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First report on crimes against humanity

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Contents

I. Introduction

A. Inclusion of the topic in the Commission's programme of work

1. At its sixty-fifth session, in 2013, the International Law Commission decided to place the topic "Crimes against humanity" on its long-term programme of work.[1] After debate within the Sixth Committee in 2013,[2] the General Assembly took note of this development.[3] At its sixty-sixth session, in 2014, the Commission decided to move this topic onto its current programme of work and to appoint a Special Rapporteur. After debate within the Sixth Committee in 2014, the General Assembly took note of this step as well.[4]

B. Purpose and structure of the present report

2. The purpose of the present report is to address the potential benefits of developing draft articles that might serve as the basis of an international convention on crimes against humanity. Further, the report provides general background with respect to the emergence of the concept of crimes against humanity as an aspect of international law, its application by international courts and tribunals and its incorporation in the national laws of some States. Ultimately, the report proposes two draft articles: one on prevention and punishment of crimes against humanity and the other on the definition of such crimes.

3. Section II of this report assesses the potential benefits resulting from a convention on crimes against humanity, which, if adhered to by States, include promoting the adoption of national laws that contain a widely accepted definition of such crimes and that allow for a broad ambit of jurisdiction when an offender is present in territory under the jurisdiction of the State party. Such a convention could also contain provisions obligating States parties to prevent crimes against humanity, to cooperate on mutual legal assistance for the investigation and prosecution of such crimes in national courts and to extradite or prosecute alleged offenders. This section notes the reactions of States in 2013-2014 to the Commission's selection of this topic, which were largely favourable, but which in some instances raised questions about the relationship of such a convention to other treaty regimes.

4. Consequently, section II also considers the relationship of such a convention to other treaty regimes, notably the Rome Statute establishing the International Criminal Court.[5] The International Criminal Court stands at the centre of efforts to

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[1] See Report of the International Law Commission on the Work of Its Sixty-Fifth Session, U.N. GAOR, 68th Sess., Supp. No. 10, U.N. Doc. A/68/10, at 116, para. 170 and Annex B (2013).

[2] See Report of the International Law Commission on the Work of Its Sixty-Third and Sixty-Fifth Sessions: Topical Summary of the Discussion Held in the Sixth Committee of the General Assembly During Its Sixty-Eighth Session, Prepared by the Secretariat, U.N. Doc. A/CN.4/666, at 17-18, para. 72 (2014) (hereinafter "Topical Summary"); see also *infra* Part II(B).

[3] See G.A. Res. 68/112, para. 8 (Dec. 18, 2013).

[4] See Report of the International Law Commission on the Work of Its Sixty-Sixth Session, U.N. GAOR, 69th Sess., Supp. No. 10, U.N. Doc. A/69/10, at 247, para. 266 (2014) (hereinafter "2014 Report"); G.A. Res. 69/118, para. 7 (Dec. 10, 2014). For discussion of the debate in the Sixth Committee, see *infra* Part II(B).

[5] Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 (hereinafter "Rome Statute").

address genocide, crimes against humanity and war crimes, and is one of the signature achievements in the field of international law. With 122 States parties as at January 2015, the Rome Statute provides a critical means for investigating and prosecuting these crimes at the international level. A convention on crimes against humanity could help promote the investigation and prosecution of such crimes at the national level, thereby enhancing the complementarity system upon which the International Criminal Court is built, as well as promoting inter-State cooperation not addressed by the Rome Statute.

5. Section III of this report provides general background with respect to the emergence of crimes against humanity as a concept of international law, including its progression from a crime associated with international armed conflict to a crime that can occur whenever there is a widespread or systematic attack directed against a civilian population by means of certain heinous acts. Further, section III notes the existence and application of crimes against humanity by contemporary international criminal tribunals, including the International Criminal Court. As noted above, the Court is built upon the principle of complementarity, whereby in the first instance the relevant crimes should be prosecuted in national courts, if national authorities are able and willing to investigate and prosecute the crime. With that in mind, section III also considers whether States have adopted national laws on crimes against humanity; whether those laws coincide with the definition of these crimes contained in article 7 of the Rome Statute; and whether those laws provide the State with the means to exercise jurisdiction over crimes occurring in its territory, crimes committed by its nationals, crimes that harm its nationals and/or crimes committed abroad by non-nationals against non-nationals in situations where the offender is present in the State's territory.

6. Section IV notes that a wide range of existing multilateral conventions can serve as potential models for a convention on crimes against humanity, including those that promote prevention, criminalization and inter-State cooperation with respect to transnational crimes. Such conventions address offences such as genocide, war crimes, State-sponsored torture, enforced disappearance, transnational corruption and organized crime, crimes against internationally protected persons and terrorism-related offences. Likewise, multilateral conventions on extradition, mutual legal assistance and statutes of limitation can provide important guidance with respect to those issues.

7. Section V assesses the general obligation that exists in various treaty regimes for States to prevent and punish crimes. Since the obligation to punish is to be addressed in greater detail in subsequent draft articles, this part focuses on the obligation to prevent as it exists in numerous multilateral treaties, and considers the contours of such an obligation as discussed in the comments of treaty bodies, United Nations resolutions, case law and the writings of publicists. In light of such information, section V proposes an initial draft article that broadly addresses "prevention and punishment of crimes against humanity".

8. Section VI turns to the definition of "crimes against humanity" for the purpose of the present draft articles. Article 7 of the Rome Statute marks the culmination of almost a century of development of the concept of crimes against humanity and expresses the core elements of the crime. In particular, the crime involves a "widespread or systematic attack"; an attack "directed against any civilian population", which means a course of conduct "pursuant to or in furtherance of a

State or organizational policy to commit such attack"; a perpetrator who has "knowledge of the attack"; and an attack that occurs by means of the multiple commission of certain specified acts, such as murder, torture or rape. Contemporary case law of the International Criminal Court is refining and clarifying the meaning of such terms, relying to a degree on the jurisprudence of earlier tribunals. In recognition that the definition contained in article 7 of the Rome Statute is now widely accepted among States, and out of a desire to promote harmony between national and international efforts to address the crime, the proposed draft article uses the exact same definition of "crimes against humanity" as appears in article 7, except for three non-substantive changes that are necessary given the different context in which the definition is being used (such as replacing references to "Statute" with "present draft articles").

9. Finally, section VII briefly addresses the future programme of work on this topic.

II. Why a convention on crimes against humanity?

A. Objectives of a convention on crimes against humanity

10. As noted in the proposal for the topic adopted by the Commission at its sixty-fifth session in 2013, in the field of international law three core crimes generally make up the jurisdiction of international criminal tribunals: war crimes; genocide; and crimes against humanity. Only two of these crimes (war crimes and genocide) are the subject of a global treaty that requires States to prevent and punish such conduct and to cooperate among themselves toward those ends. By contrast, there is no such treaty dedicated to preventing and punishing crimes against humanity.

11. Yet crimes against humanity may be more prevalent than either genocide or war crimes. Such crimes may occur in situations not involving armed conflict and do not require the special intent that is necessary for establishing genocide.[6] Moreover, treaties focused on prevention, punishment and inter-State cooperation exist for many far less egregious offences, such as corruption, bribery or organized crime. While some treaties address offences, such as State-sponsored torture or enforced disappearance of persons, which under certain conditions might also constitute crimes against humanity, those treaties do not address crimes against humanity as such.

12. As such, a global convention on prevention, punishment and inter-State cooperation with respect to crimes against humanity appears to be a key missing piece in the current framework of international law and, in particular, international humanitarian law, international criminal law and international human rights law.

[6] See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2015, para. 139 (hereinafter *2015 Croatia v. Serbia Genocide Judgment*) ("The Court recalls that, in 2007, it held that the intent to destroy a national, ethnic, racial or religious group as such is specific to genocide and distinguishes it from other related criminal acts such as crimes against humanity and persecution.") (citing to *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v. Serbia & Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43, at paras. 187-188 (hereinafter *2007 Bosnia & Herzegovina v. Serbia & Montenegro Genocide Judgment*)).

Such a convention could help to stigmatize such egregious conduct, could draw further attention to the need for its prevention and punishment and could help to adopt and harmonize national laws relating to such conduct, thereby opening the door to more effective inter-State cooperation on prevention, investigation, prosecution and extradition for such crimes. In building a network of cooperation, as has been done with respect to other offences, sanctuary would be denied to offenders, thereby — it is hoped — helping both to deter such conduct *ab initio* and to ensure accountability *ex post*.[7]

13. Hence, the overall objective for this topic will be to draft articles for what could become a convention on the prevention and punishment of crimes against humanity (hereinafter "convention on crimes against humanity" or "convention"). Using the definition of crimes against humanity embodied in the Rome Statute, the convention could require all States parties to take effective measures to prevent crimes against humanity in any territory under their jurisdiction. One such measure would be for States parties to criminalize the offence in its entirety in their national law, a step that most States have not yet taken. Further, the convention could require each State party to exercise jurisdiction not just with respect to acts that occur on its territory or by its nationals, but also with respect to acts committed abroad by non-nationals who later are present in territory under the State party's jurisdiction.

14. Moreover, the convention could require robust inter-State cooperation by the parties for investigation, prosecution and punishment of the offence, including through the provision of mutual legal assistance and extradition. The convention could also impose an *aut dedere aut judicare* obligation when an alleged offender is present in territory under a State party's jurisdiction. The convention could also contain other relevant obligations, such as an obligation for compulsory dispute settlement between States parties whenever a dispute arises with respect to the interpretation or application of the convention.

15. The convention would not address other serious crimes, such as genocide or war crimes, which are already the subject of widely-adhered-to global treaties relating to their prevention and punishment. An argument can be made that existing global treaties on genocide and war crimes could be updated through a new instrument, and there is support among some States[8] and non-State actors[9] for an

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[7] For calls within the academic community for such a convention, see M.C. Bassiouni, "'Crimes against Humanity': The Need for a Specialized Convention," *Columbia J. of Transnat'l L.*, vol. 31, p. 457 (1994); M.C. Bassiouni, "Crimes against Humanity: the Case for a Specialized Convention," *Washington University Global Studies L. Rev.*, vol. 9, p. 575 (2010); L. Sadat (ed.), *Forging a Convention for Crimes against Humanity* (Cambridge University Press, 2011) (completed as part of an initiative of the Whitney R. Harris World Law Institute at Washington University in St. Louis); M. Bergsmo & T. Song (eds.), *On the Proposed Crimes Against Humanity Convention* (Torkel Opsahl Academic EPublisher, 2014).

[8] See "Towards a Multilateral Treaty for Mutual Legal Assistance and Extradition for Domestic Prosecution of the Most Serious International Crimes," a non-paper informally circulated by Argentina, Belgium, The Netherlands, and Slovenia at the Sixth Committee in November 2013. A resolution on this initiative was presented before the UN Conference on Crime Prevention and Criminal Justice (CCPCJ), but was withdrawn after extensive debate in the Committee of the Whole, where several delegations raised "serious concerns" regarding the competence of the CCPCJ in this matter. See CCPCJ Report on the Twenty-Second Session (7 December 2012 and 22-26 April 2013), Official Records of the Economic and Social Council, Supp. No. 10, U.N. Doc. E/2013/30, paras. 64-66 (2013).

[9] See M. Zgonec-Rožej and J. Foakes, *International Criminals: Extradite or Prosecute?*, Chatham House Briefing Paper No. IL BP 2013/01, at 16 (July 2013).

expanded initiative of that kind. Bearing in mind that several States have suggested that work on this topic should complement rather than overlap with existing legal regimes,[10] the present topic focuses on the most prominent gap in such regimes, where the need for a new instrument appears the greatest. The Commission, of course, remains open to the views of States and others as it proceeds with this topic, and ultimately it will be for States to decide whether the scope of the Commission's work is optimal.

B. Reactions by States

16. In the course of the debate within the Sixth Committee in the fall of 2013, several delegations supported adding the topic of crimes against humanity to the Commission's agenda,[11] and noted the value of having such a convention. For example, the Nordic countries indicated that:

> [R]obust inter-State cooperation for the purposes of investigation, prosecution and punishment of these crimes is crucial, as is the obligation to extradite or prosecute alleged offenders, regardless of their nationality. It is therefore important that the Commission's work on Crimes against humanity include a legal analysis of the obligation to extradite or prosecute. Moreover, it is equally important that clear principles on the latter be identified. Additional clarity on the scope of application of this obligation would help to ensure maximum effect and compliance with existing rules.[12]

17. At the same time, other delegations cautioned that such a convention must be addressed in a prudent manner,[13] with a particular emphasis on avoiding any conflicts with existing international regimes, including the International Criminal Court.[14] A few delegations expressed doubts about whether a convention on this

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[10] See, e.g., Topical Summary, *supra* note 2, at 18, para. 72.

[11] Austria (A/C.6/68/SR.17, para. 74); Czech Republic (A/C.6/68/SR.18, para. 102); Italy (A/C.6/68/SR.19, para. 10); Japan (*available at* https://papersmart.unmeetings.org/media2/703457/japan-part-1.pdf); Mongolia (A/C.6/68/SR.19, para. 79); Denmark, Finland, Iceland, Norway and Sweden (per Norway, A/C.6/68/SR.17, para. 36); Peru (A/C.6/68/SR.18, para. 28); United States (A/C.6/68/SR.17, para. 51).

[12] Statement to the Sixth Committee by Norway on behalf of the Nordic Countries, at 5 (Oct. 28, 2013), *available at* https://papersmart.unmeetings.org/media2/703463/norway-part-1.pdf.

[13] China (A/C.6/68/SR.19, para. 61); India (*ibid.*, para. 21); Malaysia (*ibid.*, para. 33); Romania (A/C.6/68/SR.18, para. 116); Spain (A/C.6/68/SR.17, para. 133); United Kingdom (A/C.6/68/SR.18, para. 22).

[14] See, e.g., Statement to the Sixth Committee by Malaysia, para. 3 (Oct. 30, 2013), *available at* https://papersmart.unmeetings.org/media2/703723/malaysia-rev.pdf ("Malaysia is of the view that the study should not undermine the intended universality of the Rome Statute. In addition, any further work on this should not overlap with existing regimes, but rather to complement it."); Statement to the Sixth Committee by the United Kingdom (Oct. 28-30, 2013), *available at* https://papersmart.unmeetings.org/media2/703573/uk-rev.pdf (stressing "that any new conventions in this area must be consistent with and complementary to the ICC Statute"); Statement to the Sixth Committee by Spain, at 2 (Oct. 28, 2013), *available at* https://papersmart.unmeetings.org/media2/703785/spain-e.pdf ("should [this ILC topic] be undertaken, it will require a careful analysis both of the specific limitation aspects to be included in the relevant Convention and, particularly, its precise relationship with the Rome Statute and the role of the International Criminal Court without overstepping their provisions."); Statement to the Sixth Committee by Norway (on behalf of the Nordic countries), *supra* note 12:

topic was really needed,[15] while a few others supported the drafting of a new convention but with a scope wider than crimes against humanity.[16]

18. Most of the 23 States that addressed the issue before the Sixth Committee in the fall of 2014 welcomed the inclusion of this topic on the Commission's current programme of work.[17] Three States did not expressly support the topic, but acknowledged that a gap exists in current treaty regimes with respect to crimes against humanity, which can benefit from further study,[18] while yet another State maintained that the topic should be "treated with great caution".[19] Four States, however, expressed the view that there exists no lacuna in the existing international law framework in relation to crimes against humanity, given the existence of the Rome Statute.[20] Finally, two States favoured pursuing a new convention, but in an alternative forum and with an alternative approach that would emphasize a wider range of crimes, but for narrower purposes limited to extradition and mutual legal assistance.[21]

19. In commenting favourably, States mentioned that work on this topic would help develop international criminal law[22] and would build upon the Commission's prior work,[23] such as by considering how an extradite-or-prosecute regime might operate for crimes against humanity.[24] At the same time, several States expressed the view that work on this topic must avoid conflicts with existing legal instruments, notably the Rome Statute.[25] On balance, the views of Governments at present appear to be that there is value in developing a new convention, but that it must be pursued carefully, with particular attention to its relationship to existing international regimes, especially the Rome Statute.

> [W]hile development on this topic towards a further operationalization of the recognition of a duty of prevention and obligations of inter-state cooperation is highly welcome, the Nordic states underline that no such obligations can be construed so as to limit either already existing, similar obligations vis-à-vis other crimes, or already existing legal obligations in this field.

[15] France (A/C.6/68/SR.17, para. 106); Iran (Islamic Republic of) (*available at* https://papersmart.unmeetings.org/media2/1156427/iran.pdf, at 7); Russian Federation (A/C.6/68/SR.19, para. 56); South Africa (A/C.6/68/SR.18, paras. 51-58).

[16] Netherlands (A/C.6/68/SR.18, para. 37); Slovenia (A/C.6/68/SR.21, para. 56).

[17] Austria (A/C.6/69/SR.19, para. 111); Croatia (A/C.6/69/SR.20, paras. 92-93); Czech Republic (*ibid*., para. 10); El Salvador (*ibid*., para. 91); Finland on behalf of the Nordic countries (A/C.6/69/SR.19, para. 81); Israel (A/C.6/69/SR.20, para. 67); Jamaica (A/C.6/69/SR.27, para. 33); Japan (A/C.6/69/SR.20, para. 49); Republic of Korea (A/C.6/69/SR.21, para. 45); Mongolia (A/C.6/69/SR.24, para. 94); New Zealand (A/C.6/69/SR.21, para. 33); Poland (A/C.6/69/SR.20, para. 36); Spain (A/C.6/69/SR.21, para. 42); Trinidad and Tobago (A/C.6/69/SR.26, para. 118); United States (A/C.6/69/SR.20, para. 121).

[18] Chile (A/C.6/69/SR.24, para. 52); Italy (A/C.6/69/SR.22, para. 53); United Kingdom (A/C.6/69/SR.19, para. 160).

[19] Romania (A/C.6/69/SR.19, para. 147).

[20] France (A/C.6/69/SR.22, para. 37); Malaysia (A/C.6/69/SR.27, para. 54); Netherlands (A/C.6/69/SR.20, paras. 15-16); South Africa (*ibid*., para. 114).

[21] The Netherlands (A/C.6/69/SR.20, paras. 15-17); Ireland (A/C.6/69/SR.19, para. 177).

[22] Croatia (A/C.6/69/SR.20, para. 94); Japan (*ibid*., para. 49).

[23] Croatia (*ibid*., paras 94-97); Czech Republic (*ibid*., para. 10).

[24] Chile (A/C.6/69/SR.24, para. 52); Finland (on behalf of the Nordic countries) (A/C.6/69/SR.19, para. 82); United Kingdom (*ibid*., para. 159).

[25] Chile (A/C.6/69/SR.24, para. 52); Italy (A/C.6/69/SR.22, para. 53); Mongolia (A/C.6/69/SR.24, paras 94-95); Romania (A/C.6/69/SR.19, para. 147;) Trinidad and Tobago (A/C.6/69/SR.26, para. 118); United Kingdom (A/C.6/69/SR.19, para. 160).

C. Relationship of a convention on crimes against humanity to other treaties, including the Rome Statute

20. The relationship of a convention on crimes against humanity to other treaties is an extremely important issue that will guide the Commission in its work. Many of the acts that fall within the scope of crimes against humanity (when they are done as part of a widespread or systematic attack directed against a civilian population) are also acts addressed in existing treaty regimes, such as the 1948 Convention on the Prevention and Punishment of the Crime of Genocide[26] and the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[27] A convention on crimes against humanity should build upon the text and techniques of relevant existing treaty regimes, but should also avoid any conflicts with those regimes.

21. In particular, a convention on crimes against humanity should avoid any conflicts with the Rome Statute. Certainly the drafting of a new convention should draw upon the language of the Rome Statute, as well as associated instruments and jurisprudence, whenever appropriate. But the new convention should avoid any conflicts with the Rome Statute, given the large number of States that have adhered to it. For example, in the event that a State party to the Rome Statute receives a request from the International Criminal Court for the surrender of a person to the Court and also receives a request from another State for extradition of the person pursuant to the proposed convention, article 90 of the Rome Statute provides a procedure to resolve the competing requests. The draft articles should be crafted to ensure that States parties to the Rome Statute can follow that procedure even after joining the convention on crimes against humanity. Moreover, in several ways the adoption of a convention could promote desirable objectives not addressed in the Rome Statute, while simultaneously supporting the mandate of the International Criminal Court.

22. First, the Rome Statute regulates relations between its States parties and the International Criminal Court, but does not regulate matters among the parties themselves (nor among parties and non-parties). In other words, the Rome Statute is focused on the "vertical" relationship of States to the International Criminal Court, but not the "horizontal" relationship of inter-State cooperation. Part 9 of the Rome Statute on "International Cooperation and Judicial Assistance" implicitly acknowledges that inter-State cooperation on crimes within the jurisdiction of the International Criminal Court should continue to operate outside the Rome Statute, but does not direct itself to the regulation of that cooperation. A convention on crimes against humanity could expressly address inter-State cooperation on the investigation, apprehension, prosecution and punishment in national legal systems of persons who commit crimes against humanity,[28] an objective fully consistent with the Rome Statute's object and purpose.

23. Second, the International Criminal Court is focused upon punishment of persons for the crimes within its jurisdiction, not upon steps that should be taken by

[26] Dec. 9, 1948, 78 U.N.T.S. 1021 (hereinafter Genocide Convention).

[27] Dec. 10, 1984, 1465 U.N.T.S. 85 (hereinafter Convention against Torture).

[28] See L. Olson, "Re-enforcing Enforcement in a Specialized Convention on Crimes Against Humanity: Inter-State Cooperation, Mutual Legal Assistance, and the *Aut Dedere Aut Judicare* Obligation," in L. Sadat (ed.), *Forging a Convention for Crimes against Humanity*, *supra* note 7, p. 323.

States to prevent such crimes before they happen. As discussed in greater detail in section V below, a new convention on crimes against humanity could include obligations relating to prevention that draw upon comparable obligations in other treaties, such as the Genocide Convention and the Convention against Torture. As such, a convention on crimes against humanity could clarify a State's obligation to prevent crimes against humanity and provide a basis for holding States accountable in that regard.

