerkez*, ICTY Trial Chamber III, judgment of 26 February 2001 (case no. IT-95-14/2-T), paras. 302-303.

directed against a civilian population". In *Krnojelac*[72] the ICTY Trial Chamber held that the following elements constitute the crime against humanity of imprisonment:

- An individual is deprived of his or her liberty.
- The deprivation of liberty is imposed arbitrarily, that is, no legal basis can be invoked to justify the deprivation of liberty.
- The act or omission by which the individual is deprived of his or her physical liberty is performed by the accused or a person or persons for whom the accused bears criminal responsibility with the intent to deprive the individual arbitrarily of his or her physical liberty or in the reasonable knowledge that his act or omission is likely to cause arbitrary deprivation of physical liberty.[73]

- *Torture*

Article 7(2)(e) of the Rome Statute defines torture as "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.

Under general international law torture is only committed where, amongst other things, a public official was involved, either as the perpetrator or as one of the participants or accomplices.[74] Article 7 of the ICC Statute broadens that definition so that torture may amount to a crime against humanity even if committed by civilians against other civilians without any involvement of public officials or military personnel. Having said that, it should be noted that some sort of involvement of public authorities is required by the Elements of Crimes. The widespread or systematic practice that constitutes the general context of the crime must take place "pursuant to or in furtherance of a State or organisational policy" of torture.[75] The result is this: as long as the single act of torture is part of a widespread or systematic practice (which takes place pursuant to or in furtherance of a State or organisational policy of torture), even torture inflicted by one citizen against another without any participation of a public official is punishable as a crime against humanity.[76]

- *Sexual violence*

This class of offence includes "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity."[77]

(a) Rape

Until recently, rape was not defined in international criminal law. In *Akayesu* the ICTR spelled out the broad parameters of this crime by saying that rape is "a physical invasion

72 See Daryl Mundis, 'Current Developments at the *ad hoc* International Criminal Tribunals', 1 *Journal of International Criminal Justice* 197 (2003) at 201.

73 *Krnojelac*, ICTY Trial Chamber II, judgement of 1 March 2002 (case no. IT-97-25-T), para. 115.

74 Cassese, note 49 above, p 374.

75 Elements of Crimes Article7(I)(f).

76 Cassese, note 49 above, p 374.

77 See Article 7(1)(g), ICC Statute.

of a sexual nature, committed under circumstances that are coercive; it may or may not involve sexual intercourse".[78] Note that in the *Akayesu* case the ICTR held that rape could amount to torture when inflicted at the instigation of or with the consent or acquiescence of a public official or person acting in an official capacity.[79]

Further elaboration of the definition of rape was then attempted by the ICTY. In *Furundzija*, after drawing on the principles of criminal law common to the major legal systems of the world, Trial Chamber II concluded that the objective elements of rape were as follows:

> "(i) 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."[80]

However, the *Furundzija* definition of rape has been recently rejected by the Appeals Chamber of the ICTY in *Kunarac*. The Trial Chamber in *Kunarac* had elaborated on the element of "coercion, or force, or threat of force" and explained that it may be set out as follows: "sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of a victim's free will, assessed in the context of the surrounding circumstances".[81] The Appeals Chamber has now clarified that force or threat of force, while providing clear evidence of non-consent, is not per se an element of the offence of rape. According to the Appeals Chamber in *Kunarac* the elements of rape in international law include 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) the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim.

The Elements of Crimes in the Rome Statute, drafted and adopted prior to the *Kunarac* Appeal, in turn sets out its own requirements in the case of rape. In terms of the Elements of Crimes, the crime against humanity of rape occurs where:

(1) The perpetrator invaded 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; and,

(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 (because of natural, induced or age-related incapacity); and,

(3) The conduct was committed as part of a widespread or systematic attack directed against a civilian population; and

---

78 *Akayesu*, ICTR Trial Chamber I, Judgment of 2 September 1998 (case no. ICTR-96-4-T), para. 597.

79 Ibid.

80 *Furundzija*, ICTY Trial Chamber II, judgment of 10 December 1998 (case no. IT-95-17/1-T), para 185. See *Kunarac and others*, ICTY Trial Chamber III, judgment of 22 February 2001 (case no. IT-96-23-T) para. 460).

81 Ibid.

(4) 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.

Ultimately then, under the Rome Statute, the prosecutor will have to show that the rape was committed by force or threat of force or coercion, the obvious implication being that where objectively such circumstances have been proved to have existed, the consent of the victim was necessarily negated or not forthcoming.

(b) Forced pregnancy

This crime is defined in Article 7(2)(f) of the Rome Statute as "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". Situations covered by this definition would include those where women are forcibly impregnated and confined so as to force them to bear children of a conquering ethnic group with a view to affecting the ethnic composition of a population, or so as to serve as a medical experiment.[82] However, the definition is not to be interpreted as "affecting national laws relating to pregnancy", with the result that the crime against humanity of forced pregnancy does not restrict the competence of States to regulate birth control and abortion in line with their own domestic principles.[83]

(c) *Sexual violence*

Sexual violence is, according to the ICTR in *Akayesu*, "any act of a sexual nature which is committed on a person under circumstances which are coercive and is not limited to physical invasion of the human body [but] may include acts which do not involve penetration or even physical contact".[84] In that case it was held that the act of undressing a female victim and forcing her to do gymnastics naked in the public courtyard in front of a crowd constituted sexual violence.[85] Note, however, that Article 7(1)(g) of the Rome Statute indicates that such sexual violence can amount to a crime against humanity only where it is "sexual violence of comparable gravity" to rape, sexual slavery, enforced prostitution, forced pregnancy or enforced sterilisation.

■ *Persecution*

Only extreme forms of discrimination amounting to deliberate persecution are to be punished as crimes against humanity. As such, it is defined in Article 7(2)(g) of the Rome Statute as "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity".

An example of persecution is provided by the ICTY Trial Chamber's decision in *Kupreskic and others*. There it was held that the deliberate and systematic killing of Bosnian Muslim civilians as well as their organised detention and expulsion from the village where the crimes were committed could constitute persecution.[86] The Trial Chamber also found that

82 Kittichaisaree, note 3 above, p 114, citing Robinson, 93 *AJIL* 53 (1999), n. 63.

83 Kittichaisaree, ibid, p 114.

84 *Akayesu*, para. 598.

85 Ibid, para. 688.

86 *Kupreskic and others*, ICTY Trial Chamber, judgment of 14 January 2000 (case no. IT-95-16-T), para. 629.

because the comprehensive destruction of Bosnian Muslim homes and property was committed on discriminatory grounds, such action amounted to persecution.[87] More recently, the ICTY Trial Chamber in *Krnojelac* has concluded that the crime of persecution consists of an act or omission that:

(i) discriminates in fact and denies or infringes upon a fundamental right laid down in international customary or treat law (the *actus reus*); and

(ii) was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the *mens rea*).[88]

- *Enforced disappearance*

Under the Rome Statute this crime constitutes "the arrest, detention or abduction of persons by, or with the authorisation, support or acquiescence of, a State or a political organisation, 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."[89]

- *Apartheid*

Article 7(2)(h) of the ICC Statute defines 'the crime of apartheid' as "inhumane acts of a character similar to [other crimes against humanity], committed in the context of an institutionalised regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining the regime".

It is clear that this crime was included to cover the South African-style imposition of a policy of apartheid, or separateness, and because the definition of apartheid in the ICC Statute closely follows its definition under Article II of the Apartheid Convention of 1973,[90] it may prove useful to consider the Convention's enumerated list of proscribed acts of apartheid for further guidance.[91] These acts include, *inter alia*, the deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part; legislative and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country; the deliberate creation of conditions preventing the full development of such a group or groups; and legislative and other measures designed to divide the population along racial lines by the creation of separate ghettos and reserves, the prohibition of mixed marriages, the expropriation of landed property belonging to a particular social group, and so on.

87 Ibid, paras. 630-631.

88 See Daryl Mundis, note 56 above, p 202.

89 See Article 7(2)(i), ICC Statute.

90 The International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973.

91 Particularly because the Elements of Crimes for the crime against humanity of apartheid provides little guidance as to what specific actions the crime is intended to proscribe.

- *Other inhumane acts*

These acts are defined in Article 7(1)(k) as acts "of a similar character to [other crimes against humanity] intentionally causing great suffering, or serious injury to body or to mental or physical health".

3.4.2 Widespread or systematic attack against a civilian population

Having set out the different classes of offences that may constitute crimes against humanity, it is important to return to the definition of a crime against humanity in Article 7(1) of the Rome Statute. In terms of that definition:

> "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".

From this definition it will be clear that the Rome Statute sets additional, general thresholds that elevate these classes of offences to the level of crimes against humanity.

The first requirement is that the act complained of must be part of a widespread or systematic attack. As the ICTY Appeals Chamber made clear in *Tadic*:

> "The Trial Chamber correctly recognised that crimes which are unrelated to widespread or systematic attacks on a civilian population should not be prosecuted as crimes against humanity. Crimes against humanity are crimes of a special nature to which a greater degree of moral turpitude attaches than to ordinary crimes."

Article 7(2) of the Rome Statute provides elucidation when it says that an attack is "a course of conduct involving the multiple commission of acts referred to in [Article 7(1)] against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack."

Various points arise from this:

- The attack is the *event* of which the *enumerated acts* must form part and there may be a combination of acts (for example, murder, rape, torture, etc.) within a single attack.[92]
- The attack may be violent or non-violent (for instance, a non-violent attack may be a policy of apartheid exerted in a way that pressurises the population to act in a particular manner), and the attack need not be a *military* attack.[93]
- The attack may have either *widespread* or *systematic* aspects. A widespread attack is an attack directed against a multiplicity of victims, while a systematic attack is an attack carried out pursuant to a preconceived policy or plan.[94] As such, it is required that the offence concerned be an instance of a repetition of similar crimes or be part

92 Kittichaisaree, note 3 above, p 94.

93 Schabas, note 48 above, p 36.

94 Kittichaisaree, note 3 above, p 96.

of a string of such crimes (widespread practice), or that it be the manifestation of a policy or a plan drawn up, or inspired by, State authorities or by the leading officials of a *de facto* State-like organisation, or of an organised political group (systematic practice).[95]

- The requirement that the attack have a widespread or systematic nature does not mean that a crime against humanity cannot be perpetrated by an individual who commits only one or two of the designated acts, or who engages in only one such offence against only one or a few civilians. So long as the individual's act or acts are part of a consistent pattern of offences by a number of persons linked to that offender, he or she may be properly charged with crimes against humanity.[96] Cassese proposes the following test to determine whether the necessary threshold is met when an individual is not accused of planning or carrying out a policy of inhumanity, but simply of committing specific atrocities or vicious acts:

  > "one ought to look at these atrocities or acts in their context and verify whether they may be regarded as part of an overall policy or a consistent pattern of inhumanity; or whether they instead constitute isolated or sporadic acts of cruelty and wickedness."[97]

- The 'systematic' nature of the attack, or its 'policy' element, is made explicit in the Rome Statute through the requirement in Article 7(2) that the specific acts must be carried out "pursuant to or in furtherance of a State or organisational policy to commit such attack". The accused's act of murder, torture, etc. must be *pursuant to a policy;* it is the existence of this policy that endows the criminal act with the character of a crime against humanity. The policy need not be country-wide; it may be localised in a particular geographical region.[98] Note also that crimes against humanity can be committed by non-state actors, since Article 7(2) specifically includes the possibility of an act being pursuant to an 'organisational policy' to commit the attack. Crimes against humanity can be committed on behalf of entities with *de facto* control over a territory even if they have no international recognition and they can be committed by a terrorist group or organisation.[99]

- The attack may by an act of omission. In *Kambanda* the ICTR found the accused guilty of crimes against humanity (in addition to the charges of genocide – see genocide notes) for having failed in his duty as Prime Minister of Rwanda to protect the children and population of Rwanda from massacre, especially after having been personally asked to do so.[100]

The second requirement is that the attack must be directed against a *civilian population*. This distinguishes it from many war crimes that may be targeted at both civilians and

---

95 Cassese, note 38 above, p 64.

96 As a good example, Kittichaisaree points out that the act of denouncing a Jewish neighbour to the Nazi authorities committed against the background of widespread persecution against the Jews has been held to be a crime against humanity. See Kittichaisaree, note 1 above, p 97, citing *Kupreskic and others*, ICTY Trial Chamber, judgment on 14 January 2000 (case no. IT-95-16-T), para. 550.

97 Cassese, note 49 above, p 361.

98 Kittichasaree, note 3 above, p 99.

99 Ibid, p 98.

100 Ibid, p 94, citing *Kambanda* (case no. ICTR 97-23-S), para. 39(ix).

combatants, and the requirement also distinguishes the Rome Statute from customary international law, which allows that a crime against humanity may be committed against civilians and military personnel.[101]

What is a civilian for the purposes of Article 7(1)? It would appear that 'civilian' must be given a broad definition to cover not only the general population but also members of the armed forces and resistance forces who have become *hors de combat* and laid down their weapons, either because they have been captured or because they have been wounded.[102]

Note that the 'population' element does not mean that the entire population of a given state must be targeted – it is merely intended to indicate the collective nature of crimes against humanity that excludes single or isolated acts punishable as war crimes or crimes against municipal law that do not rise to the level of crimes against humanity.