24. Third, while the International Criminal Court is a key international institution for prosecution of high-level persons who commit these crimes, the Court was not designed (nor given the resources) to prosecute all persons responsible for crimes against humanity. Rather, the Court is predicated on the notion that, in the first instance, national jurisdictions are the proper place for prosecution in the event that appropriate national laws are in place (the principle of complementarity).[29] Further, in some circumstances the Court may wish to transfer a suspect in its custody for prosecution in a national jurisdiction, but may be unable to do so if the national jurisdiction is not capable of charging the suspect with crimes against humanity.[30] Given that the Court does not have the capacity to prosecute all persons responsible for crimes against humanity, or to strengthen national legal systems in this regard, a new convention could help reinforce the Court by developing greater capacity at the national level for prevention and punishment of such crimes.[31]

25. Fourth, and relatedly, a convention on crimes against humanity would require the enactment of national laws that criminalize crimes against humanity, something which, as discussed in section II, currently many States have not done, including many States parties to the Rome Statute. In particular, a convention could require States to exercise jurisdiction over an offender present in its territory even when the offender is a non-national and committed the crime abroad.[32] Upon joining the convention, States without such laws would be expressly obliged to enact them. States with such laws would be obliged to review them to determine whether they encompass the full range of heinous conduct covered by the convention, and allow for the exercise of jurisdiction over offenders.

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[29] M. El Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (Martinus Nijhoff, 2008); J. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (Oxford, 2008).

[30] Such circumstances arose, for example, before the International Criminal Tribunal for Rwanda in the *Bagaragaza* case. See *Prosecutor v. Bagaragaza*, Appeals Chamber, Decision on Rule 11*bis* Appeal, Case No. ICTR-05-86-AR11*bis*, para. 18 (Aug. 30, 2006) ("the Appeals Chamber cannot sanction the referral of a case to a jurisdiction for trial where the conduct cannot be charged as a serious violation of international humanitarian law").

[31] See Statement to the Sixth Committee by Austria, at 5 (Oct. 28, 2013), *available at* https://papersmart.unmeetings.org/media2/703455/austria-part-1.pdf ("The Rome Statute of the International Criminal Court certainly cannot be the last step in the endeavor to prosecute such crimes and to combat impunity. The Court is only able to deal with a few major perpetrators, but this does not take away the primary responsibility of states to prosecute crimes against humanity.").

[32] See P. Akhavan, "The Universal Repression of Crimes against Humanity before National Jurisdictions: The Need for a Treaty-Based Obligation to Prosecute," in L. Sadat (ed.), *Forging a Convention for Crimes against Humanity*, *supra* note 7, p. 28, at 31 (noting that "whatever implicit duty to prosecute may arguably exist [in the Rome Statute] does not extend to universal jurisdiction" and that, as of 2009, only eleven European Union and eight African Union States have enacted laws allowing for such jurisdiction with respect to crimes against humanity).

26. As such, rather than conflict with other treaty regimes, a well-designed convention on crimes against humanity could help fill a gap[33] in existing treaty regimes and, in doing so, simultaneously reinforce those regimes.

III. Background to crimes against humanity

A. Concept of crimes against humanity

27. The concept of "crimes against humanity" is generally seen as having two broad features. First, the crime is so heinous that it is viewed as an attack on the very quality of being human.[34] Second, the crime is so heinous that it is an attack not just upon the immediate victims, but also against all humanity, and hence the entire community of humankind has an interest in its punishment. It has been noted:

> Whilst rules proscribing war crimes address the criminal conduct of a perpetrator towards an immediate protected object, rules proscribing crimes against humanity address the perpetrator's conduct not only towards the immediate victim but also towards the whole of humankind … Because of their heinousness and magnitude they constitute egregious attacks on human dignity, on the very notion of humaneness. They consequently affect, or should affect, each and every member of mankind, whatever his or her nationality, ethnic group and location.[35]

28. As discussed below, the concept "crimes against humanity" has evolved over the past century, with watershed developments in the Charter of the International Military Tribunal (Nuremberg Charter) and the Charter of the International Military Tribunal for the Far East (Tokyo Charter), and important refinements in the statutes and case law of contemporary international criminal tribunals, including the International Criminal Court.[36] Although the codification and application of the

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[33] See, e.g., Statement to the Sixth Committee by Slovenia, at 7 (Oct. 30, 2013), *available at* https://papersmart.unmeetings.org/media2/703847/slovenia.pdf ("This legal gap in the international law has been recognised for some time and is particularly evident in the field of State cooperation, including mutual legal assistance and extradition. We believe all efforts should be directed at filling this gap.")

[34] Hannah Arendt characterized the Holocaust as a "new crime, the crime against humanity — in the sense of a crime 'against human status,' or against the very nature of mankind." H. Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, at 268 (Viking Press, 1965).

[35] *Prosecutor v. Erdemović*, Appeals Chamber, Judgment, ICTY Case No. IT-96-22-A, para. 21 (Oct. 7, 1997) (hereinafter "*Erdemović 1997*") (Joint Separate Opinion of Judges McDonald and Judge Vohrah); see D. Luban, "A Theory of Crimes against Humanity," *Yale J. of Int'l L.*, vol. 29, at 85, para. 90 (2004) ("We are creatures whose nature compels us to live socially, but who cannot do so without artificial political organization that inevitably poses threats to our well-being, and, at the limit, to our very survival. Crimes against humanity represent the worst of those threats; they are the limiting case of politics gone cancerous."); see also R. Vernon, "What is Crime against Humanity?", *J. of Pol. Phil.*, vol. 10, p. 231 (2002); C. Macleod, "Towards a Philosophical Account of Crimes against Humanity," *European J. of Int'l L.*, vol. 21, p. 281 (2010).

[36] See generally B. Ricci, *Crimes against Humanity: A Historical Perspective* (iUniverse, 2004); O. López Goldaracena, *Derecho internacional y crímenes contra la humanidad* (Asociación Americana de Juristas, 2006); P. Parenti (ed.), *Los crímenes contra la humanidad y el genocidio en el derecho internacional: origen y evolución de las figuras, elementos típicos, jurisprudencia internacional* (Ad-Hoc, 2007); M.C. Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application* (Cambridge University Press, 2011); N. Geras, *Crimes against Humanity: Birth of a Concept* (Manchester University Press, 2011).

crime has led to some doctrinal divergences, the concept contains several basic elements that are common across all formulations of the crime. The crime is an international crime; it matters not whether the national law of the territory in which the act was committed has criminalized the conduct. The crime is directed against a civilian population and hence has a certain scale or systematic nature that generally extends beyond isolated incidents of violence or crimes committed for purely private purposes. The crime can be committed within the territory of a single State or can be committed across borders. Finally, the crime concerns the most heinous acts of violence and persecution known to humankind. A wide range of scholarship has analysed these various elements.[37]

[37] E. Schwelb, "Crimes against Humanity," *British Yearbook of International Law*, vol. 23, p. 181 (1946); J. Dautricourt, "Crime against Humanity: European Views on its Conception and its Future," *J. of Crim. L. and Criminology*, vol. 40, p. 170 (1949); J. Graven, "Les Crimes contre l'Humanité," *Recueil des Cours*, vol. 1950-I, p. 433 (1950); E. Aronéanu, *Le Crime Contre l'Humanité* (Dalloz, 1961); P. Ramella, *Crímenes contra la humanidad* (Ediciones Depalma, 1986); P. Ramella, *Crimes contra a humanidade* (Forense, 1987); P. Sturma, "Knávrhu kodexu zlocinu proti míru a bezpecnosti lidstva," *Praìvniìk*, vol. 128 (9/10), p. 879 (1989); G. Richard (ed.), *L'Histoire Inhumaine: Massacres et Génocides des Origines à Nos Jours* (A. Colin, 1992); M. Delmas-Marty et al., "Le crime contre l'humanité, les droits de l'homme et l'irréductible humain," *Revue de Science Criminelle et de Droit Pénal Comparé*, vol. 11, p. 477 (1994); A. Becker, *Der Tatbestand des Verbrechens gegen die Menschlichkeit – Überlegungen zur Problematik eines völkerrechtlichen Strafrechts* (Duncker & Humblot, 1996); Y. Dinstein, "Crimes against Humanity," in J. Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century, Essays in Honor of Krzysztof Skubiszewski*, p. 891 (Kluwer, 1996); M. Lippman, "Crimes Against Humanity," *Boston College Third World L. Rev.*, vol. 17, p. 171 (1997); S. Chalandon & P. Nivelle, *Crimes contre l'Humanité: Barbie, Bouvier, Bousquet, Capon* (Plon, 1998); B. Van Schaack, "The Definition of Crimes Against Humanity: Resolving the Incoherence," *Columbia J. Transnat'l L.*, vol. 37, p. 787 (1999); M.C. Bassiouni, *Crimes against Humanity in International Law* (Kluwer, 2d ed. 1999); J. Bazelaire & T. Cretin, *La justice internationale, son évolution, son avenir, de Nuremberg à La Haye* (Presses Universitaires de France, 2000); A. Gil Gil, *Zeitschrift für die gesamte Strafrechtswissenschaft*, vol. 112, p. 381 (2000); E. Greppi, *I crimini di guerra e contro l'umanità nel diritto internazionale* (UTET, 2001); K. Kittichaisaree, *International Criminal Law*, p. 85 (2001); Y. Jurovics, *Réflexions sur la spécificité du crime contre l'humanité* (LGDJ, 2002); F. Palombino, "The Overlapping between War Crimes and Crimes against Humanity in International Criminal Law," *Italian Y.B. Int'l L.*, vol. 12, p. 123 (2002); A. Cassese, "Crimes against Humanity," in A. Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, p. 375 (Oxford University Press, 2002); M. Lattimer and P. Sands (eds.), *Justice for Crimes against Humanity* (Hart Publishing, 2003); G. Manske, *Verbrechen gegen die Menschlichkeit als Verbrechen an der Menschheit* (Duncker & Humblot, 2003); A. Romero Mendoza (ed.), *Crímenes de lesa humanidad: un enfoque venezolano* (El Nacional, 2004); S. Meseke, *Der Tatbestand der Verbrechen gegen die Menschlichkeit nach dem Römischen Statut des IStGH* (Berliner Wissenschafts-Verlag, 2004); K. Ambos, *Estudios de derecho penal internacional*, p. 303 (Universidad Católica Andrés Bello, 2005); D.L. Shelton (ed.), *Encyclopedia of Genocide and Crimes against Humanity* (Macmillan Reference, 2005); L. May, *Crimes against Humanity: A Normative Account* (Cambridge University Press, 2005); M Capellà i Roig, *La tipificación internacional de los crímenes contra la humanidad* (Tirant lo Blanch, 2005); L. Moir, "Crimes against Humanity in Historical Perspective," *N.Z. Y.B. Int'l L.*, vol. 3, p. 101 (2006); K. Ambos and S. Wirth, "El Derecho Actual sobre Crímenes en Contra de la Humanidad," in K. Ambos (ed.), *Temas de Derecho Penal Internacional y Europeo*, p. 167 (Pons, 2006); R. C. Slye, "Refugee Jurisprudence, Crimes against Humanity, and Customary International Law," in A.F. Bayefsky (ed.), *Human Rights and Refugees, Internally Displaced Persons and Migrant Workers* (2006); A. Cassese, *International Criminal Law*, p. 98 (Oxford University Press, 2nd ed. 2008); M. del Carmen Márquez Carrasco, *El proceso de codificación y desarrollo progresivo de los crímenes contra la humanidad* (Universidad de Sevilla,

B. Historical emergence of the prohibition of crimes against humanity

29. An important forerunner of the concept of "crimes against humanity" is the "Martens clause" of the Convention with Respect to the Laws and Customs of War on Land and the Convention respecting the Laws and Customs of War on Land (1899 and 1907 Hague Conventions), the latter of which made reference to the "laws of humanity and the … dictates of public conscience" when crafting protections for persons in time of war.[38] That clause is typically understood as indicating that, until there exists a comprehensive codification of the laws of war, principles of "humanity" offer residual protection.[39]

30. The Hague Conventions addressed conduct occurring in inter-State armed conflicts, not violence by a Government directed against its own people. In the aftermath of the First World War, further thought was given to whether international law regulated atrocities inflicted domestically by a Government. In 1919, a

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Secretariado de Publicaciones, 2008); C. Eboe-Osuji, "Crimes against Humanity: Directing Attacks against a Civilian Population," *African J. of Legal Stud.*, vol. 2, p. 188 (2008); A. Morlachetti, "Imprescriptibilidad de los Crímenes de Lesa Humanidad," in H. Romero Villanueva, *La Prescripción Penal*, p. 137 (Abeledo Perrot, 2008); M. Delmas-Marty et al., *Le crime contre l'humanité* (Presses Universitaires de France, 2009); J. Doria, "Whether Crimes against Humanity Are Backdoor War Crimes," in J. Doria et al. (eds.), *The Legal Regime of the International Criminal Court: Essays in Honor of Professor Igo Blishchenko*, p. 645 (Martinus Nijhoff Publishers, 2009); S. Kirsch, *Der Begehungszusammenhang der Verbrechen gegen die Menschlichkeit* (Peter Lang, 2009); S. Kirsch, "Two Kinds of Wrong: On the Context Element of Crimes against Humanity," *Leiden J. of Int'l L.*, vol. 22, p. 525 (2009); B. Kuschnik, *Der Gesamttatbestand des Verbrechens gegen die Menschlichkeit: Herleitungen, Ausprägungen, Entwicklungen* (Duncker & Humblot, 2009); S. Garibian, *Le crime contre l'humanité, au regard des principes fondateurs de l'Etat moderne* (Schulthess Verlag, 2010); E. Amati, "I Crimini contro l'Umanità," in E. Amati et al. (eds.), *Introduzione al Diritto Penale Internazionale*, p. 411 (Giuffrè, 2d ed. 2010); W. van der Wolf (ed.), *Crimes Against Humanity and International Law* (International Courts Association, 2011); L. van den Herik, "Using Custom to Reconceptualize Crimes Against Humanity," in S. Darcy and J. Powderly (eds.), *Judicial Creativity at the International Criminal Tribunals* (2010); M. DeGuzman, "Crimes against Humanity," in B. Brown (ed.), *Research Handbook on International Criminal Law*, p. 62 (Edgar Elgar Publishing, 2011); G. Acquaviva & F. Pocar, "Crimes against Humanity," *Max Planck Encyclopedia of Public International Law*, vol. II, p. 855 (2012); J. Dondé Matute, *Tipos Penales en el Ámbito Internacional*, p. 97 (Instituto Nacional de Ciencias Penales, 2d ed. 2012); M. Bettati, "Le crime contre l'humanité," in H. Ascensio et al. (eds.), *Droit international pénal*, p. 103 (Pedone, 2d ed. 2012); H.D. Bosly & D. Vandermeersch, *Génocide, crimes contre l'humanité et crimes de guerre face à la justice* (LGDJ, 2012); P.M. Dhena, *Droit d'ingérence humanitaire et normes internationales impératives: Essai sur les crimes de guerre, crimes contre l'humanité et crime de génocide* (l'Harmattan, 2012); C. Focarelli, *Diritto Internazionale*, vol. I, p. 485 (CEDAM, 2d ed. 2012); A. Valencia Villa, "Los Crímenes de Lesa Humanidad: Su Calificación en América Latina y algunos Comentarios en el Caso Colombiano," in H. Olásolo Alonso et al. (coord.), *Perspectiva Iberoamericana sobre la Justicia Penal Internacional*, vol. I, p. 119 (Tirant lo Blanch, 2012); L. Sadat, "Crimes Against Humanity in the Modern Age," *American J. Int'l L.*, vol. 107, p. 334 (2013).

[38] Convention respecting the Laws and Customs of War on Land, Oct. 18, 1907, preamble, 36 Stat. 2277, 187 Consol. T.S. 227. The 1907 version of the clause provides:

> Until a more complete code of the laws of war has been issued, the high contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the laws of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of public conscience.

[39] See T. Meron, "The Martens Clause, Principles of Humanity, and Dictates of Public Conscience," *Am. J. of Int'l L.*, vol. 94, p. 78 (2000).

Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties presented a report to the post-First World War Paris Peace Conference which, after referencing the Martens clause, identified various crimes for which persons might be prosecuted with respect to conduct during the war.[40] The Commission advocated including atrocities by a Government against its own people within the scope of what would become the Treaty of Versailles, so that prosecutions before international and national tribunals would address crimes in violation of both "the established laws and customs of war" and "the elementary laws of humanity".[41] The Commission therefore called for the establishment of an international commission to prosecute senior leaders, with the applicable law being "the principles of the law of nations as they result from the usages established among civilized peoples, from the laws of humanity and from the dictates of public conscience".[42]

31. No "crimes against humanity", however, were ultimately included in articles 228 and 229 of the Treaty of Versailles;[43] those provisions relate solely to war crimes. As such, no prosecutions for crimes against humanity occurred relating to the First World War,[44] but the seeds were sown for such prosecutions in the aftermath of the Second World War.[45] The Charter of the International Military Tribunal established at Nuremberg,[46] as amended by the Berlin Protocol,[47] included "crimes against humanity" as a component of the jurisdiction of the Tribunal. The Nuremberg Charter defined such crimes in article 6(c) as:

> murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

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[40] Report Presented to the Preliminary Peace Conference by the Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties (Carnegie Endowment for International Peace, Division of International Law Pamphlet No. 32, 1919), *partially reprinted in Am. J. of Int'l L.*, vol. 14, p. 95 (1920).

[41] *Ibid.*, at 115.

[42] *Ibid.*, at 122; see M.C. Bassiouni, "World War I: 'The War to End All Wars' and the Birth of a Handicapped International Criminal Justice System," *Denver J. of Int'l L. & Policy*, vol. 30, p. 244 (2002).

[43] Treaty of Peace between the Allied and Associated Powers of Germany, Arts. 228-29, June 28, 1919, 225 C.T.S. 188, 285, 2 Bevans 43, at 136-37.

[44] The Treaty of Peace between the Allies and Turkey, *American J. of Int'l L.*, vol. 15, p. 179, at 235 (Supp. 1921), included a provision on prosecution for "crimes against humanity," but that treaty never entered into force.

[45] See R. Clark, "History of Efforts to Codify Crimes Against Humanity," in L. Sadat (ed.), *Forging a Convention for Crimes against Humanity*, *supra* note 7, p. 8. On the role of Sir Hersch Lauterpacht in developing crimes against humanity as one of the headings for prosecutions at Nürnberg, see E. Lauterpacht, *The Life of Hersch Lauterpacht*, p. 272 (Cambridge University Press, 2010) and the review by S. Schwebel at *British Yearbook International Law*, vol. 83, p. 143 (2013).

[46] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Annex, Charter of the International Military Tribunal, art. 6(c), Aug. 8, 1945, 82 U.N.T.S. 280 (hereinafter Nürnberg Charter).

[47] Protocol Rectifying Discrepancy in Text of Charter, October 6, 1945, *published in Trial of the Major War Criminals Before the International Military Tribunal*, vol. 1 (Nürnberg 1947). The Berlin Protocol replaced a semi-colon after "during the war" with a comma, so as to harmonize the English and French texts with the Russian text. The effect of doing so was to link the first part of the provision to the latter part of the provision ("in connection with any crime within the jurisdiction of the Tribunal"), and hence to the existence of an international armed conflict.

32. This definition of crimes against humanity was linked to the existence of an international armed conflict; the acts only constituted crimes under international law if committed in execution of or in connection with "any crime within the jurisdiction of the Tribunal", meaning a crime against peace or a war crime. As such, the justification for intruding into matters that traditionally were within the national jurisdiction of a State was based on the crime's connection to inter-State conflict. That connection, in turn, suggested heinous crimes occurring on a large-scale, perhaps as part of a pattern of conduct.[48] The International Military Tribunal, charged with trying the senior political and military leaders of the Third Reich, convicted several defendants for crimes against humanity committed during the war,[49] though in some instances the connection of those crimes with other crimes in the Tribunal's jurisdiction was tenuous.[50]

33. After the first trial of senior German leaders,[51] further individuals were convicted of crimes against humanity during the trials conducted by the occupation authorities pursuant to Control Council Law No. 10.[52] For example, crimes against humanity played a part in all 12 of the subsequent trials conducted by occupation authorities of the United States of America.[53] Control Council Law No. 10 did not expressly provide that crimes against humanity must be connected with a crime against peace or a war crime; while some of the trials maintained that connection,

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[48] See United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, p. 179 (Her Majesty's Stationery Office, 1948) ("Only crimes which either by their magnitude and savagery or by their large number or by the fact that a similar pattern was applied at different times and places, endangered the international community or shocked the conscience of mankind, warranted intervention by States other than that on whose territory the crimes had been committed, or whose subjects had become their victims.").

[49] See R. Clark, "Crimes against Humanity at Nuremberg," in G. Ginsburgs & V.N. Kudriavtsev (eds.), *The Nuremberg Trial and International Law*, p. 177 (Martinus Nijhoff Publishers, 1990); L. Mansfield, "Crimes against Humanity: Reflections on the Fiftieth Anniversary of Nuremberg and a Forgotten Legacy," *Nordic J. Int'l L.*, vol. 64, p. 293 (1995).

[50] See, e.g., *Prosecutor v. Kupreškić et al.*, Trial Chamber, Judgment, ICTY Case No. IT-95-16-T, para. 576 (Jan. 24, 2000) (noting the tenuous link between the crimes against humanity committed by Baldur von Schirach and the other crimes within the IMT's jurisdiction) (hereinafter "*Kupreškić 2000*").

[51] Crimes against humanity were also within the jurisdiction of the Tokyo Tribunal. See Charter of the International Military Tribunal for the Far East, art. 5(c), Jan. 19, 1946, 4 Bevans 20, at 20 (amended Apr. 26, 1946) (hereinafter Tokyo Charter). No persons, however, were convicted of this crime by that tribunal; rather, the convictions concerned war crimes against persons other than Japanese nationals that occurred outside Japan. See N. Boister & R. Cryer, *The Tokyo International Military Tribunal: A Reappraisal*, at 32, 194, 328-30 (Oxford University Press, 2008).

[52] Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, Dec. 20, 1945, in *Official Gazette Control Council for Germany*, vol. 3, p. 50 (1946). Control Council Law No. 10 recognized crimes against humanity as: "Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated." *Ibid.*, art. II(1)(c).