3.5 *Mens rea* – crimes against humanity

Article 7(1) provides that a 'crime against humanity'means any of the enumerated acts when committed as part of a widespread or systematic attack directed against any civilian population, "with knowledge of the attack". This requirement amounts to a form of specific intent, which sets another threshold that must be crossed before a particular offence can be regarded as a crime against humanity.[103]

Clearly each of the underlying acts committed (in terms of the greater event: the attack) require their own form of intent. However, overall, these acts must be committed with a specific intention that is associated with the main event – the attack that gives the individual acts their 'crime against humanity' character. In *Kupreskic*, for example, the ICTY Trial Chamber described the mental element for a crime against humanity thus: "[T]he requisite *mens rea* for crimes against humanity appears to be the *intent* to commit the underlying offence, combined with the *knowledge* of the broader context in which that offence occurs".[104]

3.5.1 Knowledge of the broader context

What is to be understood by the requirement of 'knowledge of the broader context'? The perpetrator must *knowingly* commit the crime; that is, he or she must be aware of the broader context in which his or her act occurs. To put it differently, it must be shown that he had knowledge that his underlying offence was *part of a widespread or systematic attack on the civilian population and pursuant to a policy or plan*.[105] If this knowledge is not present, the perpetrator would only have the *mens rea* for an ordinary crime and not a crime against humanity.[106] Without the requisite 'big-picture' intention, he would only

101 Cassese, note 49 above, p 93.

102 Ibid.

103 Schabas, note 48 above, p 37.

104 *Kupreskic and others*, ICTY Trial Chamber, judgment of 14 January 2000 (case no. IT-95-16-T), para. 556.

105 *Tadic,* ICTY Appeals Chamber, judgment of 15 July 1999 (case no. IT-94-1-A), para. 248.

106 Kittichaisaree, note 3 above, p 91.

have the *mens rea* for his individual act and would not have formed the overall intention to associate his individual act with the widespread or systematic attack.

This requirement may be established by, for example, proof of the participation of the perpetrator in the planning, organisation or execution of a large-scale commission of vicious acts of inhumanity.[107] The requisite knowledge could be inferred from, for example, the historical or political circumstances in which the acts occur; the functions of the accused at the time of the crimes; the accused's responsibilities in the political or military hierarchy; the widespread nature and seriousness of the acts committed; and the nature of the crimes committed as well as their notoriety.[108]

What is the extent of the knowledge required? It is not necessary that the accused knew of all the characteristics of the attack or the precise details of the plan or policy of the State or organisation.[109] Where there is an *emerging* widespread or systematic attack against a civilian population, it is enough if the perpetrator intended to *further* such an attack.[110]

At the very least the perpetrator needed to be aware of the possibility that his act was part of the attack and he then took that risk. As the ICTY Trial Chamber explained in *Blaskic*:

> "[t]he accused need not have sought all the elements of the context in which his acts were perpetrated; it suffices that, through the functions he willingly accepted, he knowingly took the risk of participating in the implementation of that context."[111]

In *Blaskic* the accused was charged with persecution against a group on a political basis. He had joined the Croat Defence Council (HVO), which had adopted the policy of discrimination against Muslims with the aim of systematically excluding them from the organs of political life. The HVO took decisions on the organisation of life in the town. Although Blaskic was a general, he had exhibited a political will to join the Council. The Tribunal found that Blaskic was deemed to be aware that the scope of his activities could not be a purely military one and that, through the functions he willingly accepted, he knowingly took the risk of participating in the implementation of the context (of persecution against the Muslims).[112]

3.5.2 Crimes of persecution

In respect of the 'persecution-style' offences that are crimes against humanity, an additional subjective mental element of a persecutory or discriminatory animus is required. This intent must be to subject a person or group to discrimination, ill-treatment

---

107 Cassese, note 49, pp 363-364.

108 Kittichaisaree, note 3 above, p 92, citing *Blaskic,* ICTY Trial Chamber, judgment of 3 March 2000 (case no IT-95-14), para. 259.

109 Schabas, note 48 above, p 37; Elements of Crimes, Article 7, para. 2. See also the recent decision of the ICTY Appeals Chamber in *Prosecutor v Kunarac, Kovac and Vukovic*, judgment of 12 June 2002 (case nos. IT-96-23-A and IT-96-23/1-A), where it was affirmed that accused need not be aware of the details of the attack (para. 102).

110 Elements of Crimes, Article 7, para. 2.

111 *Blaskic,* ICTY Trial Chamber, judgment of 3 March 2000 (case no. IT-95-14), para. 251.

112 Kittichaisaree, note 3 above, p 92.

or harassment so as to bring about great suffering or injury to that person or group on religious, political or other such grounds.[113] As such, this additional form of intent amounts to a *special form of intent*, or *dolus specialis*.

3.5.3 Can a crime against humanity be committed negligently?

Because of the gravity of crimes against humanity, and the fact that the underlying classes of offences (murder, extermination, deportation, rape, torture, persecution, etc) are usually associated with a mental element of intention (or at least reckless intent, or *dolus eventualis*) on the part of the perpetrator, it cannot be the case that crimes against humanity can result from a negligent state of mind.[114]

4 War Crimes

4.1 Introduction

War crimes have an ancient lineage and, historically, belligerent States took it upon themselves to determine those acts committed in time of war for which they would try the combatants or civilians belonging to the enemy. Of the core crimes in the Rome Statute, 'war crimes' were the first to have been prosecuted at international law. German soldiers were convicted of 'acts in violation of the laws and customs of war' at Leipzig in the early 1920s, pursuant to Articles 228 and 230 of the Treaty of Versailles.[115]

Generally speaking, war crimes are crimes committed in violation of international humanitarian law applicable during armed conflicts. The sources of international humanitarian law are vast and are broadly divided into two categories of substantive rules – 'the law of The Hague' and 'the law of Geneva'. These constitute the rules concerning behaviour that is prohibited in the case of an armed conflict.

The 'law of The Hague' is made up of the Hague Conventions of 1868, 1899 and 1907, which generally speaking set out rules regarding the various categories of lawful combatants and regulate the means and methods of warfare in respect of those combatants.[116] The 'law of Geneva', so called because it comprises the four Geneva Conventions of 1949 plus the two Additional Protocols thereto of 1977, regulates the treatment of persons who do not take part in the armed hostilities (such as civilians, the wounded and the sick) and those who used to take part but no longer do (such as prisoners

113 Cassese, note 38 above, p 82.

114 Cassese, note 49 above, p 364.

115 In Articles 228 to 230 of the Treaty of Versailles Germany recognised the jurisdiction of the Allied Powers to try persons accused of violating the laws and customs of war as well as the obligation to hand over such accused persons to the Allies for that purpose. None of these provisions was implemented due to later German pressure. Instead, Germany proposed to try its own nationals accused of war crimes before the Supreme Court of Leipzig, a proposal that produced mock trials resulting in only 13 convictions out of 901 cases, and with insignificant sentences that ultimately were not executed. See Georges Abi-Saab, *'The concept of "war crimes"'*, pp 102-103 in S Yee and W Tieya (eds), *International Law in the Post-Cold War Area* (2001), pp 99-118.

116 The Hague rules also deal with the treatment of persons who do not take part in armed hostilities or who no longer take part in them, but in this respect they have been supplanted by the Geneva rules, which cover this aspect of humanitarian law in more detail.

of war).[117] An exception here is the Third Geneva Convention which, in addition to the focus on treatment of persons no longer involved in the conflict, also regulates the various classes of lawful combatants and thereby updates the Hague rules. The Hague rules have been further updated by the First Additional Protocol to the Geneva Convention of 1977, which deals with the means and methods of combat with a particular emphasis on sparing civilians as far as is possible in an armed conflict.

Drawing on these existing sources of humanitarian law, the drafters of the Rome Statute in Article 8 have set out an elaborate 'codification' of the rules concerning behaviour that is prohibited in situations of armed conflict, and have ensured that the ICC is empowered to punish as 'war crimes' any deviations from these rules. We shall turn to Article 8 in more detail below.

4.2 Armed conflict

International humanitarian law finds application during times of armed conflict; that is, war crimes can only be committed in an armed conflict. Similarly, in order to constitute a violation of Article 8 of the Rome Statute there must be a nexus between the criminal conduct and the armed conflict.

The first point to note is that war crimes may be committed during either international or internal armed conflicts. Up until 1990 the scope of international responsibility for war crimes was the subject of much confusion. The two major sources of humanitarian law, described above, did not appear to extend international criminal responsibility to those who committed the prohibited acts during times of internal armed conflicts. Put differently, responsibility seemed to be limited to crimes committed during international conflicts. Indeed, even when the Geneva Conventions were updated with the two Additional Protocols in 1977, the drafters made it clear that there could not be 'grave breaches' of the Geneva Conventions during times of non-international armed conflict.

The position has changed (and become clearer) in the light of the jurisprudence of the ICTY. In the *Tadic* case, the ICTY Appeals Chamber stated that international criminal responsibility for war crimes included acts committed during internal armed conflict, that is, during times of civil war.[118] Through a progressive reading of the ICTY Statute, the judges were able to read this in as a component of the term 'laws and customs of war' associated with the Hague Convention. This progressive reading has, by and large, come to be reflected in Article 8 of the Rome Statute. States Parties to the Rome Statute have now accepted that war crimes' responsibility can be founded in a time of internal as well as international armed conflict. So long as it is linked with the armed conflict, the offence, whether committed by members of the military or civilians, will constitute a war crime. Note that this is true even of offences committed by civilians against other civilians. If, however, no link exists between the offence and the armed conflict, then nothing more than an 'ordinary' offence under the law applicable in the relevant territory has been committed.[119]

---

117 Cassese, note 38 above, p 48.

118 *Tadic,* ICTY Appeals Chamber, decision of 2 October 1995 (case no. IT-94-1-AR72), paras. 96-136.

119 See the decision of the Swiss Appellate Military Tribunal in *Niyonteze*, judgment of 27 April 2001, available at www.icrc.org/ihl-nat-nsf, and cited in Cassese, note 2 above, p 49.

When, for the purposes of international criminal law, does an armed conflict exist? The test to determine the existence of an armed conflict has been set out by the ICTY. In *Tadic* the ICTY Appeals Chamber said that an armed conflict exists "whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State".[120] Note therefore that an 'armed conflict' is not constituted by mere civil unrest or terrorist activities.

An armed conflict is understood, moreover, to extend beyond the cessation of hostilities until such time as there is a general conclusion of the peace (in the case of an international conflict) or a peaceful settlement (in the case of an internal conflict).[121] In addition, an armed conflict can be said to exist even though no actual fighting is taking place in the particular geographical area where the crime is committed. In *Tadic* the defendant had argued that no armed conflict was taking place at the time at which he was said to have committed war crimes (against Bosnian Muslims and Croats who were detained by Serb forces at a camp in Omarska). In other words, his argument was that an armed conflict exists only in those parts of a State where actual fighting is taking place. The Tribunal rejected this argument and found that there is nothing in the Geneva Conventions that suggests that humanitarian law does not apply to the conditions of detention of prisoners detained away from the scene of fighting.[122] As such, an armed conflict is understood to apply to the whole territory of the warring States (in an international conflict) or to the whole territory under the control of a party to an internal conflict.[123]

4.3 Class of perpetrator

War crimes may be committed by all types of persons: by military personnel against enemy servicemen or civilians or by civilians against either members of the enemy armed forces or enemy civilians. Whatever class of perpetrator is involved for a war crime to have been committed, "a sufficient nexus must be established between the alleged offence and the armed conflict which gives rise to the applicability of international humanitarian law".[124] If during an armed conflict a civilian kills another civilian in a strictly private interpersonal conflict, then no war crime has been committed as the conduct is not associated in any way with the broader context of the armed conflict. Where, however, civilians act on behalf of or with the encouragement of a warring party to commit acts of brutality against, for instance, inmates in a camp belonging to another group that is considered hostile to the warring party, then those acts could constitute war crimes.[125]

120 *Tadic*, paras. 63-64.

121 Kittichaisaree, note 3 above, p 131.

122 See Greenwood 'International Humanitarian Law and the *Tadic* Case', 7 *EJIL* 2 (1996), 265 at 269.

123 Kittichaisaree, note 3 above, p 131.

124 *Tadic*, 7 May 1997, paras. 752 et seq.

125 See in this regard the facts in the *Tadic* case. There the ICTY found at para. 575 that "[t]hose acts clearly occurred with the connivance or permission of the authorities running these camps and indicate that such acts were part of an accepted policy towards prisoners. …Indeed, such treatment effected the objective of the *Republic Srpska* to ethnically cleanse, by means of terror, killings or otherwise, the area controlled by Bosnian Serb forces. Accordingly, those acts were directly connected with the armed conflict."

As a final point, note that crimes committed by servicemen against their own military (whatever their nationality) do not constitute war crimes, although they may nonetheless be punishable under the military law of the relevant army. For example, in the *Pilz* case before the Dutch Special Court of Cassation, it was found that a war crime was not inflicted upon a Dutchman who had enlisted in the German army, was prevented from receiving medical assistance by a German doctor "in abuse of his authority as a superior" and was then shot on the orders of this doctor. The Court held that, by entering the military service of the occupying power, the Dutchman had removed himself from the protection of international law. The offence thus constituted a crime under the internal law of Germany only.[126]

4.4 War crimes under the ICC Statute

4.4.1 When will Article 8 be triggered?

Under customary international law, the distinction between crimes against humanity and genocide on the one hand and war crimes on the other hand is that the former two have a jurisdictional threshold (crimes against humanity are acts committed as part of a widespread and systematic attack; genocide involves the specific intention to destroy in whole or in part a protected group). War crimes, by contrast, can in principle cover even isolated acts committed by individual soldiers or civilians acting without direction from superiors. Having said that, under the Rome Statute the ICC's attention will be directed 'in particular' to those war crimes that are "committed as part of a plan or policy or as part of a large-scale commission of such crimes".[127] This so called 'non-threshold threshold' built into Article 8 ensures that two jurisdictional triggers – (a) that the war crime is committed as part of a plan or policy, or (b) that the war crime is committed alongside other war crimes on a large scale – should ordinarily be met before the ICC will be seized with the case. Note, this jurisdictional threshold is not an additional requirement for the elements of war crimes, but is rather a method used to prevent the ICC from being overburdened with isolated cases.