[53] T. Taylor, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials Under Control Council Law No. 10*, at 69, 92, 118-19 (1949); see J. Brand, "Crimes against Humanity and the Nürnberg Trials," *Oregon L. Rev.*, vol. 28, p. 93 (1949); J. Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law*, p. 85 (Oxford University Press, 2011).

others did not.[54] The *Justice Case* did not maintain the connection, but did determine that crimes against humanity entail more than isolated cases of atrocity or persecution and require "proof of conscious participation in systematic government organized or approved procedures".[55] German national courts also applied Control Council Law No. 10 in hundreds of cases and in doing so did not require a connection with war crimes or crimes against peace.[56]

34. The principles of international law recognized in the Nuremberg Charter were noted and reaffirmed in 1945-1946 by the General Assembly,[57] which also directed the International Law Commission to "formulate" those principles and to prepare a draft code of offences.[58] The Commission then studied and distilled these principles in 1950 as the "Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal", which defined crimes against humanity in Principle VI(c) as: "Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime".[59] In its commentary to this principle, the Commission emphasized that the crime need not be committed during a war, but maintained that pre-war crimes must nevertheless be in connection with a crime against peace.[60] At the same time, the Commission maintained that "acts may be crimes against humanity even if they are committed by the perpetrator against his own population".[61]

35. Although the Commission's 1950 Nuremberg Principles continued to require a connection between crimes against humanity and war crimes or crimes against the peace, that connection was omitted in the Commission's 1954 draft Code of Offences against the Peace and Security of Mankind. That draft code identified as one of the offences against the peace and security of mankind: "Inhuman acts such as murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, racial, religious or cultural grounds by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities".[62] When explaining the final clause of that offence, the Commission said that:

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[54] See, e.g., *United States of America v. Flick et al.*, 3 L.R.T.W.C. 1212–14 (1952).

[55] See, e.g., *United States of America v. Altstoetter et al.* ("*Justice Case*"), 3 L.R.T.W.C. 974, 982 (1951).

[56] See U. Vultejus, "Verbrechen gegen die Menschlichkeit," *Strafverteidiger*, vol. 12, p. 602 (1992).

[57] See *Extradition and Punishment of War Criminals*, G.A. Res. 3(I), at 9-10 (Feb. 13, 1946); *Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal*, G.A. Res. 95(I), U.N. Doc. A/64/Add.1, at 188 (Dec. 11, 1946).

[58] G.A. Res. 177(II) (Nov. 21, 1947).

[59] *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, with Commentaries,* Report of the International Law Commission on the Work of its Second Session, U.N. GAOR, 5th Sess., Supp. No. 12, principle 6(c), U.N. Doc. A/1316 (1950), *reprinted in Yearbook of the International Law Commission*, vol. 2, p. 374 (1950).

[60] *Ibid.*, para. 123.

[61] *Ibid.*, para. 124.

[62] *Code of Offences against the Peace and Security of Mankind*, with Commentaries, Report of the International Law Commission on the Work of its Sixth Session, U.N. GAOR, 9th Sess., Supp. No. 9, ch. 3, art. 2(11), U.N. Doc. A/2693 (1954); see D. Johnson, "The Draft Code of Offences against the Peace and Security of Mankind," *International and Comparative Law*, vol. 4, p. 445 (1955).

> in order not to characterize any inhuman act committed by a private individual as an international crime, it was found necessary to provide that such an act constitutes an international crime only if committed by the private individual at the instigation or with the toleration of the authorities of a State.[63]

36. There was hope that in the 1950s it would be possible to establish a permanent international criminal court, but the General Assembly deferred action on the Commission's 1954 draft code of offences, indicating that first the crime of aggression should be defined.[64] Some attention then focused on developing national laws with respect to the crime. In that regard, the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity called upon States to criminalize nationally "crimes against humanity" and to set aside statutory limitations on prosecuting the crime.[65] As the first definition of crimes against humanity in a multilateral convention drafted and adhered to by several States, it bears noting that article 1(b) referred to "[c]rimes against humanity whether committed in time of war or in time of peace as they are defined in the Charter of the International Military Tribunal, Nuremberg, of 8 August 1945 and confirmed by resolutions 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations ...."

37. Consisting of just four substantive articles, the 1968 Convention is narrowly focused on statutory limitations; while it does call upon States parties to take steps "with a view to making possible" extradition for the crime, the convention does not expressly obligate a party to exercise jurisdiction over crimes against humanity. As at January 2015, the convention has attracted adherence by 55 States.

38. In 1981, the General Assembly invited the Commission to resume its work on the draft code of offences.[66] In 1991, the Commission completed on first reading a draft code of crimes against the peace and security of mankind.[67] The Assembly then invited the Commission, within the framework of the draft code, to consider further the question of establishing an international criminal jurisdiction to address such crimes, including proposals for a permanent international criminal court.[68] Completion of the project became especially pertinent after the establishment of the ad hoc international criminal tribunals for the former Yugoslavia and Rwanda (discussed below), and the emergence of greater support for a permanent international criminal court. In 1996, the Commission completed a second reading

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[63] *Yearbook of the International Law Commission*, vol. 2, p. 150 (1954).

[64] G.A. Res. 898 (IX) (Dec. 14, 1954); G.A. Res. 1187 (XII) (Dec. 11, 1957).

[65] Nov. 26, 1968, 754 U.N.T.S. 73; see R. Miller, "The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity," *American J. of Int'l L.*, vol. 65, p. 476 (1971). For a regional convention of a similar nature, see European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes, Jan. 25, 1974, E.T.S. No. 82. As of January 2015, there are seven States Parties to this Convention.

[66] G.A. Res. 36/106 (Dec. 10, 1981).

[67] Report of the International Law Commission, U.N. GAOR, 46th Sess., Supp. No. 10, U.N. Doc. A/46/10, at 265 (1991) (hereinafter *1991 ILC Report*). The 1991 draft Code contained twenty-six categories of crimes.

[68] G.A. Res. 46/54 (Dec. 9, 1991).

of the draft code of crimes.[69] The 1996 draft Code of Crimes against the Peace and Security of Mankind listed in article 18 a series of acts that constituted crimes against humanity "when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group".[70] In explaining that opening clause, the Commission commented:

> (3) The opening clause of this definition establishes the two general conditions which must be met for one of the prohibited acts to qualify as a crime against humanity covered by the Code. The first condition requires that the act was "committed in a systematic manner or on a large scale". This first condition consists of two alternative requirements. The first alternative requires that the inhumane acts be "committed in a systematic manner" meaning pursuant to a preconceived plan or policy. The implementation of this plan or policy could result in the repeated or continuous commission of inhumane acts. The thrust of this requirement is to exclude a random act which was not committed as part of a broader plan or policy. The Charter of the Nuremberg Tribunal did not include such a requirement. Nonetheless the Nuremberg Tribunal emphasized that the inhumane acts were committed as part of the policy of terror and were "in many cases … organized and systematic" in considering whether such acts constituted crimes against humanity.
>
> (4) The second alternative requires that the inhumane acts be committed "on a large scale" meaning that the acts are directed against a multiplicity of victims. This requirement excludes an isolated inhumane act committed by a perpetrator acting on his own initiative and directed against a single victim. The Charter of the Nuremberg Tribunal did not include this second requirement either. Nonetheless the Nuremberg Tribunal further emphasized that the policy of terror was "certainly carried out on a vast scale" in its consideration of inhumane acts as possible crimes against humanity. The term "mass scale" was used in the text of the draft code as adopted on first reading to indicate the requirement of a multiplicity of victims. This term was replaced by the term "large scale" which is sufficiently broad to cover various situations involving a multiplicity of victims, for example, as a result of the cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude. The first condition is formulated in terms of the two alternative requirements. Consequently, an act could constitute a crime against humanity if either of these conditions is met.
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> (5) The second condition requires that the act was "instigated or directed by a Government or by any organization or group". The necessary instigation or direction may come from a Government or from an organization or a group. This alternative is intended to exclude the situation in which an individual commits an inhumane act while acting on his own initiative

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[69] *Draft Code of Crimes against the Peace and Security of Mankind*, Report of the International Law Commission on the work of its forty-eighth session, *Yearbook of the International Law Commission, 1996*, vol. II (Part Two), at 17 (1996). The 1996 draft Code contained five categories of crimes. See E. Vargas Carreño, "El Proyecto de Código de Crímenes contra la Paz y la Seguridad de la Humanidad de la Comisión de Derecho Internacional," in *Liber Amicorum: Héctor Fix Zamudio*, vol. II, p. 1523 (Secretaría de la Comisión Interamericana de Derechos Humanos, 1998).

[70] *Ibid.*, at 47.

pursuant to his own criminal plan in the absence of any encouragement or direction from either a Government or a group or organization. This type of isolated criminal conduct on the part of a single individual would not constitute a crime against humanity. It would be extremely difficult for a single individual acting alone to commit the inhumane acts as envisaged in article 18. The instigation or direction of a Government or any organization or group, which may or may not be affiliated with a Government, gives the act its great dimension and makes it a crime against humanity imputable to private persons or agents of a State.

(6) The definition of crimes against humanity contained in article 18 does not include the requirement that an act was committed in time of war or in connection with crimes against peace or war crimes as in the Charter of the Nuremberg Tribunal. The autonomy of crimes against humanity was recognized in subsequent legal instruments which did not include this requirement. … The absence of any requirement of an international armed conflict as a prerequisite for crimes against humanity was also confirmed by the International Tribunal for the Former Yugoslavia: 'It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict.'[71]

39. Since 1996, the Commission on occasion has addressed crimes against humanity. In 2001 the Commission indicated that the prohibition of crimes against humanity was "clearly accepted and recognized" as a peremptory norm of international law.[72] The International Court of Justice has also indicated that the prohibition on certain acts, such as State-sponsored torture, has the character of *jus cogens*,[73] which *a fortiori* suggests that a prohibition of the perpetration of that act on a widespread or systematic basis would also have the character of *jus cogens*.

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[71] *Ibid.*, at 47-48 (footnotes omitted).

[72] Draft Articles on State Responsibility, Commentary on Article 26, para. 5, in *Official Records of the General Assembly, Fifty-sixth Session*, U.N. Doc. A/56/10, p. 283 (2001) (maintaining that those "peremptory norms that are clearly accepted and recognized include the prohibition of … crimes against humanity"); see also *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, U.N. Doc. A/CN.4/L.682, para. 374 (Apr. 13, 2006), as corrected by U.N. Doc. A/CN.4/L.682/Corr.1 (Aug. 11, 2006) (finalized by Martti Koskenniemi) (identifying crimes against humanity as one of the "most frequently cited candidates for the status of *jus cogens*"); see also *Jurisdictional Immunities of the State* (*Germany v. Italy; Greece intervening*), I.C.J. Reports 2012, p. 99, at para. 95 (indicating that the crimes against humanity at issue in the *Arrest Warrant* case "undoubtedly possess the character of *jus cogens*"); *Case of Almonacid Arellano et al. v. Chile*, Inter-Am. Ct. H.R., Judgment, Preliminary Objections, Merits, Reparations and Costs, Series C No. 154, para. 96 (Sept. 26, 2006) (acknowledging the *jus cogens* status of crimes against humanity).

[73] *Questions Relating to the Obligation to Prosecute or Extradite* (*Belgium v. Senegal*), I.C.J. Reports 2012, p. 422, at para. 99; see also *Prosecutor v. Furundžija,* Trial Chamber, Judgment, ICTY Case No. IT-95-17/1, para. 153 (1998); *Al-Adsani v. United Kingdom*, E.Ct.H.R., Judgment, App. No. 35763/97, para. 61 (2001).

C. Crimes against humanity before contemporary international and special courts and tribunals

40. By its resolution 827 (1993), the Security Council established the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (International Tribunal for the Former Yugoslavia) and adopted the statute of the Tribunal. Article 5 of the statute includes "crimes against humanity" as part of the jurisdiction of the International Tribunal for the Former Yugoslavia.[74] That article reads:

> *Article 5*
> *Crimes against humanity*
>
> The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:
>
> (a) murder;
>
> (b) extermination;
>
> (c) enslavement;
>
> (d) deportation;
>
> (e) imprisonment;
>
> (f) torture;
>
> (g) rape;
>
> (h) persecutions on political, racial and religious grounds;
>
> (i) other inhumane acts.

Although the Secretary-General's report proposing this article indicated that crimes against humanity "refer to inhumane acts of a very serious nature … committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds,"[75] that particular language was not included in the text of article 5. The formulation used in article 5 retained a connection to armed conflict by criminalizing specified acts "when committed in armed conflict, whether international or internal in character, and directed against any civilian population." This formulation is best understood contextually, having been developed in 1993 with an understanding that armed conflict in fact existed in the former Yugoslavia (which had led to the exercise of the Council's Chapter VII enforcement powers), and as designed principally to dispel the notion that crimes against humanity had to be linked to an international armed conflict. To the extent that this formulation might be read to suggest that customary international law requires a nexus to armed conflict, the Appeals Chamber of the Tribunal later clarified that there was "no logical or legal basis" for retaining a connection to

[74] Statute of the International Tribunal for the Former Yugoslavia (S/25704, annex), at art. 5.

[75] Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, U.N. Doc. S/25704, at 13, para. 48 (May 3, 1993).

armed conflict, since "it has been abandoned" in State practice since Nuremberg. The Appeals Chamber also noted that the "obsolescence of the nexus requirement is evidenced by international conventions regarding genocide and apartheid, both of which prohibit particular types of crimes against humanity regardless of any connection to armed conflict".[76] Indeed, the Appeals Chamber later maintained that such a connection in the Statute of the Tribunal was simply circumscribing the subject matter jurisdiction of the Tribunal, not codifying customary international law.[77] Through its jurisprudence, the Tribunal also developed important guidance as to what elements must be proven when prosecuting an individual for crimes against humanity.[78] Thereafter, a large number of defendants before the Tribunal were convicted of crimes against humanity.[79]

41. By its resolution 955 (1994), the Security Council established the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide And Other Such Violations Committed in the Territory Of Neighbouring States between 1 January 1994 and 31 December 1994 (International Criminal Tribunal for Rwanda) and adopted the statute of the Tribunal. Article 3 of the statute includes "crimes against humanity" as part of the jurisdiction of the International Criminal Tribunal for Rwanda.[80] Although article 3 retained the same list of conduct (murder, extermination, etc.), the chapeau language did not retain the reference to armed conflict, and instead introduced the formulation from the 1993 report of the Secretary-General (S/25704, para. 48) of "crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds". As such, the statute expressly provided that a discriminatory motive was required in order to establish the crime. Like that of the International Tribunal for the Former Yugoslavia, the jurisprudence of the International Criminal Tribunal for Rwanda further developed the key elements that

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[76] *Prosecutor v. Tadić*, Appeals Chamber, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY Case No. IT-94-1-AR72, para. 140 (Oct. 2, 1995) (hereinafter "*Tadić 1995*").

[77] See, e.g., *Prosecutor v. Tadić*, Appeals Chamber, Judgment, ICTY Case No. IT-94-1-A, paras. 249-51 (July 15, 1999) (hereinafter *Tadić 1999*) ("The armed conflict requirement is satisfied by proof that there was an armed conflict; that is all that the Statute requires, and in so doing, it requires more than does customary international law"); see also *Prosecutor v. Kordić & Čerkez*, Trial Chamber, Judgment, ICTY Case No. IT-95-14/2-T, para. 33 (Feb. 26, 2001) (hereinafter *Kordić 2001*).

[78] See, e.g., *Tadić 1999*, paras. 227-29.

[79] See, e.g., M.C. Roberge, "Jurisdiction of the Ad Hoc Tribunals for the former Yugoslavia and Rwanda over Crimes Against Humanity and Genocide," *International Review of the Red Cross*, vol. 321, p. 651 (1997); G. Mettraux, "Crimes against Humanity in the Jurisprudence of the International Criminal Tribunals for the former Yugoslavia and for Rwanda," *Harvard Int'l L. J.*, vol. 43, p. 237 (2002); S. Meseke, "La contribution de la jurisprudence des tribunaux pénaux internationaux pour l'ex-Yougoslavie et le Rwanda à la concrétisation de l'incrimination du crime contre l'humanité," in M. Chiavario (ed.), *La justice pénale internationale entre passé et avenir*, p. 173 (2003); Sadat, *supra* note 37, at 342-46.

[80] Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. Doc. S/RES/955, Annex at art. 3 (Nov. 8, 1994); see generally L.J. van den Herik, *The Contribution of the Rwanda Tribunal to the Development of International Law* (Brill, 2005).

must be proven when prosecuting an individual for crimes against humanity.[81] Here, too, defendants before the Tribunal were regularly convicted of crimes against humanity.[82]

42. Also in 1994, the Commission completed a draft statute for a permanent international criminal court, which included in article 20(d) crimes against humanity as part of the jurisdiction of the proposed court. In its commentary on that provision, the Commission noted:

> It is the understanding of the Commission that the definition of crimes against humanity encompasses inhumane acts of a very serious character involving widespread or systematic violations aimed at the civilian population in whole or in part. The hallmarks of such crimes lie in their large-scale and systematic nature. The particular forms of unlawful act (murder, enslavement, deportation, torture, rape, imprisonment, etc.) are less crucial to the definition than the factors of scale and deliberate policy, as well as in their being targeted against the civilian population in whole or in part. This idea is sought to be reflected in the phrase "directed against any civilian population" in article 5 of the statute of the [International Tribunal for the Former Yugoslavia], but it is more explicitly brought out in article [18][83] of the draft code. The term "directed against any civilian population" should be taken to refer to acts committed as part of a widespread and systematic attack against a civilian population on national, political, ethnic, racial or religious grounds. The particular acts referred to in the definition are acts deliberately committed as part of such an attack.[84]

43. Thereafter, the General Assembly decided to establish an ad hoc committee to review the major substantive and administrative issues arising out of the draft statute prepared by the Commission and to consider arrangements for the convening of an international conference of plenipotentiaries.[85] That led, in turn, to the establishment of a preparatory committee to discuss further the major issues arising out of the draft statute prepared by the Commission, with a view to preparing a widely acceptable consolidated text,[86] which was then considered and revised

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[81] See, e.g., *Prosecutor v. Akayesu*, Trial Chamber, Judgment, Case No. ICTR-96-4-T, paras. 578-98 (Sept. 2, 1998) (hereinafter *Akayesu 1998*); see also van den Herik, *supra* note 80, at 160-96; R. Kolb, "The Jurisprudence of the Yugoslav and Rwandan Criminal Tribunals on their Jurisdiction and on International Crimes," *British Yearbook of Int'l L.*, vol. 71 (2000), pp. 259, 291-300; R. Kolb, "The Jurisprudence of the Yugoslav and Rwandan Criminal Tribunals on their Jurisdiction and on International Crimes (2000-2004)," *British Yearbook of Int'l L.*, vol. 75 (2004), pp. 269, 310-326; R. Kolb, "The Jurisprudence of the Yugoslav and Rwandan Criminal Tribunals on their Jurisdiction and on International Crimes (2004-2013)," *British Yearbook of Int'l L.*, vol. 84 (2014), p. 131 at 163-72.

[82] See, e.g., *Akayesu 1998*, para. 23; see also van den Herik, *supra* note 80, at 151-98, 270-73; G. Mettraux & J. Cerone, "The Jurisprudential Contributions of the ICTR to the Legal Definition of Crimes against Humanity — The Evolution of the Nexus Requirement," *New England J. of Int'l and Comp. L.*, vol. 14, p. 191 (2008); Sadat, *supra* note 37, at 346-49.

[83] At the time of this commentary, the relevant article in the draft Code was Article 21, as adopted at first reading, and subsequently renumbered to be Article 18 at second reading.

[84] Report of the International Law Commission on the Work of its Forty-Sixth Session, U.N. GAOR, 49th Sess., Supp. No. 10, U.N. Doc. A/49/10, at 40 (1994).

[85] G.A. Res. 49/53 (Dec. 9, 1994).

[86] G.A. Res. 50/46 (Dec. 11, 1995).

further at a diplomatic conference.[87] That conference led to the adoption in Rome on 17 July 1998 of the Rome Statute establishing the International Criminal Court.[88] As at January 2015, 122 States are parties to the Rome Statute.

44. Article 5(1)(b) of the Rome Statute includes crimes against humanity within the jurisdiction of the International Criminal Court.[89] Article 7(1) defines the crime as a series of acts "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack".[90] Article 7(2) further clarifies that such an attack "means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such acts".[91] Article 7, which is addressed in greater detail in section VI below, does not retain the nexus to an armed conflict that characterized the statute of the International Tribunal for the Former Yugoslavia, nor the discriminatory motive requirement that characterized the statute of the International Criminal Tribunal for Rwanda (except with respect to acts of persecution).

45. In preparation for the entry into force of the Rome Statute, States developed the document entitled *Elements of Crimes*, which sets forth important guidance as to what must be proven when prosecuting an individual for crimes against humanity.[92]

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[87] G.A. Res. 51/207 (Dec. 17, 1996).

[88] Rome Statute, *supra* note 5.

[89] *Ibid.*, art. 5(b).