In respect of these individual or isolated cases the expectation is that, in accordance with Article 17 of the Rome Statute, it will remain the responsibility of the States where any suspected war criminal is found to investigate the case and to prosecute the person concerned.[128] It should also be mentioned that the proviso does *not* rule out the possibility of the ICC exercising jurisdiction over war crimes not committed as part of a plan or policy or as part of a large-scale commission of such crimes. This situation may arise, for example, where the State is unwilling or unable genuinely to carry out the investigation or prosecution of a case that involves an isolated war crime, and the ICC's jurisdiction might thus be triggered.

126 See Cassese, note 38 above, p 48.

127 Article 8(1), ICC Statute.

128 Michael Bothe, 'War Crimes', p 380 in Cassese, note 49 above.

4.5 *Actus reus* – war crimes

The Rome Statute in Article 8(2) is the first attempt to clearly and comprehensively set out a definition of war crimes. Drawing on the Geneva Conventions and international humanitarian law, the Statute adopts a four-part division to its elucidation of 'war crimes' – the first two covering war crimes committed during an international armed conflict and the other two covering war crimes committed during an internal armed conflict.

4.5.1 War crimes in times of international armed conflict

■ *Grave breaches of the Geneva Conventions*

The Rome Statute begins its listing of war crimes by defining grave breaches of the Geneva Conventions as war crimes (Article 8 (2)(a)). The four Geneva Conventions adopted in 1949 protect different categories of persons. Convention I protects the wounded and sick in land warfare; Convention II protects the wounded, sick and shipwrecked in sea warfare; Convention III protects prisoners of war; and Convention IV protects civilians. In addition, certain property is protected under the Geneva Conventions and the First Additional Protocol.

The 1949 Geneva Conventions introduced the important development of individual criminal responsibility for certain particularly severe violations of the treaties, known as 'grave breaches', committed against 'protected persons' or 'protected objects' provided for in the Conventions as well as the First Additional Protocol. Grave breaches are defined in Articles 50, 51, 130 and 147 of Geneva Conventions I, II, III and IV, respectively, as well as in Article 85 of the First Additional Protocol (see Box 3.1).

Box 3.1: 'Grave Breaches' in the Geneva Conventions

Particularly severe violations of the Geneva Conventions of 1949 are known as 'grave breaches'. According to the Fourth or 'civilian' Convention, grave breaches consist of: wilful killing, torture or inhuman treatment (including biological experimentation), wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial, taking of hostages, and extensive destruction and appropriation of property that is not justified by military necessity and carried out wantonly and unlawfully (Article 147). The other three Geneva Conventions have shorter enumerations but the fundamentals of the definition are the same.

Hand in hand with the idea of this criminal responsibility was the recognition under the Conventions that States were obliged to investigate, prosecute or extradite persons suspected of committing these 'grave breaches', irrespective of their nationality or the place where the crime was committed, giving rise to an obligation *aut dedere aut judicare* (either prosecute or extradite). After 1949 the rules on grave breaches of the Geneva

Conventions were honoured less in their observance than in their breach, and with the exception of the prosecutions that took place under the Statutes of the ICTY and the ICTR in the 1990s, the punitive scheme under the Conventions was very seldom put into effect.

The Rome Statute, of course, is aimed at remedying that defect. It follows the Conventions and provides in Article 8(2)(a) that any of the following acts ('grave breaches') against persons or property protected under the provisions of the relevant Geneva Convention will amount to a war crime:

- Wilful killing;
- Torture or inhuman treatment, including biological experiments;
- Wilfully causing great suffering, or serious injury to body or health;
- Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- Compelling a prisoner of war or other protected person to serve in the forces of a hostile power;
- Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trials;
- Unlawful deportation or transfer or unlawful confinement;
- Taking of hostages.

In respect of the elements of these grave breaches, the following points might be noted.

(a) Wilful killing

In relation to wilful killing, such action includes killing that is perpetrated intentionally or recklessly (*dolus eventualis*) in relation to the death of the protected person. It goes without saying that this prohibition covers only protected persons under the Geneva Conventions – a combatant (who has not become a prisoner and is neither sick nor wounded) may lawfully be killed on the battlefield.

(b) Torture or inhuman treatment

When it comes to torture or inhuman treatment as a war crime, note the difference between such a war crime under Article 8(2)(a) of the Statute and torture as a crime against humanity under customary international law. Under the latter, torture as defined can only be committed at the instigation of, or with the consent or acquiescence of, an official or a person acting in an official capacity for one of the following purposes – to obtain information or a confession, to punish, to intimidate or for any reason based on discrimination. The ICC Statute, in relation to crimes against humanity, defines torture without the requirement that it involve an official or a person acting in an official capacity and without the requirement that it be committed for a specific purpose.

In relation to war crimes, the Statute has also done away with the official capacity requirement. Nonetheless, the Statute requires that for a war crime to have been committed the torture must be executed for the specific purpose of furthering the war effort. As such, it must be linked to an armed conflict with the purpose of obtaining

information or a confession, or to punish, intimidate or for any reason based on discrimination.[129]

(c) Compelling someone to serve in the forces of a hostile power

Regarding the crime of compelling someone to serve in the forces of a hostile power, the act prohibited is to compel a person who is in the hands of a party of which he or she is not a national to serve in the armed forces of that party. This grave breach is contained in the list of Geneva Conventions III and IV and is therefore aimed at protecting detained persons – under these Conventions being prisoners of war and civilians – from being compelled to serve in the forces of a hostile power.[130]

(d) Unlawful deportation and taking hostages

The grave breaches of unlawful deportation and of taking hostages are breaches contained only in Geneva Convention IV; that is, these crimes as grave breaches under Article 8(2)(a) of the Rome Statute are crimes directed against the civilian population only.

(e) Protected persons or property

The chapeau of Article 8(2)(a) of the Rome Statute provides that grave breaches of the Geneva Conventions of 1949 are the acts enumerated in that provision "against persons or property protected under the provisions of the relevant Geneva Conventions".

In the case of Geneva Conventions I, II and III this means that the targeted persons must be members of the armed forces of a party to the international conflict. With respect to Geneva Convention IV, protected persons are civilians. In both cases there is the requirement that for 'protection' to subsist the persons must be "in the hands of a Party to the conflict or Occupying Power of which they are *not* nationals".

However, flexibility is given to the term 'national'. It does not mean that simply because a person has some nationality link to the party that is holding him or her that he or she therefore does not have protection. A person would still be protected if they were, for example, nationals of the belligerent party but refugees who no longer owed allegiance to or had diplomatic protection from that party. For example, the ICTY Appeals Chamber in *Tadic* regarded Bosnian Muslims as 'protected persons' in relation to their Bosnian Serb captors, even though they were together regarded as nationals of Bosnia and Herzegovina.[131]

The real crux of these persons being so identified as 'protected' is that for some reason or other they are not or are no longer taking a direct or active part in the hostilities. They are combatants who are considered *hors de combat* because of injury, shipwreck or illness, or because they have been taken as prisoners of war, or they are civilians.

---

129 See Kittichaisaree, note 3 above, pp 144-145. See also the Elements of Crimes for the war crime of torture. Note that if the person commits torture without the requisite purpose of furthering the war effort, he could still be guilty of a grave breach of the Geneva Conventions under the prohibition in the ICC Statute on "wilfully causing great suffering, or serious injury to body or health" (Article 8(2)(a)(iii)).

130 Michael Bothe, p 394 in Cassese, note 49 above.

131 See *Tadic*, Appeals Judgement, paras. 167-169.

The notion of 'protected property' is not defined in any of the Geneva Conventions but is generally regarded as property found in territories occupied by foreign forces. Such property, which would include medical units and establishments, medical transports and hospital ships, among others, may not be destroyed except in cases of military necessity.[132]

(f) Narrowness of application

Lastly, note the narrowness of application. The Geneva Conventions suggest that these 'grave breaches' can only be committed in a time of international armed conflict. The Rome Statute does not suggest otherwise. The Elements of Crimes makes it quite explicit that the 'grave breaches' war crimes are committed in an international armed conflict only. This follows the jurisprudence of the ICTY in *Tadic,* where it was accepted that the grave breaches regime applied only to international armed conflict, even though this was not stated in the Tribunal's Statute.

■ *Other serious violations of the laws and customs applicable in international armed conflict*

Article 8(2)(b) sets out the second category of war crimes, which are explicitly limited to *international* armed conflict. The 'serious violations of the laws and customs applicable in international armed conflict' are generally drawn from the law of The Hague. Unlike the focus of the grave breaches crimes under Article 8(2)(a), which aim to protect the innocent victims of war or those who are *hors de combat*, the general focus of the crimes under Article 8(2)(b) is on the combatants themselves. As a result, there is no requirement that the crimes must be directed against 'protected persons'. These crimes are a continuation of ancient rules of chivalry reflecting a code of conduct among warriors.[133] Having said that, there are certain rules contained in the list that have as their focus the protection of the civilian population and that are drawn from Additional Protocol I of 1977 of the Geneva Convention.

As a general overview, the "serious violations of the laws and customs applicable in international armed conflict" covered by Article 8(2)(b) of the Rome Statute include the following:

a) Prohibited methods of warfare:

These prohibitions serve to protect, in the first place, the civilian population against armed attacks 'as such'; that is, attacks directed against persons who are civilians,[134] attacks against civilian objects,[135] attacks that violate the principle of proportionality[136] and attacks against undefended places.[137] Civilians are also

132 Kittichaisaree, note 3 above, p 41.

133 Schabas, note 48 above, p 47.

134 Article 8(2)(b)(i).

135 Article 8(2)(b)(ii).

136 Article 8(2)(b)(iii), which prohibits an attack that is intentionally launched in the knowledge that it will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment that would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.

137 Article 8(2)(b)(v), such undefended places being defined as towns, villages, dwellings or buildings that are undefended and that are not military objectives.

protected against 'misuse', for instance, the use of civilians or protected persons as a means to render certain points or areas immune from military operations[138] and the starvation of civilians as a method of warfare are prohibited, as is any attack against objects indispensable to the survival of the civilian population.[139] Secondly, the 'destruction of property' is outlawed in that the destruction or seizing of the enemy's property is considered a war crime unless such destruction or seizure is imperatively demanded by the necessities of war.[140] Thirdly, the improper use of signs and perfidy is rendered a war crime.[141] Fourthly, combatants are protected under this section of the Rome Statute insofar as it is prohibited to kill or wound persons who are *hors de combat*.[142] Lastly, there is a prohibition placed on declaring that no quarter will be given; that is, ordering that there shall be no survivors, threatening an adversary therewith or conducting hostilities on this basis.[143]

b) Prohibited weapons

Several of the provisions of Article 8(2)(b) deal with prohibited weapons (for example, poison or poisoned weapons,[144] poisonous gases and all analogous liquids, materials or devices,[145] and dum-dum bullets[146]) and render their use a war crime. Note that the diplomatic realities at the Rome Conference prevented the most obviously damaging weapons, such as nuclear weapons and landmines, from being specifically included in the subsection. Nuclear weapons, for instance, were excluded on the insistence of the nuclear powers that "material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate" be the subject of a comprehensive prohibition included as an annex to the Statute, yet to be prepared.[147] Similarly, the give-and-take of diplomacy meant that other countries then demanded that biological and chemical weapons not be explicitly prohibited. Nevertheless, the use of nuclear weapons will always constitute a violation of humanitarian law, in particular those rules relating to the protection of the civilian

138 Article 8(2)(b)(xxiii), which prohibits utilising the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations.

139 Article 8(2)(b)(xxv): Intentionally starving civilians "as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions".

140 Article 8(2)(b)(xiii). Note that the crime of pillage, outlawed in Article 8(2)(b)(xvi) – and which involves an appropriation of property for private, personal use – must be distinguished from the *official* destruction or seizure of property prohibited under Article 8(2)(b)(xiii).

141 Article 8(2)(b)(vii) "Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury".

142 Article 8(2)(b)(vi).

143 Article 8(2)(b)(xii), as read with Article 40 of Additional Protocol I of 1977 – see Bothe, p 406, in Cassese, note 49 above.

144 Article 8(2)(b)(xvii).

145 Article 8(2)(b)(xviii).

146 Article 8(2)(b)(xix).

147 See Article 8(2)(b)(xx).

population, and so will be covered by Article 8(2)(b)(i),[148] (ii)[149] or (iv).[150] Likewise, the same arguments can be made in relation to the use of biological weapons.[151] And while not mentioned explicitly, chemical weapons appear to be outlawed under Article 8(2)(b)(xviii).[152]

(c) Child conscription

In addition to the provisions reflecting the Hague rules, there are some 'new crimes' under paragraph (b) that have now been codified by the drafters at Rome. They cover, for instance, the protection of humanitarian and peacekeeping missions[153] and prohibit environmental damage.[154] Another new war crime under the Statute is the conscription or enlistment of children under the age of fifteen into the national armed forces or using them to participate actively in hostilities.[155]

Possibly the most controversial of these 'new crimes', given the Israeli-Palestinian conflict, is that contained in Article 8(2)(b)(viii). In terms of this Article it is a war crime for an Occupying Power to transfer, directly or indirectly, parts of its own civilian population into the territory it occupies, or to deport or transfer all or parts of the population of the occupied territory within or outside this territory.