[90] *Ibid.*, art. 7(1). For discussion of the new phrase "with knowledge of the attack," see *infra* Part VI(D). For general commentary on the adoption of Article 7, see P. Hwang, "Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court," *Fordham Int'l L. J.*, vol. 22, p. 457, at 497-501 (1998); D. Robinson, "Defining 'Crimes against Humanity' at the Rome Conference," *American J. of Int'l L.*, vol. 93, p. 43 (1999); H. von Hebel, "Crimes Against Humanity under the Rome Statute," in P. van Krieken (ed.), *Refugee Law in Context: The Exclusion Clause*, p. 105 (T.M.C. Asser Press, 1999); D. Cattin, "A General Definition of Crimes against Humanity under International Law," *Revue de Droit Penal et des Droits de l'Homme*, vol. 8, p. 83 (1999); H. von Hebel and D. Robinson, "Crimes within the Jurisdiction of the Court," in R. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results*, p. 79 (Martinus Nijhoff Publishers, 1999); R. Clark, "Crimes against Humanity and the Rome Statute of the International Criminal Court," in R. Clark et al. (eds.), *International and National Law in Russia and Eastern Europe: Essays in Honor of George Ginsburgs*, p. 139 (Kluwer Law International, 2001); D. Robinson, "The Elements of Crimes against Humanity," in R. Lee et al. (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, p. 57 (Transnational Publishers, Ardsley, 2001); A. Gil Gil, "Los Crímenes contra la Humanidad y el Genocidio en el Estatuto de la Corte Penal Internacional a la luz de 'los Elementos de los Crímenes,'" in K. Ambos (coord.), *La Nueva Justicia Penal Supranacional: Desarrollos Post-Roma*, at 65, 68-94, 104 (Tirant lo Blanch, 2002); T. McCormack, "Crimes Against Humanity," in D. McGoldrick, et al. (eds.), *The Permanent International Criminal Court: Legal and Policy Issues*, p. 179 (Hart Publishing, 2004); P. Currat, *Les crimes contre l'humanité dans le Statut de la Cour pénale internationale* (Schulthess, 2006); C.K. Hall et al., "Article 7, Crimes against Humanity," in O. Triffterer & K. Ambos (eds.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, p. 159 (Hart Publishing, 2d ed. 2008); W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, at 137-87 (Oxford University Press, 2010); Sadat, *supra* note 37, at 350-55.

[91] Rome Statute, *supra* note 5, art. 7(2).

[92] See International Criminal Court, *Elements of Crimes*, U.N. Doc. PCNICC/2000/1/Add.2 (2000) (hereinafter ICC, *Elements of Crimes*). Article 9(1) of the Rome Statute provides that *Elements of Crimes* "shall assist the Court in the interpretation and application of [article 7]". See generally S. Chesterman, "An Altogether Different Order: Defining the Elements of Crimes

Since the entry into force of the Rome Statute in July 2002, several defendants have been indicted and some convicted by the International Criminal Court for crimes against humanity.[93] For example, in March 2014, the Court's Trial Chamber II issued its judgment that Germain Katanga had committed, through other persons, murder as a crime against humanity during an attack in February 2003 on the village of Bogoro in the Democratic Republic of the Congo.[94]

46. Crimes against humanity have also featured in the jurisdiction of "hybrid" tribunals that contain a mixture of international law and national law elements. The agreement between Sierra Leone and the United Nations which established the Special Court for Sierra Leone in 2002 includes crimes against humanity as a part of the Special Court's jurisdiction.[95] Article 2 of the Court's statute provides that the "Special Court shall have the power to prosecute persons who committed the following crimes as part of a widespread or systematic attack against any civilian population", and then lists nine categories of acts. Several defendants have been indicted and some convicted by the Special Court for crimes against humanity, including the former President of Liberia, Charles Taylor.[96]

47. By contrast, the statute of the Special Tribunal for Lebanon does not include crimes against humanity within the scope of the jurisdiction of the Tribunal, which was established in 2007 by the Security Council and charged with applying Lebanese law rather than international law.[97] The Secretary-General considered that the pattern of terrorist attacks at issue for that tribunal "could meet the prima facie definition of the crime, as developed in the jurisprudence of international criminal

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against Humanity," *Duke J. of Comp. and Int'l L.*, vol. 10, p. 307 (2000); R. Lee et al. (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001); M. Badar, "From the Nuremberg Charter to the Rome Statute: Defining the Elements of Crimes against Humanity," *San Diego Int'l L. J.*, vol. 5, p. 73 (2004). Consistent with article 7, the two elements that must exist to establish a crime against humanity, in conjunction with the various proscribed acts, are: (1) the conduct was committed as part of a widespread or systematic attack directed against a civilian population; and (2) the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population. The Elements of Crimes have been amended to take account of further elements adopted at the 2010 ICC Review Conference. See *Elements of Crimes*, ICC-PIDS-LT-03-002/11_Eng (2011).

[93] *Prosecutor v. Dyilo*, Trial Chamber I, Judgment, Case No. ICC-01/04-01/06-2842 (Mar. 14, 2012); *Prosecutor v. Katanga*, Trial Chamber II, Judgment, ICC-01/04-01/07 (Mar. 7, 2014) (hereinafter "*Katanga 2014*"); Sadat, *supra* note 37, at 355-68.

[94] *Katanga 2014*, 1691. Since all appeals have been discontinued, this judgment is final.

[95] Agreement on the Establishment of a Special Court for Sierra Leone, Sierra Leone-U.N., art. 2, Jan. 16, 2002, 2178 U.N.T.S. 138.

[96] See, e.g., *Prosecutor v. Taylor*, Trial Chamber II, Judgment, SCSL-03-01-T (May 18, 2012); *Prosecutor v. Taylor*, Appeals Chamber, Judgment, SCSL-03-01-PT (Sept. 26, 2013); see also *Prosecutor v. Fofana and Kondewa*, Appeals Chamber, Judgment, SCSL-04-14-A (May 28, 2008); *Proseutor v. Brima et al*., Appeals Chamber, Judgment, SCSL-04-16-A (Feb. 22, 2008); see generally W. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda, and Sierra Leone*, at 40 (Cambridge University Press, 2006); C. C. Jalloh & S. Meisenberg (eds.), *The Law Reports of the Special Court for Sierra Leone* (Martinus Nijhoff Publishers, 2012) (2 vols.); R.W.F. van der Wolf (ed.), *The Case Against Charles Taylor* (2013); Sadat, *supra* note 37, at 349-50.

[97] S.C. Res. 1757 (May 30, 2007).

tribunals".[98] However, there was insufficient support within the Security Council for including crimes against humanity in the Tribunal's jurisdiction.[99]

48. Special courts have been set up within a few national legal systems (at times with international judges participating) and some of these courts have exercised jurisdiction over crimes against humanity. The Special Panels for Serious Crimes, established in 2000, had jurisdiction over crimes against humanity committed between 1 January and 25 October 1999 in East Timor. The relevant language was an almost verbatim repetition of article 7 of the Rome Statute[100] and the Special Panels convicted several defendants.[101] Likewise, the Extraordinary Chambers in

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[98] Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon, U.N. Doc. S/2006/893, at 6, para. 24 (Nov. 15, 2006).

[99] See *ibid.*, para. 25; Statement by Mr. Nicholas Michel, Under-Secretary-General for Legal Affairs, U.N. Doc. S/2006/893/Add.1, at 2 (Nov. 21, 2006) ("The text of the statute, the language of the report, the preparatory work and the background of the negotiations clearly demonstrate that the tribunal will not be competent to qualify the attacks as crimes against humanity.").

[100] See U.N. Transitional Administration in East Timor Regulation 2000/15, On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, § 5, UNTAET/REG/2000/15 (2000); see also K. Ambos & S. Wirth, "The Current Law of Crimes against Humanity: An Analysis of UNTAET Regulation 15/2000," *Criminal Law Forum*, vol. 13, p. 1, at 2 (2002).

[101] *Prosecutor v. Marques et al.*, East Timor Special Panel for the Trial of Serious Crimes, Judgment, Case No. 9/2000 (Dec. 11, 2001); *Deputy Prosecutor General v. Pedro*, *ibid.*, Judgment, Case No. 1/2001 (Apr. 14, 2005); *Prosecutor v. Leite*, *ibid.*, Judgment, Case No. 04b/2001 (Dec. 7, 2002); *Prosecutor v. Cardoso*, *ibid.*, Judgment, Case No. 04c/2001, (Apr. 5, 2003); *Prosecutor v. Carvalho*, *ibid.*, Judgment, Case No. 10/2001 (Mar. 18, 2004); *Prosecutor v. Martins et al.*, *ibid.*, Judgment, Case No. 11/2001 (Nov. 13, 2003); *Prosecutor v. Santos*, *ibid.*, Judgment, Case No. 16/2001 (Sept. 9, 2002); *Prosecutor v. Sarmento et al.*, *ibid.*, Judgment, Case No. 18./2001 (July 16, 2003); *Prosecutor v. Sarmento*, *ibid.*, Judgment, Case No. 18a/2001 (Aug. 12, 2003); *Prosecutor v. Mendonça*, *ibid.*, Judgment, Case No. 18b/2001 (Oct. 13, 2003); *Prosecutor v. Correia*, *ibid.*, Judgment, Case No. 19/2001 (Mar. 29, 2004); *Prosecutor v. Tacaqui*, *ibid.*, Judgment, Case No. 20/2001 (Dec. 9, 2004); *Prosecutor v. Soares*, *ibid.*, Judgment, Case No. 02/2002-B (Dec. 1, 2004); *Prosecutor v. Ena et al.*, *ibid.*, Judgment, Case No. 5/2002 (Mar. 23, 2004); *Prosecutor v. Soares*, *ibid.*, Judgment, Case No. 7a/2002 (Dec. 9, 2003); *Prosecutor v. Olivera et al.*, *ibid.*, Judgment, Case No. 12/2002 (Feb. 23, 2004); *Prosecutor v. Da Costa Nunes*, *ibid.*, Judgment, Case No. 1/2003 (Dec. 10, 2003); *Prosecutor v. Atolan*, *ibid.*, Judgment, Case No. 3/2003 (June 9, 2003); *Prosecutor v. Cloe et al.*, *ibid.*, Judgment, Case No. 4/2003 (Nov. 16, 2004); *Prosecutor v. Sufa*, *ibid.*, Judgment, Case No. 4a/2003 (Nov. 25, 2004); *Prosecutor v. Beno*, *ibid.*, Judgment, Case No. 4b/2003 (Nov. 16, 2004); *Prosecutor v. Metan*, *ibid.*, Judgment, Case No. 4c/2003 (Nov. 16, 2004); *Prosecutor v. Gusmão*, *ibid.*, Judgment, Case No. 7/2003 (Feb. 28, 2003); *Prosecutor v. Mau*, *ibid.*, Judgment, Case No. 8/2003 (Feb. 23, 2004); *Prosecutor v. Lao*, *ibid.*, Judgment, Case No. 10/2003 (Dec. 3, 2004); *Prosecutor v. Soares*, *ibid.*, Judgment, Case No. 11/2003 (Dec. 11, 2003); *Prosecutor v. Ludji et al.*, *ibid.*, Judgment, Case No. 16/2003 (May 19, 2004); *Prosecutor v. Guterres*, *ibid.*, Judgment, Case No. 18a/2003 (Feb. 28, 2005); *Prosecutor v. Da Costa et al.*, *ibid.*, Judgment, Case No. 22/2003 (Apr. 25, 2005,); *Prosecutor v. Maubere*, *ibid.*, Judgment, Case No. 23/2003 (July 5, 2004); *Prosecutor v. Fernandes*, *ibid.*, Judgment, Case No. 25/2003 (Apr. 19, 2005); *Prosecutor v. Correia*, *ibid.*, Judgment, Case No. 27/2003 (Apr. 25, 2005); *Prosecutor v. Mesquita et al.*, *ibid.*, Judgment, Case No. 28/2003 (Dec. 6, 2004); *Prosecutor v. Perreira*, *ibid.*, Judgment, Case No. 34/2003 (Apr. 27, 2005); *Prosecutor v. De Deus*, *ibid.*, Judgment, Case No. 2a/2004 (Apr. 12, 2005); see also *Report to the Secretary-General of the Commission of Experts to review the Prosecution of Serious Violations of Human Rights in Timor-Leste (the then East Timor) in 1999 (May 26, 2005)*, U.N. Doc. S/2005/458, Annex II (July 15, 2005); C. Reiger & M. Wierda, *The Serious Crimes Process in Timor-Leste: In Retrospect* (International Center for Transitional Justice, 2006).

the Courts of Cambodia, established by Cambodia in 2001[102] and the subject of a Cambodia-United Nations agreement in 2003,[103] included within article 5 of their statute "the power to bring to trial all Suspects who committed crimes against humanity", which the Court has done.[104] The Supreme Iraqi Criminal Tribunal, established in 2003 by the Iraqi Governing Council, also had within its jurisdiction crimes against humanity.[105] Again, unlike the Nuremberg Charter, the crime as formulated for these tribunals requires no link to armed conflict.[106]

49. The Extraordinary African Chambers within the Senegalese judicial system, established in 2012-2013 pursuant to agreements between Senegal and the African Union, are empowered to try persons "responsible for the crimes and serious violations of international law, international humanitarian law and custom, and international conventions ratified by Chad and Senegal, that were committed in Chad between 7 June 1982 and 1 December 1990".[107] Article 4(b) of the statute of the Chambers provides that they have jurisdiction over crimes against humanity, which are then defined in article 6 in terms that draw upon, but do not replicate, article 7 of the Rome Statute.

50. Finally, crimes against humanity have also featured at times in the jurisprudence of regional human rights courts and tribunals,[108] such as before the Inter-American Court of Human Rights[109] and the European Court of Human Rights. The Grand Chamber of the European Court, for example, in 2008 analysed the meaning of "crimes against humanity" as the concept existed in 1956, finding

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[102] See G.A. Res. 57/228B (May 13, 2003).

[103] Agreement Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, Cambodia-U.N., June 6, 2003, 2329 U.N.T.S. 117.

[104] *Prosecutor v. Kaing Guek Eav alias Duch*, Trial Chamber, Judgment, No. 001/18-07-2007/ECCC/TC (July 26, 2010) (hereinafter *Duch Trial Chamber Judgment*); *Prosecutor v. Nuon Chea et al.*, Office of the Co-Investigating Judges, Closing Order, No. 002/19-09-2007-ECCC-OCIJ (Sept. 15, 2010).

[105] Statute of the Iraqi Special Tribunal, art. 10(b), Dec. 10, 2003, 43 I.L.M. 231 (2004). The Iraqi Interim Government enacted a new statute in 2005, built upon the earlier statute, which changed the tribunal's name to "Supreme Iraqi Criminal Tribunal." See Law of the Supreme Iraqi Criminal Tribunal, Law No. 10, Official Gazette of the Republic of Iraq (Oct. 18, 2005); see also M. Scharf, "The Iraqi High Tribunal: A Viable Experiment in International Justice?," *J. of Int'l Crim. Just.*, vol. 5, p. 258 (2007); B. Kuschnik, "The Legal Findings of Crimes against Humanity in the Al-Dujail Judgments of the Iraqi High Tribunal: A Forerunner for the ICC?," *Chinese J. of Int'l L.*, vol. 7, p. 459 (2008); E. van Heugten & P.A. van Laar (eds.), *The Iraqi Special Tribunal for Crimes against Humanity: The Dujail Case* (International Courts Association, 2011).

[106] See, e.g., *Duch Trial Chamber Judgment*, *supra* note 104, para. 291 ("The notion of armed conflict also does not form part of the current-day customary definition of crimes against humanity.").

[107] Agreement on the Establishment of the Extraordinary African Chambers within the Senegalese Judicial System, Senegal-African Union, Aug. 22, 2012, 52 I.L.M. 1024 (2013); Agreement on the Statute of the Chambers, Senegal-African Union, Jan. 30, 2013, 52 I.L.M. 1028.

[108] See A. Huneeus, "International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Bodies," *Am. J. Int'l L.*, vol. 107, p. 1 (2013).

[109] See, e.g., J. Dondé Matute, "Los Elementos Contextuales de los Crímenes de Lesa Humanidad y la Corte Interamericana de Derechos Humanos," in K. Ambos et al. (eds.), *Sistema Interamericano de Protección de Derechos Humanos y Derecho Penal Internacional,* Tomo II, p. 205 (Konrad-Adenauer-Stiftung, 2011).

that even by that point the nexus with armed conflict that initially formed part of the customary definition of crimes against humanity may have disappeared.[110]

51. In light of such developments, it is now well settled that, under international law, criminal responsibility attaches to an individual for committing crimes against humanity. As the Trial Chamber in the *Tadić* case indicated, "since the Nuremberg Charter, the customary status of the prohibition against crimes against humanity and the attribution of individual criminal responsibility for their commission have not been seriously questioned".[111]

D. Crimes against humanity in national law

52. In its annual report for its sixty-sixth session,[112] the Commission requested that States provide information on: (a) whether the State's national law at present expressly criminalizes "crimes against humanity" as such and, if so; (b) the text of the relevant criminal statute(s); (c) under what conditions the State is capable of exercising jurisdiction over an alleged offender for the commission of a crime against humanity (e.g., when the offence occurs within its territory or when the offence is by its national or resident); and (d) decisions of the State's national courts that have adjudicated crimes against humanity. As at early February 2015, the Commission had received responses from four States. The information contained in those responses is incorporated in the present report.

53. The national laws of several States address in some fashion crimes against humanity, thereby allowing national prosecutions falling within the scope of those laws.[113] For example, chapter 11 of the Criminal Code of Finland codifies crimes against humanity (as well as genocide and war crimes).[114] Section 3 of that chapter defines the crime, while section 4 indicates circumstances when the crime is to be regarded as aggravated. Generally, Finnish criminal law is only applied to crimes committed within the territory of Finland; crimes committed in another State's

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[110] *Korbely v. Hungary*, E.Ct.H.R. Grand Chamber Judgment, No. 9174/02, para. 82 (Sept. 19, 2008). International jurisprudence may also arise before the African Court of Justice and Human Rights. See Protocol on the Statute of the African Court of Justice and Human Rights, art. 28A, as amended at the 24th African Union Summit in Malabo (June 2014) (providing that the Court's International Criminal Law Section shall have power to try persons for crimes against humanity). As of January 2015, however, this Protocol and the amendments have not yet entered into force.

[111] *Prosecutor v. Tadić*, Trial Chamber, Opinion & Judgment, ICTY Case No. IT-94-1-T, para. 623 (May 7, 1997) (hereinafter *Tadić 1997*); see also *Prosecutor v. Sesay, Kallon and Gbao* (*RUF Case*), Trial Chamber I, Judgment, Case No. SCSL-04-15-T, para. 58 (Mar. 2, 2009).

[112] See 2014 Report, *supra* note 4, para. 34.

[113] See generally A. Eser et al. (eds.), *National Prosecution of International Crimes* (2003-2007)(6 vols.); M. Bergsmo et al. (eds.), *Importing Core International Crimes into National Law* (Tokel Opsahl Academic EPublisher, 2d ed. 2010); R. Falconí, "The Codification of Crimes against Humanity in the Domestic Legislation of Latin American States," *International Criminal Law Review*, vol. 10, p. 453 (2010); W.J. van der Wolf, *Prosecution and Punishment of International Crimes by National Courts* (International Courts Association, 2011). For country-specific studies, see, e.g., C. Ferstman, "Domestic Trials for Genocide and Crimes against Humanity: The Example of Rwanda," *African J. of Int'l and Comp. L.*, vol. 9, p. 857 (1997); L. van den Herik, "The Dutch Engagement with the Project of International Criminal Justice," *Netherlands Int'l L. Rev.* vol. 55, p. 303 (2010).

[114] Criminal Code of Finland, Law No. 39/1889 (as amended 2012), *available at* http://www.finlex.fi/fi/laki/kaannokset/1889/en18890039.pdf (unofficial English translation).

territory by a Finnish national or resident, or by a person who is apprehended in Finland and is a national or permanent resident of Denmark, Iceland, Norway or Sweden; and crimes committed in another State's territory that are directed against Finnish nationals and are punishable by more than six months in prison. There are, however, exceptions to this general rule. Thus, pursuant to chapter 1, section 7(1) of the Criminal Code, "Finnish law applies to an offence committed outside of Finland where the punishability of the act, regardless of the law of the place of commission, is based on an international agreement binding on Finland or on another statute or regulation internationally binding on Finland (*international offence*)." Crimes against humanity are regarded as being such an offence.

54. Similarly, title 12 bis of the Penal Code of Switzerland[115] codifies genocide and crimes against humanity, with article 264a defining crimes against humanity. Swiss law extends to crimes committed in Switzerland (article 3) and to crimes committed outside Switzerland that are against the Swiss State (article 4), that are against minors (article 5), that Switzerland has undertaken to prosecute under an international agreement (article 6) or that otherwise involve an act punishable in the State where it was committed if the perpetrator is in Switzerland and, under Swiss law, the act may result in extradition, but the author is not extradited (if the perpetrator is not a Swiss national, and the crime was not committed against a Swiss national, then prosecution may only proceed if the extradition request was rejected for a reason other than the nature of the act or the perpetrator committed a particularly serious crime proscribed by the international community) (article 7).

55. By contrast, other States do not have any national law expressly criminalizing "crimes against humanity," although they may have statutes that allow for prosecution of conduct that, in some circumstances, amount to crimes against humanity. For example, the United States has no national law on crimes against humanity as such. While it has statutes containing criminal prohibitions on torture, war crimes and genocide,[116] these statutes do not criminalize all conduct that might amount to crimes against humanity, and some of the constituent acts of crimes against humanity as defined in certain international texts are not found in United States national law. At the same time, other statutes with extraterritorial application might apply depending on the circumstances, such as statutes addressing terrorism offences or violent crime. Cuba also does not criminalize "crimes against humanity" as such, but its law takes account of crimes against humanity as a basis for setting aside limitations under national law that might otherwise apply.[117]

56. In the decades following Nuremberg, various national prosecutions occurred, such as the *Eichmann* and *Demjanjuk* cases in Israel,[118] the *Menten* case in The

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[115] Penal Code of Switzerland, Law No. 311.0 (as amended 2015), *available at* http://www.admin.ch/opc/fr/classified-compilation/19370083/index.html.

[116] See 18 U.S.C. § 2340A (2012) (prohibiting torture); 18 U.S.C. § 2441 (2012) (prohibiting war crimes); 18 U.S.C. § 1091 (2012) (prohibiting genocide).

[117] See Código Penal de la República de Cuba, Ley No. 62, art. 5, para. 3; art. 18, para. 4, *available at* http://www.tsp.cu/ley_62_codigo_penal_cuba.

[118] *Attorney General for the Government of Israel v. Eichmann*, I.L.R., vol. 36, p. 1 (District of Jerusalem), p. 277 (Supreme Court of Israel) (1968); *Attorney General for the Government of Israel v. Demjanjuk*, Trial Judgment (Apr. 18, 1988) (Israel District Court); *Demjanjuk v. State of Israel*, Isr. S.C. 221 (1993) (Israel Supreme Court); see Hans W. Baade, "The Eichmann Trial: Some Legal Aspects, " *Duke Law Journal*, vol. 10, p. 400 (1961); J.E.S. Fawcett, "The Eichmann Case," *British Year Book of Int'l L.*, vol. 38, p. 181 (1962); Georg Schwarzenberger, "The Eichmann Judgment," *Current Legal Problems*, vol. 15, p. 248 (1962).