(d) Sexual crimes

Another development brought about by para. 8(2)(b) relates to sexual crimes. In terms of Article 8(2)(b)(xxii) it is a war crime to commit rape, sexual slavery, enforced prostitution, forced pregnancy,[156] enforced sterilisation or any other form of sexual violence also constituting a grave breach of the Geneva Conventions.[157] While the terms 'rape' and 'enforced prostitution' already appear in Geneva Convention IV and Protocol I, the outlawing of 'sexual slavery', 'forced pregnancy' and 'enforced sterilisation' are essentially new crimes. In addition, the broad prohibition of 'sexual

148 Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities.

149 Intentionally directing attacks against civilian objects, that is, objects that are not military objectives.

150 Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment that would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.

151 See Michael Bothe, in Cassese, note 49 above, pp 396-397. Landmines too might fall foul of the principle laid down by Article 8(2)(b)(iv) inasmuch as the use of landmines in a specific situation might arguably involve "knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects".

152 Michael Bothe, ibid, p 397.

153 See Article 8(2)(b)(iii), which prohibits intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.

154 See Article 8(2)(b)(iv).

155 Article 8(2)(b)(xxvi).

156 Which is defined in Article 7, paragraph 2(f) as "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".

157 Article 8(2)(b)(xxii).

violence' serves to catch those acts of a sexual nature that are not covered by the other acts mentioned in the paragraph.

Three criteria arise in relation to proving the crime of 'sexual violence'. (i) the misconduct complained of must involve an act of a sexual nature or causing a person to engage in such acts; (ii) the act must have a violent character (force, threat of force, other forms of coercion or taking advantage of an already existing coercive environment); and (iii) the conduct must be of a gravity comparable to that of a grave breach of the Geneva Conventions (an admittedly imprecise criterion).[158]

4.5.2 War crimes in times of non-international armed conflict

The next two categories of crimes under the Statute apply to non-international armed conflict. These crimes are far more controversial, at least historically. As early as 1949 States were prepared to recognise international legal obligations for war crimes committed between them (i.e. in times of international armed conflict). They were far more reluctant, though, when it came to internal armed conflict or civil war – which they considered to be their own business.

Did that mean that there were no protections in humanitarian law for victims of internal armed conflicts? No, most notably certain protections are set out in 'Common Article 3' of the Geneva Conventions (see Box 3.2).[159] Common Article 3 is the only article that makes reference to non-international armed conflict, and in the *Nicaragua* case[160] the International Court of Justice explained that it serves as a minimum rule of international humanitarian law to be imperatively applied to *all* types of armed conflicts.[161]

Box 3.2: Common Article 3 of the Geneva Conventions

Common Article 3 was a compromise provision included in the Geneva Conventions at the Diplomatic Conference that adopted them in 1949 and is common to and identically worded in all four of them. The Article proscribes the following acts, even when committed during non-international armed conflicts:

> "(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilized peoples".

158 See Michael Bothe, p 416, in Cassese, note 49 above.

159 Note that Common Article 3 applies to internal *armed conflicts* only; that is, it does not extend to mere internal strife, civil unrest or terrorist activity – Kittichaisaree, note 3 above, p 189.

160 'Military and Paramilitary Activities in and Against Nicaragua', 27 June 1986, *ICJ Reports* (1986), p 4.

161 Kittichaisaree, note 3 above, p 188.

Common Article 3 has achieved the status of a rule of customary international law, and Additional Protocol II of the Geneva Conventions attempted to expand its scope. Nonetheless, neither contains a provision on grave breaches in relation to non-international armed conflicts. In other words, while Common Article 3 and Protocol II contain primary protections applicable during armed conflicts of an internal nature, no secondary rules were set out stipulating that a violation of these protections would amount to a war crime, which would render the individual perpetrator punishable as such.

We have seen earlier that a momentous change was brought about in this regard by the *Tadic* decision of the ICTY Appeals Chamber. The Tribunal developed the concept of war crimes in times of non-international armed conflict by relying on the scope of application of the 'laws or customs of war' as a category of rules distinct from the 'grave breaches' regime set out under the Geneva Conventions.[162] This jurisprudential development was confirmed through the adoption by the Security Council of the Statute of the ICTR, which expressly recognises violations of Common Article 3 and Additional Protocol II as war crimes punishable under the jurisdiction of the Tribunal.

The ICC Statute reaffirms this trend and we see therefore that paragraphs (c) and (d) of Article 8 apply to non-international armed conflict as contemplated by Common Article 3, while paragraphs (e) and (f) apply to non-international armed conflict as extended in meaning by Additional Protocol II.

- *Violations of Common Article 3 of the Geneva Conventions*

  The criminal acts proscribed by this section are the Common Article 3 crimes of:

  - Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
  - Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
  - Taking of hostages;
  - The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all judicial guarantees that are generally recognised as indispensable.

As one noted commentator has explained, these standards or prohibitions represent a "common denominator of core human rights".[163]

- *Application of the prohibitions*

The prohibitions apply, as has already been explained, to armed conflicts 'not of an international character'. While the protections offered are thus applicable in conflicts of

162 It will be remembered that the Tribunal felt unable to condemn the accused for grave breaches of the Geneva Conventions – breaches that would have allowed the Tribunal to more comfortably punish the accused for war crimes since such breaches entailed at international law the idea of individual criminal responsibility – and accordingly the Tribunal had to consider whether humanitarian law rules beyond the scope of the grave breaches regime entailed individual criminal responsibility. This the Tribunal did by developing the concept of war crimes in non-international armed conflicts on the basis of customary international law rules relating to 'the laws or customs of war'.

163 Schabas, note 48 above, p 52.

an internal nature, the ICC Statute provides that these protections do not extend "to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature".[164] Internal disturbances and acts of terrorism that do not amount to an armed conflict are therefore not subject to the laws of armed conflict at all, although the State (but not the rebels) will be subject to the provisions of any human rights treaties to which it is a party.[165]

As a consequence, under the ICC Statute during 'internal disturbances and tensions', crimes that would otherwise have been outlawed under the principles of Common Article 3 are punishable as crimes against humanity, not war crimes, before the ICC.[166]

The prohibited acts listed under Article 8(2)(c) of the Rome Statute, like the 'grave breaches' in Article 8(2)(a), are acts that are committed against 'protected persons'. Such 'protected persons' are described in Article 8(2)(c) as "persons taking no active part in the hostilities [civilians], including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause".