Netherlands,[119] the *Barbie* and *Touvier* cases in France[120] and the *Finta*, *Mugesera* and *Munyaneza* cases in Canada.[121] Such cases can raise difficult issues concerning immunities, statutes of limitations and the effect of national amnesty laws. For example, in the *Rubens Paiva* case currently being prosecuted in Brazil, lower courts have allowed a prosecution to proceed against former military or police officers alleged to have committed crimes against humanity, notwithstanding Brazil's 1979 amnesty law.[122] In some circumstances, the issue of crimes against humanity arose in the context of national proceedings other than prosecutions, such as extradition[123] or immigration[124] proceedings. Under the influence of the Rome Statute,[125] in recent years many States have adopted or amended national laws that criminalize crimes against humanity, as well as other crimes.[126]

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[119] *Menten Case*, 75 I.L.R. 362 (1987) (Dutch Supreme Court).

[120] *Barbie Case*, 78 I.L.R. 125 (1988); 100 I.L.R. 331 (1995) (French Court of Cassation); *Touvier Case*, 100 I.L.R. 338 (1995) (French Court of Cassation); see L. Sadat Wexler, "The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again," *Columbia J. of Transnat'l L.*, vol. 32, p. 289 (1994); S. Chalandon & P. Nivelle, *Crimes contre l'humanité — Barbie, Touvier, Bousquet, Papon* (1998).

[121] *Regina v. Finta*, [1994] 1 S.C.R. 701, [1997] 104 I.L.R. 284 (Supreme Court of Canada); *Munyaneza v. R*, 2014 QCCA 906 (Quebec Court of Appeal).

[122] For the Federal Court of Appeals decision agreeing with the Court of First Instance in setting aside the amnesty law, see Brasil. Tribunal Regional Federal da 2ª Região. 2ª Turma Especializada. *Habeas Corpus* n.º 0104222-36.2014.4.02.0000. Impetrantes: Rodrigo Henrique Roca Pires e Outro. Impetrado: Juízo da 4ª Vara Federal Criminal – RJ. Autuado em 26 de Agosto de 2014 [Brazil. Federal Regional Court of the 2nd Region. 2nd Specialized Chamber. *Habeas Corpus* no. 0104222-36.2014.4.02.0000. Rodrigo Henrique Roca Pires and Another v. 4th Federal Criminal Court, Judiciary Section of Rio de Janeiro. Issued on: August 26, 2014]. The Supreme Federal Court, however, has suspended proceedings pending determination of the applicability of the amnesty law. See Brasil. Supremo Tribunal Federal. Rcl 18686 MC/RJ, Relator: Min. Teori Zavascki, Decisão de 29 de setembro de 2014, publicado eletronicamente no DJe-191 em 1 de outubro de 2014 [Brazil. Federal Supreme Court. Rcl 18686 MC/RJ, Rapporteur: Min. Teori Zavascki, Decision of September 29, 2014, published electronically at the DJe-191 on October 1st, 2014], *available at* http://www.stf.jus.br/portal/processo/verProcessoPeca.asp?id=263694199&tipoApp=.pdf.

[123] See, e.g., *Demjanjuk v. Petrovsky*, 776 F. 2d 571 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986).

[124] See, e.g., *Mugesera v. Canada*, [2005] 2 SCR 100 (Supreme Court of Canada). For an analysis of Canada's reliance on immigration proceedings for addressing crimes against humanity, finding the practice to be an incomplete remedy, see J. Yap, "*Aut Deportare Aut Judicare*: Current Topics in International Humanitarian Law in Canada," in D. Jinks et al. (eds.), *Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies*, p. 355 (TMC Asser Press, 2014).

[125] For an analysis of how complementarity under the Rome Statute serves as an incentive to the adoption of national legislation, and reviewing the arguments for and against finding an obligation in the Rome Statute to adopt national legislation, see J. Kleffner, "The Impact of Complementarity on National Implementation of Substantive Criminal Law," *J. of Int'l Crim. Just.*, vol. 1, at 91 (2003) ("The Statute is ambiguous on this issue, and States as well as academic writers differ on it").

[126] See, e.g., A. Alvarez, "The Implementation of the ICC Statute in Argentina," *J. of Int'l Crim. Just.*, vol. 5, p. 480 (2007); Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24 (CAHWCA) (Canada); F. Lafontaine, "Parties to Offences under the Canadian *Crimes against Humanity and War Crimes Act*: an Analysis of Principal Liability and Complicity," *Les Cahiers de Droit*, vol. 50, p. 967 (2009); R.J. Currie & J. Rikhof, *International and Transnational Criminal Law* (2d ed. 2013) (surveying the treatment of international crimes under Canadian law); Code of Crimes against International Law, Bundesgesetzblatt, § 7, I, p. 2254 (2002)

57. Various studies have attempted not just to compile the existence of national laws on crimes against humanity, but to analyse the scope of those laws both in terms of the substantive crimes and the circumstances when jurisdiction may be exercised over such crimes.[127] Important elements to consider when assessing such laws are: (a) whether there exists a specific law on "crimes against humanity" (as opposed to ordinary criminal statutes on penalizing acts of violence or persecution); (b) if a specific law exists on "crimes against humanity," whether that law includes all the components encompassed in the most relevant contemporary definition of the crime, that is, article 7 of the Rome Statute; and (c) if a specific law exists on "crimes against humanity," whether that law is limited only to conduct that occurs within the State's territory, or whether it also extends to conduct by or against its nationals abroad, or even extends to acts committed abroad by non-nationals against non-nationals.[128]

58. A relevant study completed in July 2013 reached several conclusions. First, it found that earlier studies, when read collectively, indicate that at best 54 per cent of States Members of the United Nations (104 of 193) have some form of national law relating to crimes against humanity.[129] The remaining Member States (89 of 193) appear to have no national laws relating to crimes against humanity. Further, the 2013 study found that earlier studies, again when read collectively, indicate that at best 66 per cent of Rome Statute parties (80 of 121) have some form of national law relating to crimes against humanity, leaving 44 per cent of Rome Statute parties (41 of 121) without any such law.[130]

(Germany), *available at* http://www.bmjv.de/DE/Ministerium/Abteilungen/Strafrecht/InternationalesStrafrechtEuropaeischeMultilateraleStrafrechtlicheZusammenarbeit/_doc/Gesetz_zur_Einfuehrung_des_Voelkerstrafgesetzbuches_in_Kraft.html; N. Capus, Die Unverjährbarkeit von Verbrechen gegen die Menschheit nach schweizerischem und nach internationalem Recht, *Zeitschrift für juristische Ausbildung und Praxis*, vol. 24, p. 247 (2006); G. Werle & F. Jessberger, "International Criminal Justice Is Coming Home: The New German Code of Crimes Against International Law, *Criminal Law Forum*, vol. 13, p. 191 (2002); M. Roscini, "Great Expectations — The Implementation of the Rome Statute in Italy," *J. of Int'l Crim. Just.*, vol. 5, p. 493 (2007); Implementation of the Rome Statute of the International Criminal Court, Act No. 27 of 2002, *Rep. S. Africa Gov't Gazette*, vol. 445, No. 23642 (South Africa) (July 18, 2002); C. Fournet, *Genocide and Crimes Against Humanity — Misconceptions and confusion in French Law and Practice* (Hart Publishing, 2013); M. du Plessis, "South Africa's Implementation of the ICC Statute — An African Example," *J. of Int'l Crim. Just.*, vol. 5, p. 460 (2007). On extraterritorial application of South Africa's statute, see *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre* (485/2012) [2013] ZASCA 168 (Nov. 27, 2013).

127 See Amnesty International, *Universal Jurisdiction: A Preliminary Survey of Legislation Around the World* (2011); Bassiouni, *supra* note 36 (especially chapter 9 on "A Survey of National Legislation and Prosecutions for Crimes Against Humanity"); International Committee of the Red Cross, *International Humanitarian Law National Implementation Database* (updated periodically), *available at* http://www.icrc.org/ihl-nat.nsf; International Human Rights Law Clinic, George Washington University Law School, *Comparative Law Study and Analysis of National Legislation Relating to Crimes against Humanity and Extraterritorial Jurisdiction* (2013), *updated and reprinted in part in* Arturo J. Carrillo & Annalise K. Nelson, *Comparative Law Study and Analysis of National Legislation Relating to Crimes Against Humanity and Extraterritorial Jurisdiction*, *The George Washington Int'l Law Rev.*, vol. 46, p. 481 (2014) (hereinafter GWU Clinic Study).

128 For a general discussion of national jurisdiction in the context of international crimes, see generally A. Cassese & M. Delmas-Marty (eds.), *Juridictions nationales et crimes internationaux* (Presses Universitaires de France, 2002).

129 GWU Clinic Study, *supra* note 127, at 487.

130 *Ibid* at 488.

59. Second, the 2013 study undertook an in-depth, qualitative review of the national laws of a sample of 83 States (States Members of the United Nations listed alphabetically from A to I). Since 12 of those States were thought by earlier studies to have no law relating to crimes against humanity, the qualitative review focused on assessing the laws of the 71 other States. That review concluded that, in fact, only 41 per cent of States in the sample actually possessed a national law specifically on "crimes against humanity" (34 of 83).[131] Of the 58 Rome Statute parties within the sample of 83 States, the review indicated that 48 per cent of them possessed a national law specifically on "crimes against humanity" (28 of 58).

60. Third, for the 34 States that possessed a national law specifically on "crimes against humanity", the 2013 study analysed closely the provisions of those laws. Of those States, only 29 per cent adopted verbatim the text of article 7 of the Rome Statute when defining the crime (10 of 34).[132] As such, of the 83 States within the sample, only about 12 per cent adopted the formulation of Rome Statute article 7 in its entirety (10 of 83). Instead, most of the 34 States that possessed a national law specifically on "crimes against humanity" deviated from the components of article 7, such as by omitting components of the chapeau language of article 7(1); omitting some prohibited acts as set forth in article 7(1)(a)–(k); or omitting the second or third paragraphs of article 7, including the component relating to furthering "a State or organizational policy." All told, of those 34 States that possessed a national law specifically on "crimes against humanity", 71 per cent of them (24 of 34) possessed national laws that lacked key elements of the article 7 definition, revealing a wide range of minor to major substantive differences.[133]

61. Finally, the 2013 study analysed whether the 34 States that possess a national law specifically on "crimes against humanity" could exercise jurisdiction over a non-national offender who commits the crime abroad against non-nationals. The study concluded that nearly 62 per cent (21 of 34) could exercise such jurisdiction. However, this meant that only 25 per cent of the States within the sample were able to exercise such jurisdiction over "crimes against humanity" (21 of 83). Further, of the 58 Rome Statute parties within the sample, 33 per cent both possess a national law specifically on "crimes against humanity" and are able to exercise such jurisdiction (19 of 58).[134]

62. A number of States have established specialized prosecutorial authorities or procedures within their legal systems to investigate and prosecute crimes against humanity and other international crimes.[135] These authorities, in turn, have begun developing networks for cooperation, such as the European network of contact points in respect of persons responsible for genocide, crimes against humanity and

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[131] *Ibid.*, at 493. By contrast, 20 per cent of States in the sample possessed laws that did not actually address "crimes against humanity", but that arguably contained some features in common with the crime, such as a prohibition of one or more of the prohibited acts listed in Article 7(1)(a)–(k) of the Rome Statute (17 of 83). Within this group are States possessing a law that is labelled "crimes against humanity", but which in fact only covers war crimes and genocide. *Ibid.*, at 490-91. The remaining 39 per cent of States in the sample had no discernible law relating to crimes against humanity (32 of 83).

[132] Ibid., at 492.

[133] Ibid., at 493-95, 497-503.

[134] Ibid., at 505-13.

[135] See, e.g., Canada's Crimes Against Humanity and War Crimes Program, *available at* http://www.justice.gc.ca/eng/cj-jp/wc-cdg/index.html.

war crimes.[136] The International Criminal Police Organization (INTERPOL) has established a fugitive investigative support subdirectorate dedicated to facilitating the apprehension and extradition of individuals accused of such crimes.[137]

63. Separate and apart from statutes providing for the criminal prosecution of crimes against humanity, some States have also included the prohibition on crimes against humanity in their immigration rules.[138] Such provisions indicate that persons accused of the commission of crimes against humanity may be barred entry to the country in question, may be removed and/or deported and may be prosecuted for committing fraud upon entry.

64. The unevenness in the adoption of national laws relating to crimes against humanity has collateral consequences with respect to inter-State cooperation in seeking to sanction offences. Existing bilateral and multilateral agreements on mutual legal assistance and on extradition typically require that the offence at issue be criminalized in the jurisdictions of both the requesting and requested States (referred to as "double" or "dual" criminality); if their respective national laws are not comparable, then cooperation usually is not required. With a large number of States having no national law on crimes against humanity, and with significant discrepancies among the national laws of States that have criminalized the offence, there at present exist considerable impediments to inter-State cooperation. Further, the absence in most States of national laws that allow for the exercise of jurisdiction over non-nationals for crimes against humanity inflicted upon non-nationals abroad means that offenders often may seek sanctuary simply by moving to a State in which the acts were not committed. Even in circumstances in which States have adopted harmonious national laws on crimes against humanity, there may exist no obligation as between the States to cooperate with respect to the offence, including by way of an obligation to extradite or prosecute the alleged offender.

IV. Existing multilateral conventions that promote prevention, criminalization and inter-State cooperation with respect to crimes

65. In pursuing the objectives identified in section II above, the Commission may be guided by numerous existing multilateral conventions that promote prevention, criminalization and inter-State cooperation with respect to transnational crimes. The Commission has previously helped draft a convention of this nature: the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents.[139] Of particular interest are the

[136] This network was set up pursuant to European Council Decision 2002/494/JHA and reaffirmed with Council Decision 2003/335/JHA.

[137] See INTERPOL's War Crimes Program, *available at* http://www.interpol.int/Crime-areas/War-crimes/War-crimes.

[138] See, e.g., Canada, Immigration and Refugee Protection Act, S.C. 2001, C.27 (as amended on December 16, 2014); U.S. Presidential Proclamation 8697 (Aug. 4, 2011) — Suspension of Entry as Immigrants and Nonimmigrants of Persons Who Participate in Serious Human Rights and Humanitarian Law Violations and Other Abuses, Fed. Reg., vol. 76, p. 49277 (2011).

[139] Dec. 14, 1973, 1035 U.N.T.S. 167. Draft prepared by the Commission at its twenty-fourth session in 1972; the Convention was then negotiated and adopted by the General Assembly in 1973, entered into force in 1977, and as of January 2015 has 178 States Parties.

conventions relating to genocide and war crimes, as well as other treaties that seek to deal comprehensively with specific crimes, such as conventions relating to State-sponsored torture, enforced disappearance, transnational corruption and organized crime and terrorist-related offences. Likewise, multilateral conventions on extradition, mutual legal assistance and statutes of limitation can provide important guidance with respect to those issues. The following discussion briefly addresses some aspects of these treaties.

A. 1948 Genocide Convention

66. The 1948 Convention on the Prevention and Punishment of the Crime of Genocide[140] sets forth in article I that the Contracting Parties "confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and punish". Article II then defines the crime in terms that were later adopted verbatim as article 6 of the Rome Statute. Article III identifies that the act itself shall be punishable, but so shall conspiracy, incitement and attempt to commit the act, as well as complicity in the act. Article IV provides that persons committing genocide or any of the other acts enumerated in article III (such as complicity in genocide) shall be punished "whether they are constitutionally responsible rulers, public officials or private individuals".

67. Article V provides: "The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article III." Article VI provides that persons charged with genocide shall be tried by a competent national tribunal "in the territory of which the act was committed, or by such international tribunal as may have jurisdiction". Article VII addresses extradition, stating that the act of genocide shall not be considered as "political crimes" and that the parties "pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force". Article VIII recalls that any party may call upon competent United Nations organs to take action to prevent and suppress genocide, while article IX provides that disputes arising under the convention shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

68. As is the case for crimes against humanity, the crime of genocide has been included in the statutes of various international criminal tribunals and developed in their jurisprudence. Moreover, the 1948 Genocide Convention has featured in several decisions of the International Court of Justice relevant to interpretation of the Convention.[141]

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[140] Genocide Convention, *supra* note 26; see also A. Gil Gil, *El genocidio y otros crímenes internacionales* (UNED, 1999); P. Gaeta (ed.), *The UN Genocide Convention: A Commentary* (Oxford University Press, 2009); C. Tams et al. (eds.), *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (Hart Publishing, 2013).

[141] *Reservations to the Convention on Genocide*, Advisory Opinion, I.C.J. Reports 1951, p. 15; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v. Yugoslavia)*, Judgment on Preliminary Objections to Jurisdiction, I.C.J. Reports 1996, p. 595; *2007 Bosnia & Herzegovina v. Serbia & Montenegro Judgment,*

B. 1949 Geneva Conventions and Additional Protocol I[142]

69. The four Geneva Conventions of 1949[143] contain in a common article[144] an identical mechanism for the prosecution of persons accused of having committed "grave breaches"[145] of the Conventions. Pursuant to the first paragraph of the common article, the parties "undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches" of the Conventions. In its second paragraph, the common article specifies that:

> Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another

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supra note 6; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment on Preliminary Objections to Jurisdiction, I.C.J. Reports 2008, p. 412; 2015 *Croatia v. Serbia Genocide Judgment*, *supra* note 6.

[142] The analysis in this sub-section is drawn from Study by the Secretariat, Survey of multilateral conventions, which may be relevant to the work of the International Law Commission on the topic "The Obligation to extradite or prosecute (*aut dedere aut judicare*)," U.N. Doc. A/CN.4/630, at 17-18, 22-23 (June 18, 2010).

[143] Geneva Convention relative to the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31 (Geneva Convention I); Geneva Convention relative to the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85 (Geneva Convention II); Geneva Convention relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135 (Geneva Convention III); Geneva Convention relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 (Geneva Convention IV).

[144] Geneva Convention I, art. 49; Geneva Convention II, art. 50; Geneva Convention III, art. 129; Geneva Convention IV, art. 146.

[145] Each Convention contains an article describing what acts constitute "grave breaches" of that particular convention. For Geneva Conventions I and II, this article is identical (arts. 50 and 51, respectively): "Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly." Article 130 of Geneva Convention III reads: "Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention." Article 147 of Geneva Convention IV reads: "Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, 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 prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."

High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.

70. This obligation to undertake measures against an alleged offender is not conditioned by any jurisdictional nexus of the offender to the State party in which the offender is present. The obligation is one of prosecution, with the possibility to transfer an accused person as an alternative. Further, the obligation to search for and prosecute an alleged offender exists irrespective of any request for transfer by another party.[146]

71. While the obligation described above is limited to grave breaches, the common article further provides, in its third paragraph, that the States parties shall take measures to suppress all acts contrary to the Conventions other than the grave breaches. Finally, under its fourth paragraph, the common article stipulates that the accused "shall benefit by safeguards of proper trial and defence" in all circumstances, and that those safeguards "shall not be less favourable than those provided by Article 105 and those following" of the Geneva Convention Relative to the Treatment of Prisoners of War. Other articles briefly address the responsibility of States parties for violations of the conventions and the possibility of a procedure for enquiry concerning any alleged violation of the Conventions.[147]

72. The Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I) builds upon the provision concerning the punishment of offenders contained in the common article to the 1949 Geneva Conventions.[148] In essence, the common article is made applicable to Protocol I by *renvoi*; article 85(1) of Protocol I specifies that "[t]he provisions of the Conventions relating to the repression of breaches and grave breaches, supplemented by this Section, shall apply to the repression of breaches and grave breaches of this Protocol".[149] Protocol I also builds upon the Geneva Conventions with a series of articles designed to help repress breaches: article 86 addresses a State's failure to act; article 87 addresses the duty of commanders; article 88 addresses mutual assistance in criminal matters;[150] article 89 addresses inter-State cooperation in situations of serious violations of the Geneva Conventions or Protocol I; article 90 addresses the establishment of an international fact-finding commission to investigate facts alleged to be a grave breach; and article 91 addresses the responsibility of States parties to pay compensation for violations of the Geneva Conventions or Protocol I.

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[146] See J. Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary*, vol. IV, p. 593 (ICRC, 1958).

[147] See, e.g., Geneva Convention III, Arts. 131–32.

[148] June 8, 1977, 1125 U.N.T.S. 3 (Protocol I).

[149] "Grave breaches" of Protocol I are identified at Articles 11 and 85(2)-(4) of Protocol I.

[150] Article 88(1) provides that the States Parties "shall afford one another the greatest measure of assistance in connexion with criminal proceedings brought in respect of grave breaches of the Conventions or of this Protocol." Article 88(2) specifies that the parties to Protocol I shall, when the circumstances allow, cooperate in extradition matters, including giving due consideration to a request received from the State in whose territory the alleged offence has occurred. Article 88(3) provides that the law of the requested party shall apply in all cases and that the paragraphs shall not "affect the obligations arising from the provisions of any other treaty of a bilateral or multilateral nature which governs or will govern the whole or part of the subject of mutual assistance in criminal matters."

C. Other potentially relevant conventions

73. Contemporary definitions of crimes against humanity include acts such as "torture", "enslavement" and "enforced disappearance of persons" as the types of acts that, if committed on a widespread or systematic basis against a civilian population, can constitute crimes against humanity. As such, when drafting a convention on crimes against humanity, account should be taken of conventions that address such acts.

74. For example, the Convention against Torture sets forth a series of articles that define the crime, call upon States parties to prevent the crime, criminalize the conduct, establish jurisdiction over the conduct and impose an obligation to extradite or prosecute an offender that turns up in the State Party's territory. Numerous other provisions address other aspects of the State party's obligations, as well as inter-State cooperation and dispute resolution. As at January 2015, 156 States are party to this convention. The International Court of Justice recently addressed at some length the *aut dedere aut judicare* obligation contained within this convention,[151] which was in turn the subject of a report by the Commission in 2014.[152]

75. The 2000 United Nations Convention against Transnational Organized Crime[153] has a Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.[154] The protocol defines the crime of trafficking, requires States parties to incorporate the crime into their national laws, and requires them to adopt prevention measures. The provisions of the convention, which apply *mutatis mutandis* to the protocol, set forth various obligations relating to prosecution, jurisdiction, adjudication and sanctions, as well as extradition, mutual legal assistance and other matters. As of January 2015, 166 States are party to this protocol.

76. Likewise, the International Convention for the Protection of All Persons from Enforced Disappearance[155] contains provisions regarding defining the crime, criminalization of the act in national law, *aut dedere aut judicare*, mutual legal assistance and extradition. Notably, article 5 of the convention provides that: "The widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law."[156] As at January 2015, 44 States are party to this convention.

77. There are, of course, numerous other global treaties that address issues of prevention, criminalization in national law, *aut dedere aut judicare*, mutual legal assistance, extradition, dispute settlement and other issues potentially relevant to a

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[151] *Questions Relating to the Obligation to Prosecute or Extradite, supra* note 73.

[152] 2014 Report, *supra* note 4, at 130-52, para. 65.

[153] Nov. 15, 2000, 2225 U.N.T.S. 209. As of January 2015, there are 179 States Parties to this convention.

[154] Nov. 15, 2000, 2237 U.N.T.S. 319.

[155] Dec. 20, 2006, 2716 U.N.T.S. 3. As of January 2015, there are 44 States Parties to this convention.

[156] *Id.*, art. 5; see M. Lot Vermeulen, *Enforced Disappearance: Determining State Responsibility under the International Convention for the Protection of All Persons from Enforced Disappearance*, at 60-62 (Intersentia, 2012).

convention on crimes against humanity. Moreover, there are also some relevant treaties operating at the regional or subregional levels, such as the Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination.[157] All such treaties should be considered in the course of the Commission's work, bearing in mind that the value and effectiveness of particular provisions must be assessed in context.

V. Preventing and punishing crimes against humanity

78. Treaties that address efforts to criminalize acts are largely focused on punishment of individuals for the crime once committed, but many also contain an obligation of some type that the States parties prevent the crime as well. Such an obligation may be set forth in a single article that speaks broadly to the issue of prevention or may be embedded in several articles that collectively seek the same end.

79. At the most general level, such an obligation simply requires the States parties to undertake to prevent (as well as punish) the acts in question. Thus, article I of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide provides: "The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish."[158] Much of the remainder of the convention is then focused on specific measures relating to punishment of individuals, although some provisions also relate to the issue of prevention.[159]

80. This general obligation to prevent manifests itself in two ways. First, it imposes upon States parties an obligation not "to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law".[160] Second, it imposes upon States parties an obligation "to employ the means at their disposal … to prevent persons or groups not directly under their authority from committing" such acts.[161] For the latter, the State party is only expected to use its best efforts (a due diligence standard) when it has a "capacity to influence effectively the action of persons likely to commit, or already committing, genocide", which in turn depends

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[157] Nov. 29, 2006 (entered into force in 2008). The International Conference on the Great Lakes Region of Africa, which developed this protocol, consists of Angola, Burundi, the Central African Republic, the Congo, the Democratic Republic of the Congo, Kenya, Rwanda, Republic of South Sudan, the Sudan, Uganda, the United Republic of Tanzania and Zambia. The instrument is a protocol to the Pact on Security, Stability and Development in the Great Lakes Region, Dec. 15, 2006 (amended 2012).

[158] Genocide Convention, art. I.

[159] Article V provides: "The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article 3." Article VIII provides: "Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article 3."

[160] *2007 Bosnia & Herzegovina v. Serbia & Montenegro Judgment*, *supra* note 6, para. 166.

[161] Ibid., para. 430; see also B. Simma, "Genocide and the International Court of Justice," in C. Safferling and E. Conze (eds.), *The Genocide Convention Sixty Years After its Adoption*, p. 259, at 262 (Asser 2010).

on the State party's geographic, political and other links to the persons or groups at issue. Further, the State party is only obligated to do what it legally can do under international law.[162]

81. A breach of this general obligation implicates the responsibility of the State if the conduct at issue (either commission of the proscribed act or a failure to take necessary, appropriate and lawful measures to prevent the proscribed act by another) is attributable to the State pursuant to the rules on State responsibility. Indeed, in the context of disputes that may arise under the Genocide Convention, article IX refers, inter alia, to disputes "relating to the responsibility of a State for genocide". Although much of the focus of the Genocide Convention is upon prosecuting individuals for the crime of genocide, the International Court of Justice has stressed that the breach of the obligation to prevent is not a criminal violation by the State but, rather, concerns a breach of international law that engages traditional State responsibility.[163] The Court's approach is consistent with views previously expressed by the Commission,[164] including in commentary to the 2001 articles on responsibility of states for internationally wrongful acts: "Where crimes against international law are committed by State officials, it will often be the case that the State itself is responsible for the acts in question or for failure to prevent or punish them."[165]

82. Many conventions also contain a different type of "prevention" obligation, which is an obligation to pursue specific measures designed to help prevent the offence from occurring, such as by obliging States parties to take effective legislative, executive, administrative, judicial or other measures to prevent the conduct from occurring in any territory under their jurisdiction. Depending on the particular crime at issue, and the context in which that State party is operating, such measures might be pursued in various ways. The State party might be expected to pursue initiatives that educate governmental officials as to the State's obligations under the relevant treaty regime. Training programmes for police, military, militias and other personnel might be necessary to help prevent the proscribed act. National laws and policies will likely be necessary to establish awareness of the criminality of the act and to promote early detection of any risk of its commission. Certainly once the proscribed act is committed, such an obligation reinforces other obligations within the treaty that require the State party to investigate and prosecute or extradite offenders, since doing so serves, in part, to deter future acts by others. Here, too, international responsibility of the State arises if the State party has failed to use its best efforts to organize the governmental apparatus, as necessary and appropriate, to minimize the likelihood of the proscribed act being committed.

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[162] *2007 Bosnia & Herzegovina v. Serbia & Montenegro Judgment*, *supra* note 6, para. 430 (finding that "it is clear that every State may only act within the limits permitted by international law"); see C. Tams, "Article I," in Tams et al., *supra* note 140, at 51 ("The duty to prevent may require state parties to make use of existing options but it does not create new rights of intervention — hence, to give just one example, the recognition of a duty to prevent adds very little to debates about the unilateral use of force to stop genocide in so-called 'humanitarian interventions'.").

[163] *2007 Bosnia & Herzegovina v. Serbia & Montenegro Judgment*, *supra* note 6, para. 167 (finding that international responsibility is "quite different in nature from criminal responsibility").

[164] See Report of the International Law Commission on the work of its 50th session, I.L.C. Yearbook 1998, Vol. II, Part 2, at 65, para. 248 (finding that the Genocide Convention "did not envisage State crime or the criminal responsibility of States in its article IX concerning State responsibility.").

[165] Report of the International Law Commission on the work of its 53rd session, I.L.C. Yearbook 2001, Vol. II, Part. 2, at 142 (para. 3 of the Commentary to Article 58).

83. For egregious offences, such provisions are often accompanied by a further provision indicating that no exceptional circumstances (such as the existence of an armed conflict or a public emergency) may be invoked as a justification for the offence. Such a general statement, sometimes placed at the beginning of the treaty, stresses that the obligation not to commit the offence is non-derogable in nature.

84. The following discussion centres on the treatment of an "obligation to prevent" in a range of treaties relevant to crimes against humanity, in comments by treaty monitoring bodies that seek to interpret such an obligation, in General Assembly resolutions, in international case law and in the writings of publicists. The present section then concludes with a proposed draft article, consisting of three paragraphs, entitled "Prevention and punishment of crimes against humanity."

A. Obligation to prevent crimes against humanity

1. Treaties

85. As discussed above, and as indicated in section IV.A of this report, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide contains within its title the notion that States parties are obligated not just to punish persons who commit genocide, but also to take measures to prevent commission of the crime. As noted in section IV.B of this report, the 1949 Geneva Conventions identify certain acts that are grave breaches of the conventions and provide that: "The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article."[166] The Conventions further provide that: "Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article." [167]

86. Such obligations to prevent and suppress crimes have been a feature of most multilateral treaties addressing transnational crimes since the 1960s. Examples include:

- Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 23 September 1971, United Nations, *Treaty Series*, vol. 974, No. 14118 (art. 10(1): "Contracting States shall, in accordance with international and national law, endeavour to take all practicable measures for the purpose of preventing the offences mentioned in Article 1.")
- Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 14 December 1973, United Nations, *Treaty Series*, vol. 1035, No. 15410 (art. 4(1): "States Parties shall co-operate in the prevention of the crimes set forth in article 2, particularly by taking all practicable measures to prevent preparations in their respective territories for the commission of those crimes within or outside their territories ….")

[166] Geneva Convention I, art. 49; Geneva Convention II, art. 50; Geneva Convention III, art. 129; Geneva Convention IV, art. 146.

[167] *Ibid.*

- International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973, United Nations, *Treaty Series*, vol. 1015, No. 14861 (art. 4(a): "The States Parties to the present Convention undertake … [t]o adopt any legislative or other measures necessary to suppress as well as to prevent any encouragement of the crime of apartheid and similar segregationist policies or their manifestations and to punish persons guilty of that crime ….")
- International Convention Against the Taking of Hostages, 17 December 1979, United Nations, *Treaty Series*, vol. 1316, No. 21931 (art. 4(1): "States Parties shall co-operate in the prevention of the offences set forth in article 1, particularly by: taking all practicable measures to prevent preparations in their respective territories for the commission of … offences … including measures to prohibit in their territories illegal activities of persons, groups and organizations that encourage, instigate, organize or engage in the perpetration of acts of taking of hostages.")
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, *Treaty Series*, vol. 1465, No. 24841 (art. 2(1): "Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.")
- Inter-American Convention to Prevent and Punish Torture, 9 December 1985, OAS Treaty Series, No. 67 (art. 1: "The State Parties undertake to prevent and punish torture in accordance with the terms of this Convention."; art. 6: "The States Parties likewise shall take effective measures to prevent and punish other cruel, inhuman, or degrading treatment or punishment within their jurisdiction.")
- Inter-American Convention on the Forced Disappearance of Persons, 9 June 1994, *International Legal Materials*, vol. XXV, 1994, p. 1529 (art. 1(c): "The States Parties to this Convention undertake … [t]o cooperate with one another in helping to prevent, punish, and eliminate the forced disappearance of persons; [t]o take legislative, administrative, judicial, and any other measures necessary to comply with the commitments undertaken in this Convention.")
- Convention on the Safety of United Nations and Associated Personnel, 9 December 1994, United Nations, *Treaty Series*, vol. 2051, No. 34547 (art. 11: "States Parties shall cooperate in the prevention of the crimes set out in article 9, particularly by: (a) Taking all practicable measures to prevent preparations in their respective territories for the commission of those crimes within or outside their territories; and (b) Exchanging information in accordance with their national law and coordinating the taking of administrative and other measures as appropriate to prevent the commission of those crimes.")
- International Convention for the Suppression of Terrorist Bombings, 15 December 1997, United Nations, *Treaty Series*, vol. 2149, No. 37517 (art. 15(a): "States Parties shall cooperate in the prevention of the offences set forth in article 2 ….")
- United Nations Convention against Transnational Organized Crime, 15 November 2000, United Nations, *Treaty Series*, vol. 2225, No. 39574

(art. 9(1): “In addition to the measures set forth in article 8 of this Convention, each State Party shall, to the extent appropriate and consistent with its legal system, adopt legislative, administrative or other effective measures to promote integrity and to prevent, detect and punish the corruption of public officials”; art. 9(2): “Each State Party shall take measures to ensure effective action by its authorities in the prevention, detection and punishment of the corruption of public officials, including providing such authorities with adequate independence to deter the exertion of inappropriate influence on their actions”; art. 29(1): “Each State Party shall, to the extent necessary, initiate, develop or improve specific training programmes for its law enforcement personnel, including prosecutors, investigating magistrates and customs personnel, and other personnel charged with the prevention, detection and control of the offences covered by this Convention”; art. 31(1): “States Parties shall endeavour to develop and evaluate national projects and to establish and promote best practices and policies aimed at the prevention of transnational organized crime”.)

- Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000, United Nations, *Treaty Series*, vol. 2237, No. 39574 (art. 9(1): “States Parties shall establish comprehensive policies, programmes and other measures: (a) To prevent and combat trafficking in persons; and (b) To protect victims of trafficking in persons, especially women and children, from revictimization.”)

- Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 18 December 2002, United Nations, *Treaty Series*, vol. 2375, No. 24841 (preamble: “Recalling that the effective prevention of torture and other cruel, inhuman or degrading treatment or punishment requires education and a combination of various legislative, administrative, judicial and other measures”; art. 3 “Each State party shall set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment ...”)

- International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, United Nations, *Treaty Series*, vol. 2716, No. 48088 (preamble: “Determined to prevent enforced disappearances and to combat impunity for the crime of enforced disappearance”; art. 23: “1. Each State Party shall ensure that the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody or treatment of any person deprived of liberty includes the necessary education and information regarding the relevant provisions of this Convention, in order to: (a) Prevent the involvement of such officials in enforced disappearances; (b) Emphasize the importance of prevention and investigations in relation to enforced disappearances; (c) Ensure that the urgent need to resolve cases of enforced disappearance is recognized. 2. Each State Party shall ensure that orders or instructions prescribing, authorizing or encouraging enforced disappearance are prohibited. Each State Party shall guarantee that a person who refuses to obey such an order will not be punished. 3. Each State Party shall take the necessary measures to ensure that the persons referred to in paragraph 1 of this article who have reason to

believe that an enforced disappearance has occurred or is planned report the matter to their superiors and, where necessary, to the appropriate authorities or bodies vested with powers of review or remedy.")[168]

- Protocol for the Prevention and Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination, 29 November 2006 (art. 8(1): "The Member States recognise that the crime of genocide, war crimes, and crimes against humanity are crimes under international law and are crimes against people's rights which they undertake to prevent and punish.")

87. Some multilateral human rights treaties, even though not focused on the prevention and punishment of crimes as such, contain relevant obligations to prevent and suppress serious human rights violations. Examples include:

- International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations, *Treaty Series*, vol. 660, No. 9464 (art. 3: "States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.")

- Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, United Nations, *Treaty Series*, vol. 1249, No. 20378 (art. 2: "States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women"; art. 3: "States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men")

- Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention), May 11, 2011, Council of Europe Treaty Series No. 210 (art. 4(2): "Parties condemn all forms of discrimination against women and take, without delay, the necessary legislative and other measures to prevent it, in particular by: embodying in their national constitutions or other appropriate legislation the principle of equality between women and men and ensuring the practical realisation of this principle; prohibiting discrimination against women, including through the use of sanctions, where appropriate; abolishing laws and practices which discriminate against women.")

Some treaties do not refer expressly to "prevention" or "elimination" of the act but, rather, focus on an obligation to take appropriate legislative, administrative and other measures to "give effect" to or to "implement" the treaty, which may be seen as encompassing necessary or appropriate measures to prevent the act.[169] Examples include:

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[168] See Vermeulen, *supra* note 156, at 66-76.

[169] See, e.g., U. Kriebaum, "Prevention of Human Rights Violations," *Austrian Review of International and European Law*, vol. 2, p. 156 (1997) (viewing ICCPR Article 2(2) as entailing "preventive measures to ensure the necessary conditions for unimpeded enjoyment of the rights enshrined in the Covenant.").

- International Covenant on Civil and Political Rights, 16 December 1966, United Nations, *Treaty Series*, vol. 999, No. 14668: "Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.")
- Convention on the Rights of the Child, 20 November 1989, United Nations, *Treaty Series*, vol. 1577, No. 27531 (art. 4: "States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention.")

88. As such, in treaties relating to crimes of the type enumerated in the definition of crimes against humanity (such as torture or apartheid), treaties relating to transnational crimes (such as transnational organized crime) and human rights treaties, an obligation to prevent the act at issue is commonly included. The obligation may be stated in a general fashion or may indicate, with a greater or lesser degree of specificity, that the State party shall take effective legislative, administrative, judicial or other measures to prevent the proscribed acts.

2. Comments by treaty bodies

89. In some instances, committees established by such treaties have addressed the meaning of the obligation to prevent as contained in the relevant treaty.[170] Thus, in its general comment No. 2, the Committee against Torture addressed a State party's obligation to prevent State-sponsored torture under article 2 of the 1984 Convention against Torture. The Committee stated in part:

> 2. Article 2, paragraph 1 obliges each State party to take actions that will reinforce the prohibition against torture through legislative, administrative, judicial, or other actions that must, in the end, be effective in preventing it. To ensure that measures are in fact taken that are known to prevent or punish any acts of torture, the Convention outlines in subsequent articles obligations for the State party to take measures specified therein.
>
> 3. The obligation to prevent torture in article 2 is wide-ranging.…
>
> 4. States parties are obligated to eliminate any legal or other obstacles that impede the eradication of torture and ill-treatment; and to take positive effective measures to ensure that such conduct and any recurrences thereof are effectively prevented. States parties also have the obligation continually to keep under review and improve their national laws and performance under the Convention in accordance with the Committee's concluding observations and views adopted on individual communications. If the measures adopted by the State party fail to accomplish the purpose of eradicating acts of torture, the Convention requires that they be revised and/or that new, more effective measures be adopted. Likewise, the Committee's understanding of and

[170] See B. Ramcharan, *The Fundamentals of International Human Rights Treaty Law*, at 100-04 (Martinus Nijhoff, 2011).

> recommendations in respect of effective measures are in a process of continual evolution, as, unfortunately, are the methods of torture and ill-treatment.[171]

90. The Committee on the Elimination of Racial Discrimination addressed a State party's obligation to prevent racial discrimination in its general recommendation No. 31. In that recommendation, the Committee provided guidance on strategies States could employ to uphold their obligation to prevent discrimination, such as implementing national strategies or "plans of action aimed at the elimination of structural racial discrimination",[172] eliminating laws that target specific segments of the population[173] and developing "through appropriate education programmes, training in respect for human rights, tolerance and friendship among racial or ethnic groups, as well as sensitization to intercultural relations, for law enforcement officials".[174]

91. Likewise, the Committee on the Elimination of Discrimination against Women addressed a State party's obligation to prevent violations of the Convention on the Elimination of All Forms of Discrimination against Women, principally in its general recommendations Nos. 6, 15 and 19. In general recommendation No. 6, the Committee recommended that States parties "[e]stablish and/or strengthen effective national machinery, institutions and procedures, at a high level of Government, and with adequate resources, commitment and authority to … [m]onitor the situation of women comprehensively; [h]elp formulate new policies and effectively carry out strategies and measures to eliminate discrimination" and also "[t]ake appropriate steps to ensure the dissemination of the Convention".[175] In general recommendation No. 15, the Committee recommended that States parties report on their efforts to prevent specific discrimination against women who have contracted AIDS.[176] In general recommendation No. 19, the Committee emphasized that:

> under article 2(e) the Convention calls on States parties to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise. Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.[177]

92. The Inter-American Commission on Human Rights, in its report on "Citizen security and human rights", noted that one of the main obligations of the state in upholding human rights "is linked to the judicial clarification of criminal conduct

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[171] See Committee Against Torture, General Comment No. 2, U.N. Doc. CAT/C/GC/2/CRP.1/Rev.4, paras. 2-4 (Nov. 2007). For an assessment of the Committee's practice with respect to Article 2, see M. Nowak & E. McArthur, *The United Nations Convention against Torture: A Commentary*, at 94-107 (Oxford University Press, 2008).

[172] Committee on the Elimination of Racial Discrimination, *General Recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system*, U.N. Doc. CERD/C/GC/31/Rev.4, para. 5(i) (2005).

[173] *Ibid.*, para. 5(a).

[174] *Ibid.*, para. 5(b).

[175] Committee on the Elimination of Discrimination against Women, General Recommendation No. 6, U.N. Doc. A/43/38, paras. 1-2 (1988).

[176] Committee on the Elimination of Discrimination against Women, General Recommendation No. 15, U.N. Doc. A/45/38, para. (d) (1990).

[177] Committee on the Elimination of Discrimination against Women, General Recommendation No. 19, U.N. Doc. A/47/38, para. 9 (1992).

with the view to eliminating impunity and preventing the recurrence of violence … [u]ndoubtedly the adequate and effective administration of justice on the part of the judicial branch and to an appropriate extent, of disciplinary entities, has a fundamental role … in terms of the lessening of the risk and the scope of violence."[178]

93. With respect to treaties that focus on an obligation to take appropriate legislative, administrative and other measures to "give effect" to or to "implement" the treaty, the relevant treaty bodies have also issued comments. Thus, the Human Rights Committee, in its general comment No. 3, emphasized, in part, "that all administrative and judicial authorities should be aware of the obligations which the State party has assumed under the Covenant. To this end, the Covenant should be publicized in all official languages of the State and steps should be taken to familiarize the authorities concerned with its contents as part of their training".[179] The Committee on the Rights of the Child, in general comment No. 5, sought to clarify what was meant by "general measures of implementation" and determined that they:

> are intended to promote the full enjoyment of all rights in the Convention … through legislation, the establishment of coordinating and monitoring bodies … comprehensive data collection, awareness-raising and training and the development and implementation of appropriate policies, services and programmes.[180]

In general comment No. 6, the Committee provided guidance on various measures for preventing mistreatment of unaccompanied and separated children located outside their country of origin, including prevention of trafficking and sexual exploitation, prevention of their military recruitment and prevention of their detention.[181]

3. United Nations resolutions

94. The General Assembly has periodically made reference to an obligation of States to prevent crimes against humanity. For example, in its 1973 Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, the Assembly recognized a general responsibility for inter-State cooperation and intra-State action to prevent the commission of war crimes and crimes against humanity. Among other things, the Assembly declared that "States shall co-operate with each other on a bilateral and multilateral basis with a view to halting and preventing war crimes and crimes against humanity, and shall take the domestic and international measures necessary for that purpose".[182] In its 2005 Basic Principles and Guidelines on the Right to a

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[178] Inter-American Commission on Human Rights, Report on Citizen Security and Human Rights, OEA/Ser.L/V/II, Doc. 57, para. 36 (2009).