- *Other serious violations of the laws and customs applicable in armed conflicts not of an international nature*[167]

  Protocol II of 1977 largely serves as the inspiration for the prohibitions contained in Article 8(2)(e) of the Rome Statute. Generally speaking, the prohibitions cover the following acts:

a) Prohibited methods and means of violence in armed conflict of an internal nature

Attacks against the civilian population 'as such' are prohibited as well as against individual civilians not taken direct part in the hostilities.[168]

In respect of combatants, there is a prohibition on "killing or wounding treacherously a combatant adversary",[169] on declaring that no quarter will be given,[170] or destroying or seizing the property of an adversary unless such destruction or seizure is imperatively demanded by the necessities of the conflict[171] and "pillaging a town or place, even when taken by assault".[172]

164 Article 8(2)(d).

165 See Christopher Greenwood, 'International Humanitarian Law: 2 The Conduct of Hostilities', pp 19-20, paper presented at the *European Training in Higher International Criminal Science Lectures* held at the European University Institute, Florence, 16-27 February 2004.

166 See Schabas, note 48 above, p 51.

167 Article 8(2)(e), ICC Statute.

168 Article 8(2)(e)(i).

169 Article 8(2)(e)(ix).

170 Article 8(2)(e)(x).

171 Article 8(2)(e)(xii).

172 Article 8(2)(e)(v). See the discussion above in note 140 on pillaging and its definition.

b) Prohibited attacks during an internal armed conflict on specially protected persons and objects

The following special protections are included under Article 8(2)(e):

- Intentional attacks directed against buildings, materials, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law, are prohibited.[173]
- Intentional attacks directed against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations are prohibited so long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.[174]
- Intentional attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected are prohibited, provided they are not military objectives.

c) Human rights violations during an internal armed conflict

The following provisions serve to protect against violations of human rights more generally:

- Article 8(2)(e)(xi) makes it a war crime to subject persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind that are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and that cause death to or seriously endanger the health of such person or persons.
- Article 8(2)(e)(vi) prohibits rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation and any other form of sexual violence also constituting a serious violation of Article 3 common to the Geneva Conventions.
- Article 8(2)(e)(vii) outlaws conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities.
- Article 8(2)(e)(viii) makes it a war crime to order the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand.

■ *Application of the prohibitions*

As with the Common Article 3 war crimes listed in Article 8(2)(c), the prohibitions contained in Article 8(2)(e) of the ICC Statute apply to armed conflicts not of an international character, but not "to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature".[175]

However, whereas the line above which the prohibitions in Article 8(2)(c) kick in is arguably very low (any armed conflict that amounts to *more than* an internal disturbance and tension such as riots, isolated and sporadic acts of violence or other acts of a similar

173 Article 8(2)(e)(ii).

174 Article 8(2)(e)(iii).

175 See the limitation contained in Article 8(2)(f).

nature), the application of the prohibitions in Article 8(2)(e) is more narrowly circumscribed by a positive definition of armed conflict in subparagraph (f). Article 8(2)(f) provides that for the purposes of this category of war crimes an armed conflict exists "whenever there is resort to armed force between States or protracted armed violence between governmental authorities and organised groups or between such groups within a State".[176] As such, for any of the war crimes to be committed listed in this subparagraph, there must be a 'protracted armed conflict' and these hostilities must take place between governmental authorities and 'organised armed groups', which are groups under responsible command and which exercise such control over a part of the territory to enable them to carry out sustained and concerted military operations.[177]

In effect, therefore, the prohibitions will become applicable in civil wars where both sides control tracts of territory. Note that Article 8(2)(f) does not limit application of the prohibitions in subparagraph (e) to protracted armed conflict between governmental authorities and organised armed groups. The Article specifically envisages the application of the prohibitions during armed conflict *between* such organised armed groups, and accordingly the conflicts between dissident groups such as those occurring in Somalia or in Lebanon would be covered, so long as the two rebel forces acquired sufficient control of territory to meet the requirements of Article 8(2)(f).[178]

4.6 *Mens rea* – war crimes

Having set out the broad categories of war crimes under the ICC Statute and how the particular war crimes are constituted, it remains to briefly consider the mental element required for a successful prosecution under Article 8.

According to Article 30 of the Statute, criminal responsibility for a war crime requires intent and knowledge: intent in relation to the conduct, namely, that the person means to engage in the conduct; and knowledge in relation to the consequence, namely, that the person means to cause that consequence or is aware that it will occur in the ordinary course of events.

Quite aside from this general rule regarding the mental element, it should be remembered that a preliminary matter for the prosecutor is to show that the act or omission was perpetrated not just during but in connection with an armed conflict.

The first point to note is that, as we have seen in the discussion of the war crimes under Article 8, certain of the crimes already entail the mental element of intention in their definition. For instance, Article 8(2)(a) on grave breaches includes 'wilful killing', and 'wilfully causing great suffering, or serious injury to body or health'. So too, Articles 8(2)(b) and 8(2)(e), on serious violations of the laws and customs applicable in international

176 This limitation is drawn from Article 1(1) of Additional Protocol II to the Geneva Conventions. See Christopher Greenwood, note 165 above, p 19.

177 See Michael Bothe, p 423, in Cassese, note 49 above, relying on the wording of Article 1(1) of Protocol II to define the term 'organised group' – the wording of Article 8(2)(f) follows closely the wording of Article 1(1) of Protocol II of 1977.

178 See Michael Bothe, ibid, p 423.

armed conflicts and non-international armed conflicts respectively, proscribe a range of attacks 'intentionally directed' against the civilian population, against specially protected buildings or against humanitarian assistance or peacekeeping missions. Article 8(2)(b) also prohibits 'intentionally' launching an attack in the knowledge that such an attack will, disproportionate to its military advantage, cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment, and 'intentionally' using starvation as a method of warfare by depriving civilians of objects indispensable to their survival, including wilfully impeding relief supplies.

It would be a mistake, however, to think that this makes the mental element of intention mentioned in Article 30 superfluous in relation to these categories of war crimes. The reference to intention in the definition of these crimes has an effect when it comes to the mental element relating to 'consequences of such crimes'. With all other war crimes it is enough if the actor had knowledge that the consequences of his conduct would occur in the ordinary course of events. However, where the particular war crime specifically includes intention in the definition, then not only must the actor have intended his unlawful conduct (for example, dropping the bomb, depriving civilians of food), proof must also be canvassed to show that he intended his consequences (for example, hitting the civilian target or causing the starvation of civilians).[179]

Secondly, while the prosecutor has the onus of showing that the threshold for war crimes exists, namely, that the specific war crime was committed in the context of and associated with an armed conflict, this does not mean that the prosecutor must prove that the perpetrator had knowledge – in the sense of legally evaluated knowledge – of whether or not there was an armed conflict, or whether it was international or national. The Elements of Crimes makes clear that "[t]here is only a requirement for the awareness of the factual circumstances that established the existence of an armed conflict that is implicit in the terms 'took place in the context of and was associated with'".[180]

179 See Bothe, ibid, p 389.

180 Elements of Crimes, Article 8, Introduction.