[179] Human Rights Committee, General Comment 3, *Article 2 Implementation at the National Level*, para. 2 (July 29, 1981), in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, vol. 1, U.N. Doc. HRI/GEN/1/Rev.9, p. 175 (2008).

[180] Committee on the Rights of the Child, General Comment No. 5, *General Measures of implementation of the Convention on the Rights of the Child, arts. 4, 42 and 44*, U.N. Doc. CRC/GC/2003/5, para. 9 (Nov. 27, 2003).

[181] Committee on the Rights of the Child, General Comment No. 6, U.N. Doc. CRC/GC/2005/6, paras. 50-63 (2005).

[182] G.A. Res. 3074 (XXVIII), para. 3 (1973).

Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, the Assembly stated that the "obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to … [t]ake appropriate legislative and administrative and other appropriate measures to prevent violations".[183]

4. Case law

95. In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, the International Court of Justice analysed the meaning of "undertake to prevent" as contained in article I of the 1948 Genocide Convention. At the provisional measures phase, the Court determined that the undertaking in article I imposes "a clear obligation" on the two parties "to do all in their power to prevent the commission of any such acts in the future".[184] At the merits phase, the Court described such an undertaking as "a formal promise … not merely hortatory or purposive … and is not to be read merely as an introduction to later express references to legislation, prosecution and extradition".[185]

96. The Court then indicated two types of obligations associated with article I, beginning with the obligation that a State itself not commit genocide:

> Under Article I the States parties are bound to prevent such an act, which it describes as "a crime under international law", being committed. The Article does not *expressis verbis* require States to refrain from themselves committing genocide. However, in the view of the Court, taking into account the established purpose of the Convention, the effect of Article I is to prohibit States from themselves committing genocide. Such a prohibition follows, first, from the fact that the Article categorizes genocide as "a crime under international law": by agreeing to such a categorization, the States parties must logically be undertaking not to commit the act so described. Secondly, it follows from the expressly stated obligation to prevent the commission of acts of genocide. That obligation requires the States parties, *inter alia*, to employ the means at their disposal, in circumstances to be described more specifically later in this Judgment, to prevent persons or groups not directly under their authority from committing an act of genocide or any of the other acts mentioned in Article III. It would be paradoxical if States were thus under an obligation to prevent, so far as within their power, commission of genocide by persons over whom they have a certain influence, but were not forbidden to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law. In short, the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide.[186]

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[183] G.A. Res. 60/147, Annex, para. 3(a) (Dec. 16, 2005).

[184] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v. Yugoslavia)*, Order on Provisional Measures, I.C.J. Reports 1993, p. 3, at p. 22.

[185] *2007 Bosnia & Herzegovina v. Serbia & Montenegro Judgment*, *supra* note 6, para. 162.

[186] *Ibid.*, para. 166.

97. The Court also decided that the substantive obligation reflected in article I was not, on its face, limited by territory but, rather, applied "to a State wherever it may be acting or may be able to act in ways appropriate to meeting the obligation[] in question."[187] Later in the judgment, the Court addressed in greater depth the obligation that a State party employ the means at its disposal to prevent persons or groups not under its authority from committing genocide. The Court said:

> it is clear that the obligation in question is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible. A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide. In this area the notion of "due diligence," which calls for an assessment *in concreto*, is of critical importance. Various parameters operate when assessing whether a State has duly discharged the obligation concerned. The first, which varies greatly from one State to another, is clearly the capacity to influence effectively the action of persons likely to commit, or already committing, genocide. This capacity itself depends, among other things, on the geographical distance of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events. The State's capacity to influence must also be assessed by legal criteria, since it is clear that every State may only act within the limits permitted by international law; seen thus, a State's capacity to influence may vary depending on its particular legal position vis-à-vis the situations and persons facing the danger, or the reality, of genocide. On the other hand, it is irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide. As well as being generally difficult to prove, this is irrelevant to the breach of the obligation of conduct in question, the more so since the possibility remains that the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result — averting the commission of genocide — which the efforts of only one State were insufficient to produce.[188]

98. In this context, the Court continued,

> a State's obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed. From that moment onwards, if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent (*dolus specialis*), it is under a duty to make such use of these means as the circumstances permit.[189]

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[187] *Ibid.*, para. 183.
[188] *Ibid.*, para. 430.
[189] *Ibid.*, para. 431.

99. The Court stressed that breach of this type of obligation to prevent "results from mere failure to adopt and implement suitable measures to prevent genocide from being committed. In other words … violation of the obligation to prevent results from omission" and, as such, "the duty to prevent places States under positive obligations, to do their best to ensure that such acts do not occur".[190] To incur responsibility, "it is enough that the State was aware, or should normally have been aware, of the serious danger that acts of genocide would be committed".[191] At the same time, the Court maintained that "a State can be held responsible for breaching the obligation to prevent genocide only if genocide was actually committed".[192]

100. The Court also addressed the distinction between prevention and punishment. While "one of the most effective ways of preventing criminal acts, in general, is to provide penalties for persons committing such acts, and to impose those penalties effectively on those who commit the acts one is trying to prevent",[193] the Court found that "the duty to prevent genocide and the duty to punish its perpetrators … are … two distinct yet connected obligations."[194] Indeed, the "obligation on each contracting State to prevent genocide is both normative and compelling. It is not merged in the duty to punish, nor can it be regarded as simply a component of that duty."[195]

101. The Court cautioned that the "content of the duty to prevent varies from one instrument to another, according to the wording of the relevant provisions, and depending on the nature of the acts to be prevented", and hence the Court's decision did not "purport to establish a general jurisprudence applicable to all cases where a treaty instrument, or other binding legal norm, includes an obligation for States to prevent certain acts".[196]

102. The 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms[197] contains no express obligation to "prevent" violations of the Convention, but the European Court of Human Rights has construed individual articles to contain such an obligation. Thus, in *Kilic v. Turkey*, the Court found that article 2(1) of the Convention, on the right to life, obliged a State party not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps within its domestic legal system to safeguard the lives of those within its jurisdiction.[198] Construing the same article in *Makaratzis v. Greece*, the Court determined that this "involves a primary duty on the State to secure the right to life by putting in place an appropriate legal and administrative framework to deter the

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[190] *Ibid.*, para. 432.

[191] *Ibid.*

[192] *Ibid.*, para. 431; see Draft Articles on State Responsibility, supra note 72, Article 14, para. 3 (maintaining that "[t]he breach of an international obligation requiring a State to prevent a given event occurs when the event occurs…."); J. Salmon, "Duration of the Breach," in J. Crawford et al. (eds.), *The Law of International Responsibility*, p. 383 (Oxford University Press, 2010); C. Economides, "Content of the Obligation: Obligations of Means and Obligations of Result," in *ibid.*, p. 371.

[193] *2007 Bosnia & Herzegovina v. Serbia & Montenegro Judgment*, *supra* note 6, para. 426.

[194] *Ibid.*, para. 425.

[195] *Ibid.*, para. 427.

[196] *Ibid.*, para. 429.

[197] European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, E.T.S. 5 as amended by E.T.S. No. 155.

[198] *Kiliç v. Turkey*, E.Ct.H.R., Judgment, App. No. 22492/93, para. 62 (2000).

commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions".[199]

103. At the same time, the Court has recognized that the State party's obligation in this regard is limited. In *Mahmut Kaya v. Turkey*, the Court found:

> Bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, the positive obligation [of article 2(1)] must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. For a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.[200]

104. The 1969 American Convention on Human Rights[201] also contains no express obligation to "prevent" violations of the Convention. Even so, when construing the obligation of the States parties to "ensure" the free and full exercise of the rights recognized by the Convention,[202] the Inter-American Court of Human Rights has found that this obligation implies a "duty to prevent", which in turn requires the State party to pursue certain steps. Specifically, the Court in *Velasquez Rodriguez v. Honduras* found:

> 166. … This obligation implies the duty of the States parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.
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> 174. The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.

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[199] *Makaratzis v. Greece*, E.Ct.H.R., Judgment, App. No. 50385/99, para. 57 (2004).

[200] *Mahmut Kaya v. Turkey*, E.Ct.H.R., Judgment, App. No. 22535/93, para. 86 (2000); see also *Osman v. United Kingdom*, E.Ct.H.R., Judgment, App. No. 87/1997/871/1083, para. 116 (1998); *Kerimova a.o. v. Russia*, E.Ct.H.R., Judgment, App. Nos. 17170/04, 22448/04, 3360/04, 5681/05 and 5684/05, para. 246 (2011).

[201] American Convention on Human Rights, O.A.S. Official Records OEA/Ser. K/XVI/1.1, Doc. 65, Rev. 1, Corr. 1 (Jan. 7, 1970).

[202] Article 1(1) reads: The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination …."

> 175. This duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages. It is not possible to make a detailed list of all such measures, since they vary with the law and the conditions of each State party. Of course, while the State is obligated to prevent human rights abuses, the existence of a particular violation does not, in itself, prove the failure to take preventive measures. On the other hand, subjecting a person to official, repressive bodies that practice torture and assassination with impunity is itself a breach of the duty to prevent violations of the rights to life and physical integrity of the person, even if that particular person is not tortured or assassinated, or if those facts cannot be proven in a concrete case.[203]

105. Similar reasoning has animated the Court's approach to interpretation of article 6 of the 1966 Inter-American Convention to Prevent and Punish Torture. For example, in *Tibi v. Ecuador*, the Court found that Ecuador violated article 6 when it failed to initiate formal investigations after complaints of maltreatment of prisoners.[204]

5. Publicists

106. Publicists have also analysed these treaty obligations concerning prevention. With respect to the general obligation to prevent, a central focus of recent scholarship has been the 2007 judgment of the International Court of Justice in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*.[205] Owing to the absence of an express statement in the Genocide Convention that States parties shall not commit genocide, some scholars have debated whether the Court was correct in maintaining that the obligation is implicit in the obligation to "prevent".[206] Reflecting on a judgment in which he participated, however, former Judge Bruno Simma has indicated: "One of the more interesting questions finally put to rest in the 2007 judgment concerned whether States parties to the Convention are

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[203] *Velasquez Rodriguez v. Honduras*, 4 Inter-Am. Ct. H.R. (ser. C), paras. 166, 174–75; see also *Juan Humberto Sánchez v. Honduras*, Inter-Am. Ct. H.R., Judgment (Ser. C), no. 99, para. 137, 142 (2003); see also *Gómez-Paquiyauri Brothers v. Peru*, Inter-Am. Ct. H.R., Judgment (Ser. C), no. 110, para. 155 (2004) (finding that the State's failure to effectively investigate allegations of torture and leaving acts unpunished meant that they had failed to take effective measures to prevent such acts from occurring, in violation of its obligations under the provisions of Article 6 of the Inter-American Torture Convention).

[204] *Tibi v. Ecuador*, Inter-Am. Ct. H.R., Judgment (Ser. C) No. 114, para. 159 (2004); see also *Gómez-Paquiyauri Brothers v. Peru*, Inter-Am. Ct. H.R., Judgment (Ser. C) No. 110, para. 155 (2004).

[205] See, e.g., M. Piqué, "Beyond Territory, Jurisdiction, and Control: Towards a Comprehensive Obligation to Prevent Crimes Against Humanity," in Bergsmo & Song, *supra* note 7, p. 135; T. Weber, "The Obligation to Prevent in the Proposed Convention Examined in Light of the Obligation to Prevent in the Genocide Convention, *ibid*., p. 173.

[206] Compare P. Gaeta, "On What Conditions Can a State Be Held Responsible for Genocide?," *European J. Int'l L.*, vol. 18, p. 631 (2007), with C. Tams, "Article I," in Tams et al., *supra* note 140, at 56-60; A. Seibert-Fohr, "The ICJ Judgment in the 'Bosnian Genocide' Case and Beyond: A Need to Reconceptualise?," in Safferling & Conze, (eds.), *The Genocide Convention Sixty Years After its Adoption*, p. 245 (Asser 2010).

themselves under an obligation not to commit genocide. The Court's answer is a clear 'yes'."[207]

107. With respect to the obligation to pursue specific measures of prevention, publicists tend to characterize the obligation as an obligation of conduct or means. Thus,

> in relation to an obligation of means, the State may be bound to take positive measures of prevention or protection in order to obtain a particular goal …. The expressions used vary from one treaty to another ("take all measures", "all appropriate measures to protect", "necessary measures", "effective measures", "appropriate measures", "do everything possible", "do everything in its power", "exercise due diligence"), but their common feature is their general formulation and their lack of precise stipulation of the means to achieve the specified result.[208]

108. Other publicists have focused on the obligation to prevent as it exists in particular treaties, such as article I of the Genocide Convention[209] or article 2(1) of the Convention against Torture. For example, two participants in the drafting of article 2(1) of the Convention against Torture have analysed it as follows:

> According to *paragraph 1* of the article, … each State party shall take *effective measures to prevent torture*. The character of these measures is left to the discretion of the State concerned. It is merely indicated that the measures may be legislative, administrative, judicial or of some other kind, but in any case they must be effective. The paragraph should also be compared with article 4 of the *Convention*, which specifically requires legislative measures in order to make all acts of torture criminal offences punishable by appropriate penalties which take into account their grave nature.
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> The obligation under article 2 is not only to prohibit but to *prevent* acts of torture. This further emphasizes that the measures shall be effective: a formal prohibition is not sufficient, but the acts shall actually be prevented.
>
> This does not mean, of course, that a State can guarantee that no act of torture will ever be committed in its territory. It is sufficient that the State does what can reasonably be expected from it in order to prevent such acts from occurring. If nevertheless such acts occur, other obligations under the *Convention* become applicable, and the State may then be obliged under article 2, paragraph 1, to take further effective measures in order to prevent a repetition. Such measures may include changes of personnel in a certain unit, stricter supervision, the issue of new instructions, etc.[210]

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[207] Simma, *supra* note 161, at 264.

[208] C. Economides, *supra* note 192, at 378.

[209] See, e.g., W. Schabas, *Genocide in International Law: The Crime of Crimes*, at 520-25 (Cambridge University Press, 2d ed. 2009); C. Tams, "Article I," in Tams et al., *supra* note 140, at 45-54; O. Ben-Naftali, "The Obligation to Prevent and Punish Genocide," in Gaeta, *supra* note 140, p. 26, at 33-44.

[210] J. Burgers and H. Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, at 48, 123 (Martinus Nijhoff Publishers, 1988) (Bergers, a member of the Netherlands delegation to the U.N. Commission on Human Rights, served as chairman of the working group charged with drawing up the initial draft of the Convention; Danelius, a member of the Swedish delegation, was a member of that working group and wrote the initial draft).

109. Still other publicists have analysed the obligation to prevent as expressed in case law. For example, one analysis of the *Velasquez Rodriguez* case finds:

> The duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages. The Court clarified, however, that while the State is obligated to prevent human rights abuses, the existence of a particular violation did not, in itself, prove the failure to take preventive measures. On the other hand, subjecting a person to official, repressive bodies that practiced torture and assassination with impunity was itself a breach of the duty to prevent violations of the rights to life and physical integrity of the person, even if that particular person was not tortured or assassinated, or if those facts could not be proven in a concrete case.[211]

110. Publicists appear to recognize that the obligation to pursue specific measures to prevent does not actually dictate the specific steps that must be taken and instead accepts that such steps may vary according to the nature of the conduct being regulated and the context in which the State party is operating. Thus, one publicist has analysed the obligation to prevent as expressed by treaty-monitoring bodies, in case law, and in other sources so as to sketch out specific measures that should be undertaken by a State party to the International Convention for the Protection of All Persons from Enforced Disappearance. Those measures included: (a) protective measures to prevent the enforced disappearance of persons not in detention; (b) safeguards surrounding arrest and detention to prevent subsequent enforced disappearance; and (c) measures to prevent repetition of enforced disappearance of persons when it occurs.[212]

B. Obligation to prevent and punish crimes against humanity

111. In light of the above, there appear to be three important elements that might be captured in an initial draft article for a convention on crimes against humanity. First, the draft article could contain an opening provision that speaks generally to the obligation of a State party both to prevent and to punish crimes against humanity. Such a provision would signal at the outset the broad obligation being undertaken by States parties with respect to the particular offence of crimes against humanity. Second, the draft article could contain a further provision addressing the obligation of the State party to pursue specific measures of prevention in the form of appropriate legislative, administrative, judicial or other measures. Consistent with prior treaties, this provision would only address the issue of prevention, since most of the remainder of the convention on crimes against humanity will address in greater detail specific measures that must be taken by the State party to punish crimes against humanity, including the obligations to incorporate crimes against humanity into national law and to exercise national jurisdiction over alleged offenders. Finally, a third provision of the draft article could address the non-derogable nature of the prohibition on crimes against humanity, an important

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[211] Ramcharan, *supra* note 170, at 99. For an analysis of the "reasonableness" standard articulated by both the European and Inter-American Courts, see Vermeulen, *supra* note 156, at 265–68.

[212] Vermeulen, *supra* note 156, at 268–312.

statement at the outset of the convention that would highlight the seriousness of this offence. Each of these elements is discussed below.

1. General obligation to prevent and punish

112. Based on the prior treaty practice recounted above, there are various ways that a general obligation to prevent and punish might be expressed in a convention on crimes against humanity. The provisions contained in the 1948 Convention against Genocide and the 1949 Geneva Conventions were early efforts at identifying such an obligation. Even so, the approach in article I of the Genocide Convention — "confirming" genocide to be a crime under international law and calling upon States parties to pursue steps to prevent and punish such conduct — remains a useful model for a general obligation in a convention to prevent crimes against humanity. Again, that formulation is:

> The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

Using such a formulation would "confirm" that crimes against humanity currently violate customary international law; would clearly confirm its historical development as a crime that arises whether committed in time of peace or war; and would generally presage what follows in subsequent provisions that call upon States parties to take specific steps, such as adopting any necessary national criminal legislation. Further, using such a formulation would help in harmonizing the present draft articles with a widely-adhered-to convention on another core crime of international law (as at January 2015, there are 146 States parties to the Genocide Convention).

113. The words "undertake to" remain appropriate, given the analysis of the International Court of Justice that "the ordinary meaning of the word 'undertake' is to give a formal promise, to bind or engage oneself, to give a pledge or promise, to agree, to accept an obligation".[213] As discussed above, this obligation consists of two types of obligations: (a) an obligation by the State not to commit such acts through its own organs, or persons over whom they have control such that their conduct is attributable to the State under international law; and (b) an obligation for the State to employ the reasonable means at its disposal, when necessary, appropriate and lawful, to prevent others not directly under its authority from committing such acts.[214] The formulation contained in article I of the Genocide Convention is not, by its terms, limited in geographic scope. As such, it prohibits a State party from committing genocide outside territory under its jurisdiction, and imposes an obligation to act with respect to other actors outside such territory, subject to the important parameters discussed above.

2. Specific measures for prevention

114. At the same time, as noted above, an obligation exists in numerous treaties that requires States Parties to pursue specific types of measures to prevent the crime. One widely-adhered-to formulation is found in article 2(1) of the 1984

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[213] *2007 Bosnia & Herzegovina v. Serbia & Montenegro Judgment*, *supra* note 6, para. 162.

[214] *Ibid.*, para. 166.

Convention against Torture (as at January 2015, 156 States have adhered to this convention), which provides that:

> Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.[215]

115. During the drafting of the Convention against Torture, this language was understood to provide flexibility and discretion to each State party as to the character of the measures to be taken, so long as they promote the basic objectives of the treaty.[216] By referring to acts occurring "in any territory under its jurisdiction", the language is broader than a reference solely to conduct occurring in the State's "territory",[217] but narrower than language that could suggest an obligation upon the State to develop legislative, administrative, judicial or other measures to prevent any conduct worldwide. "Territory under its jurisdiction" includes sovereign territory, vessels and aircraft of the State's nationality and occupied and other territory under its jurisdiction.[218] Such a geographic formulation appears to be supported in many contemporary treaties in addition to the Convention against Torture;[219] by establishing an obligation upon States to take specific measures to prevent conduct "in territory under its jurisdiction", the language focuses the obligation on areas where the State has a day-to-day ability to act and avoids suggesting a more open-ended and therefore perhaps less clear obligation with respect to the adoption of specific measures.

116. As noted above, the specific measures that must be taken will depend in part on the context and risks at issue for any given State party. Nevertheless, such an obligation normally would oblige the State party to: (a) adopt national laws, institutions and policies necessary to establish awareness of the criminality of the act and to promote early detection of any risk of its commission; (b) continually to keep those laws and policies under review and as necessary improve them; (c) pursue initiatives that educate governmental officials as to the State's obligations under the convention; (d) develop training programmes for police, military, militia and other relevant personnel as necessary to help prevent the commission of crimes against humanity; and (e) once the proscribed act is committed, fulfil in good faith other obligations within the convention that require the State party to investigate and either prosecute or extradite offenders, since doing so serves, in part, to deter

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[215] Article 2(3) provides: "An order from a superior officer or a public authority may not be invoked as a justification of torture." The issue raised by this provision will be addressed in a future report of the Special Rapporteur in the context of the State Party's obligation to ensure that a crime against humanity constitutes an offence under its criminal law.

[216] See *ibid.*

[217] See, e.g., Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, art. 4(1), Dec. 14, 1973, 1035 U.N.T.S. 167 (obliging States to take "all practicable measures to prevent preparations in their respective territories for the commission of" offences); Convention against the Taking of Hostages, art. 4(1), Dec. 17, 1979, 1316 U.N.T.S. 205 (same); Convention on the Safety of United Nations and Associated Personnel, art. 11(a), Dec. 9, 1994, 2051 U.N.T.S. 363 (same).

[218] Nowak and McArthur, *supra* note 171, at 116-17.

[219] See, e.g., International Convention on the Elimination of Racial Discrimination, art. 3, Dec. 21, 1965, 660 U.N.T.S. 195 (obliging States to "undertake to prevent … all practices of this nature in territories under their jurisdiction"); Inter-American Convention to Prevent and Punish torture), art. 6, O.A.S. Official Records OAS/Ser.L.V.1.4, Doc. 67, Rev. 9 (Dec. 9, 1985 (obliging States to "take effective measures to prevent … torture within their jurisdiction").

future acts by others. Such measures, of course, may already be in place for most States, since the underlying wrongful acts associated with crimes against humanity (murder, torture, etc.) are already proscribed in most national legal systems.

117. The general and more specific obligations to prevent crimes against humanity on the basis of the above-quoted texts would build upon obligations that already exist to prevent the underlying wrongful acts from occurring even on an isolated basis. When combining them in a single draft article, the texts might be harmonized by referring to "Each State Party" (used in the Convention against Torture) rather than "The Contracting Parties" (used in the Genocide Convention).

3. Non-derogation provision

118. As previously noted, general and specific obligations on prevention are often accompanied by a further provision indicating that no exceptional circumstances (such as the existence of an armed conflict or a public emergency) may be invoked as a justification for the offence. Such a general statement is often placed at the outset of the treaty that addresses serious crimes, which has the advantage of stressing that the obligation not to commit the offence is non-derogable in nature.

119. For example, article 2(2) of the Convention against Torture makes clear that no exceptional situation may be invoked to justify acts of torture; hence, the obligation set forth is non-derogable in nature.[220] Specifically, that paragraph provides:

> No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.[221]

Comparable language may be found in other treaties addressing serious crimes at the global or regional level. For example, article 1(2) of the 2006 International Convention for the Protection of All Persons from Enforced Disappearance contains the same language, while article 5 of the 1985 Inter-American Convention to Prevent and Punish Torture contains comparable language. One advantage of this formulation with respect to crimes against humanity is that it is drafted in a manner that can speak to the conduct of either State or non-State actors.

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[220] See Burgers and Danelius, *supra* note 21010, at 124; Nowak and McArthur, *supra* note 171, at 116-17.

[221] Convention against Torture, *supra* note 27, art. 2(2). Article 2(3) of the Convention against Torture provides: "An order from a superior officer or a public authority may not be invoked as a justification of torture." The issue raised by this provision will be addressed in a future report of the Special Rapporteur in the context of the State Party's obligation to ensure that a crime against humanity constitutes an offence under its criminal law.

C. Draft article 1: Preventing and punishing crimes against humanity

120. Bearing these considerations in mind, the Special Rapporteur proposes the following draft article:

Draft article 1
Prevention and punishment of crimes against humanity

1. Each State Party confirms that crimes against humanity, whether committed in time of peace or in time of war, are crimes under international law which it undertakes to prevent and punish.

2. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent crimes against humanity in any territory under its jurisdiction.

3. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of crimes against humanity.

VI. Definition of crimes against humanity

121. As indicated in section III above, the definition of crimes against humanity has been the subject of different formulations over the past century. The most widely accepted formulation, however, is that of article 7 of the Rome Statute, which was built upon the formulations articulated in the Nuremberg and Tokyo Charters, the Nuremberg Principles, the 1954 draft Code of Offences against the Peace and Security of Mankind, the 1993 statute of the International Tribunal for the Former Yugoslavia , the 1994 statute of the International Criminal Tribunal for Rwanda, the 1994 draft statute for an international criminal court, of the International Law Commission, and the Commission's 1996 draft Code of Crimes against the Peace and Security of Mankind. Article 7 of the Rome Statute reflects an agreement reached among the 122 States that were parties to the statute as at January 2015.

122. While from time to time the view is expressed that article 7 might be improved, and although disagreements may exist regarding whether it reflects customary international law[222] or what constitutes the best interpretation of some of its aspects,[223] there can be little doubt that article 7 has very broad support among States as a definition of crimes against humanity. Indeed, every State that addressed this issue before the Sixth Committee in the fall of 2014 maintained that the

[222] See, e.g., A. Cassese, "Crimes against Humanity," *supra* note 37, at 375. For example, while a "policy" element appears in Article 7, the ICTY Appeals Chamber maintained in 2002 in the *Kunarac* case that there is "nothing" in customary international law that requires a policy element and, rather, an "overwhelming" case against it. *Kunarac 2002*, para. 98; see also Mettraux, supra note 79, pp. 270−82. Yet with the passage of time and the adherence of a large number of States to the Rome Statute, it seems likely that Article 7 is having an effect in crystalizing customary international law. See generally R. Baxter, "Multilateral Treaties as Evidence of Customary International Law", *British Yearbook of Int'l L.*, vol. 41 (1965), p. 275.

[223] See, e.g., D. Robinson, "The Draft Convention on Crimes Against Humanity: What to Do with the Definition?," in Bergsmo & Song, *supra* note 7, at 103, 105 (but concluding that "the arguments for crafting a new definition are widely seen to be outweighed by the benefits of using the established definition in Article 7" of the Rome Statute).

Commission should not adopt a definition of "crimes against humanity" for a new convention that differs from article 7 of the Rome Statute.[224] Moreover, any convention that seeks in part to promote the complementarity regime of the Rome Statute should use the article 7 definition so as to foster national laws that are in harmony with the Rome Statute. More generally, using the article 7 definition would help minimize undesirable fragmentation in the field of international criminal law.

123. Article 7 of the Rome Statute provides:

> *Article 7*
> *Crimes against humanity*
>
> 1. For the purpose of this Statute, "crimes against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
>
> (a) Murder;
>
> (b) Extermination;
>
> (c) Enslavement;
>
> (d) Deportation or forcible transfer of population;
>
> (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
>
> (f) Torture;
>
> (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
>
> (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
>
> (i) Enforced disappearance of persons;
>
> (j) The crime of apartheid;
>
> (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

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[224] See Austria (A/C.6/69/SR.19, para. 111); Croatia (A/C.6/69/SR.20, para. 94); Finland on behalf of the Nordic countries (A/C.6/69/SR.19, para. 81); Italy (A/C.6/69/SR.22, para. 53); Poland (A/C.6/69/SR.20, para. 36); New Zealand (A/C.6/69/SR.21, para. 33); Republic of Korea (*ibid*., para. 45); and Mongolia (A/C.6/69/SR.24, para. 94). Similar views were expressed in the interventions made in 2013 on this issue. See, e.g., Statement to the Sixth Committee by Norway (on behalf of the Nordic countries), *supra* note 12: ("[I]t is the firm opinion of the Nordic countries that agreed language within the Rome Statute cannot be opened for reconsideration in this process. Notably, the definition of crimes against humanity in Article 7 of the Rome Statute must be retained as the material basis for any further work of the ILC on this topic.").

2. For the purpose of paragraph 1:

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

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

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

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

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

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

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

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

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

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

124. As noted in section III above, early definitions of crimes against humanity required that the underlying acts be accomplished in connection with armed

conflict, most likely in part to address concerns about whether the crime was well-settled in international law, and in part to distinguish international crimes from large-scale, violent national crimes.[225] While the statute of the International Tribunal for the Former Yugoslavia maintained the armed conflict connection because that statute was crafted in the context of such a conflict, since 1993 that connection has disappeared from the statutes of international criminal tribunals, including the Rome Statute.[226] In its place are the "chapeau" requirements that the crime be committed within the context of a widespread or systematic attack directed against a civilian population in furtherance of a State or organizational policy to commit such an attack.

A. "Widespread or systematic" attack

125. The requirement that there be a "widespread or systematic attack" first appeared in the statute of the International Criminal Tribunal for Rwanda,[227] though some decisions of the International Tribunal for the Former Yugoslavia maintained that the requirement was implicit even in the that court's statute, given the inclusion of such language in the report of the Secretary-General proposing the statute.[228] Jurisprudence of both courts maintained that the conditions of "widespread" and "systematic" were disjunctive rather than conjunctive requirements; either condition may be met to establish the existence of the crime.[229] For example, the Trial Chamber of the International Criminal Tribunal for Rwanda in the case *Prosecutor v. Akayesu* found: "The act can be part of a widespread or systematic attack and need not be a part of both."[230] This reading of the widespread/systematic requirement is also reflected in the Commission's commentary to the 1996 draft Code of Crimes against the Peace and Security of Mankind, where it stated that "an

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[225] Bassiouni, *supra* note 36, at 21.

[226] Ambos & Wirth, *supra* note 99, at 3–13.

[227] See *infra* Part II. Unlike the English version the French version of Article 3 the ICTR Statute used a conjunctive formulation ("généralisée et systématique"). In the *Akayesu* case, the Trial Chamber indicated: "In the original French version of the Statute, these requirements were worded cumulatively …, thereby significantly increasing the threshold for application of this provision. Since Customary International Law requires only that the attack be either widespread or systematic, there are sufficient reasons to assume that the French version suffers from an error in translation." *Akayesu 1998*, para. 579, footnote 144.

[228] *Tadić 1997*, para. 648; *Prosecutor v. Blaškić*, Judgment, ICTY Case No. IT-95-14-T, para. 202 (Mar. 3, 2000) (hereinafter *Blaškić 2000*); see G. Sluiter, "'Chapeau Elements' of Crimes Against Humanity in the Jurisprudence of the UN Ad Hoc Tribunals," in L. Sadat (ed.), *Forging a Convention for Crimes against Humanity*, *supra* note at 102.

[229] See, e.g., *Akayesu 1998*, para. 579; *Prosecutor v. Kayishema*, Trial Chamber, Judgment, Case No. ICTR-95-1, para. 123 (May 21, 1999) (hereinafter *Kayishema 1999)* ("The attack must contain one of the alternative conditions of being widespread or systematic."); *Prosecutor v. Mrkšić,* Trial Chamber, Judgment, ICTY Case No. IT-95-13/1, para. 437 (Sept. 27, 2007) (hereinafter *Mrkšić 2007*) ("[T]he attack must be widespread or systematic, the requirement being disjunctive rather than cumulative"); *Tadić 1997*, para. 648 ("[E]ither a finding of widespreadness…or systematicity…fulfills this requirement.").

[230] *Akayesu 1998*, para. 579.

act could constitute a crime against humanity if either of these conditions [of systematicity or scale] is met".[231]

126. When this standard was considered for the Rome Statute, some States expressed the view that the conditions of "widespread" and "systematic" should be conjunctive requirements — that they both should be present to establish the existence of the crime — because otherwise the standard would be overinclusive.[232] Indeed, if "widespread" commission of acts alone were sufficient, these States maintained that spontaneous waves of widespread, but unrelated, crimes would constitute crimes against humanity.[233] Owing to that concern, a compromise was developed that involved adding to article 7(2)(a) a definition of "attack" which, as discussed below, contains a policy element.[234]

127. Case law of the International Criminal Court has affirmed that the conditions of "widespread" and "systematic" are disjunctive. For example, in its *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya* (hereinafter *Kenya Authorization Decision 2010*), Pre-Trial Chamber II of the Court stated that "this contextual element [of widespread or systematic] applies disjunctively, such that the alleged

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[231] Report of the International Law Commission on the work of its forty-eighth session, *Yearbook of the International Law Commission, 1996*, vol. II (Part Two), at 47 (hereinafter "1996 ILC Report"). See also Report of the Ad Hoc Committee on the Establishment of a Permanent International Criminal Court, GAOR, 50th Session Supplement No. 22, U.N. Doc. A/50/22, at 17 (1995) (hereinafter "1995 Ad Hoc Comm. Report") ("elements that should be reflected in the definition of crimes against humanity included…[that] the crimes usually involved a widespread *or* systematic attack") (emphasis added); Report of the International Law Commission on the work of its forty-seventh session, *Yearbook of the International Law Commission, 1995*, vol. II (Part Two), at 25 (hereinafter "1995 ILC report") ("the concepts of 'systematic' and 'massive' violations were complementary elements of the crimes concerned"); Report of the International Law Commission on the work of its forty-sixth session, *Yearbook of the International Law Commission, 1994*, vol. II (Part Two), at 40 (hereinafter "1994 ILC Report") ("the definition of crimes against humanity encompasses inhumane acts of a very serious character involving widespread *or* systematic violations") (emphasis added); Report of the International Law Commission on the work of its forty-third session, *Yearbook of the International Law Commission, 1991*, vol. II (Part Two) at 103 (hereinafter "1991 ILC Report") ("[e]ither one of these aspects — systematic or mass scale — in any of the acts enumerated … is enough for the offence to have taken place").

[232] See United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, A/CONF.183/13 (Vol. II), at 148 (India), at 150 (United Kingdom of Great Britain and Northern Ireland, France), at 151 (Thailand, Egypt), at 152 (Islamic Republic of Iran), at 154 (Turkey), at 155 (Russian Federation), at 156 (Japan); B. Van Schaack, "The Definition of Crimes Against Humanity: Resolving the Incoherence," *Columbia J. of Transnat'l L.*, vol. 37, at 787, 844 (1999).

[233] D. Robinson, "Defining Crimes against Humanity at the Rome Conference," *supra* note 90, at 47.

[234] P. Hwang, "Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court," *Fordham Int'l L. J.*, vol. 22, at 457, 497 (1998); M. deGuzman, "The Road from Rome: The Developing Law of Crimes Against Humanity", *Human Rights Quarterly*, vol. 22, at 335, 372 (2000) (citing the author's notes of debate, Committee of the Whole (June 17, 1998), taken while the author was a legal advisor on the delegation of Senegal to the Rome Conference); Van Schaack, *supra* note 37, at 844-45.

acts must be *either* widespread *or* systematic to warrant classification as crimes against humanity".[235]

128. The first condition requires that the attack be "widespread". According to the Trial Chamber of the International Tribunal for the Former Yugoslavia in *Kunarac*, "the adjective 'widespread' connotes the large-scale nature of the attack and the number of targeted persons".[236] As such, this requirement refers to a "multiplicity of victims"[237] and excludes isolated acts of violence,[238] such as murder directed against individual victims by persons acting on their own volition rather than as part of a broader initiative. At the same time, a single act committed by an individual perpetrator can constitute a crime against humanity if it occurs within the context of a broader campaign.[239] There is no specific numerical threshold of victims that must be met for an attack to be "widespread"; rather, the determination is dependent on the size of the civilian population that was allegedly attacked.[240] For example, in *Prosecutor v. Kunarac*, the Appeals Chamber of the International Tribunal for the Former Yugoslavia identified the following test for determining whether an attack is widespread:

> A Trial Chamber must therefore "first identify the population which is the object of the attack and, in light of the means, methods, resources and result of the attack upon the population, ascertain whether the attack was indeed widespread ..." The consequences of the attack upon the targeted population, the number of victims, the nature of the acts … could be taken into account to determine whether the attack satisfies either or both requirements of a "widespread" or "systematic" attack vis-à-vis this civilian population.[241]

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[235] See Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Pre-Trial Chamber, ICC-01/09, para. 94 (Mar. 31, 2010) (hereinafter *Kenya Authorization Decision 2010*) (emphasis in original); see also *Prosecutor v. Jean-Pierre Bemba Gombo*, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges, ICC-01/05-01/08, para. 82 (June 15, 2009) (hereinafter *Bemba 2009*).

[236] *Prosecutor v. Kunarac*, Trial Chamber, Judgment, ICTY Case No. IT-96-23, para. 428 (Feb. 22, 2001) (*Kunarac 2001*); see *Prosecutor v. Katanga*, Pre-Trial Chamber Decision on the Confirmation of Charges, ICC-01/04-01/07, para. 394 (Sept. 30, 2008) (hereinafter *Katanga 2008*); see also *Prosecutor v. Kordić and Ćerkez*, Appeals Chamber, Judgment, IT-95-14/2-A, para. 94 (Dec. 17, 2004); *Prosecutor v. Blagojević and Jokić*, Trial Chamber, Judgment, ICTY Case No. IT-02-60-T, para. 545-46 (Jan. 17, 2005).

[237] *Bemba 2009*, para. 83; 1996 ILC Report, at 47 (using the phrase "on a large scale" instead of widespread); *Akayesu 1998*, para. 580; *Kayishema 1999*, para. 123; see also *Mrkšić 2007*, para. 437 ("widespread refers to the large scale nature of the attack and the number of victims").

[238] See *Prosecutor v. Bosco Ntaganda*, Pre-Trial Chamber II, Decision on the Prosecutor's Application under Article 58, ICC-01/04-02/06, para. 19 (July 13, 2012) (hereinafter *Ntaganda 2012*); *Prosecutor v. Harun*, Pre-Trial Chamber I, Decision on the Prosecution Application under Article 58(7) of the Statute, ICC-02/05-01/07, para. 62 (Apr. 27, 2007) (hereinafter *Harun 2007*); see also *Prosecutor v. Rutaganda*, Trial Chamber, Judgment, ICTR-96-3-T, para. 67-69 (Dec. 6, 1999); *Kayishema 1999*, paras. 122-23; 1996 ILC Report, at 47; 1991 ILC Report, at 103.

[239] *Kupreškić 2000*, para. 550; *Tadić 1997*, para. 649.

[240] See *Prosecutor v. Kunarac*, Appeals Chamber, Judgment, ICTY Case No. IT-96-23, para. 95 (June 12, 2002) (hereinafter *Kunarac 2002*).

[241] *Ibid*. (citations omitted).

129. "Widespread" can also have a geographical dimension, with the attack occurring in different locations.[242] Thus, in the *Bemba* case, Pre-Trial Chamber II of the International Criminal Court found that there was sufficient evidence to establish that an attack was "widespread" on the basis of reports of attacks in various locations over a large geographical area, including evidence of thousands of rapes, mass grave sites and a large number of victims.[243] Yet a large geographic area is not required; the International Tribunal for the Former Yugoslavia has found that the attack can be in a small geographic area against a large number of civilians.[244]

130. In its *Kenya Authorization Decision 2010*, Pre-Trial Chamber II of the International Criminal Court indicated that "[t]he assessment is neither exclusively quantitative nor geographical, but must be carried out on the basis of the individual facts".[245] An attack may be widespread owing to the cumulative effect of multiple inhumane acts or the result of a single inhumane act of great magnitude.[246]

131. The second, alternative condition requires that the attack be "systematic". In its commentary to the 1996 draft Code of Crimes against the Peace and Security of Mankind, the Commission stated that the requirement of "systematic" means that the inhumane acts are committed "pursuant to a preconceived plan or policy" and that the "implementation of this plan or policy could result in the repeated or continuous commission of inhuman acts".[247] Like "widespread", the term "systematic" excludes isolated or unconnected acts of violence,[248] and jurisprudence from the International Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda and the International Criminal Court reflects a similar understanding of what is meant by the term. The International Tribunal for the Former Yugoslavia defined "systematic" as "the organized nature of the acts of violence and the improbability of their random occurrence"[249] and found that evidence of a pattern or methodical plan establishes that an attack was systematic.[250] Thus, the Appeals Chamber in *Kunarac* confirmed that "patterns of crimes — that is the non-accidental repetition of similar criminal conduct on a regular basis — are a common expression of such systematic occurrence".[251] The Trial Chamber in *Kunarac* found that there was a systematic attack on the Muslim civilian population on the basis of evidence of a consistent pattern: once the Serb forces had control of a town or village, they would ransack or burn down Muslim apartments or houses; they would then round up or capture Muslim villagers, who were sometimes beaten or killed during the process; and the men and women would

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[242] See, e.g., *Ntaganda 2012*, para. 30; *Prosecutor v. Ruto*, Pre-Trial Chamber II, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-01/11, para. 177 (Jan. 23, 2012) (hereinafter *Ruto 2012*).

[243] *Bemba 2009*, paras. 117-124.

[244] *Blaškić 2000*, para. 206; *Prosecutor v. Kordić and Ćerkez*, Appeals Chamber, Judgment, ICTY Case No. IT-95-14-/2-A, para. 94 (Dec. 17, 2004) (hereinafter *Kordić 2004*).

[245] *Kenya Authorization Decision 2010*, para. 95.

[246] 1996 ILC Report, at 47; see also *Bemba 2009*, para. 83 (finding that widespread "entails an attack carried out over a large geographical area or an attack in a small geographical area directed against a large number of civilians.").

[247] 1996 ILC Report, at 47; see also 1991 ILC Report, at 103 ("The systematic element relates to a constant practice or to a methodical plan to carry out such violations.").

[248] See 1996 ILC Report, at 47; 1991 ILC Report, at 103.

[249] *Mrkšić 2007*, para. 437; *Kunarac 2001*, para. 429.

[250] See, e.g., *Tadić 1997*, para. 648.

[251] *Kunarac 2002*, para. 94.

be separated and kept in various detention centres or prisons.[252] Likewise, the International Criminal Tribunal for Rwanda has defined "systematic" as organized conduct following a consistent pattern or pursuant to a policy or plan.[253]

132. Consistent with jurisprudence of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, Pre-Trial Chamber I of the International Criminal Court found in *Harun* that "'systematic' refers to 'the organized nature of the acts of violence and improbability of their random occurrence'".[254] Pre-Trial Chamber I found in *Katanga* that the term "has been understood as either an organized plan in furtherance of a common policy, which follows a regular pattern and results in a continuous commission of acts, or as 'patterns of crimes' such that the crimes constitute a 'non-accidental repetition of similar criminal conduct on a regular basis'".[255] In applying the standard in *Ntaganda*, Pre-Trial Chamber II found an attack to be systematic since "the perpetrators employed similar means and methods to attack the different locations: they approached the targets simultaneously, in large numbers, and from different directions, they attacked villages with heavy weapons, and systematically chased the population by similar methods, hunting house by house and into the bushes, burning all properties and looting".[256]

B. "Directed against any civilian population"

133. The second general requirement of article 7 of the Rome Statute is that the act must be committed as part of an attack "directed against any civilian population". Article 7(2)(a) of the Rome Statute defines "attack directed against any civilian population" for the purpose of paragraph 1 as "a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack".[257] Moreover, jurisprudence from the International Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda and the International Criminal Court has construed the meaning of each of those terms: "directed against", "any", "civilian" and "population".

134. The International Tribunal for the Former Yugoslavia has established that the phrase "directed against" requires that a civilian population be the intended primary target of the attack, rather than an incidental victim.[258] Pre-Trial Chamber II of the International Criminal Court subsequently adopted this interpretation in the *Bemba*

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[252] *Kunarac 2001*, paras. 573, 578.

[253] *Akayesu 1998*, para. 580 ("systematic may be defined as thoroughly organized and following a regular pattern on the basis of a common policy"); *Kayishema 1999*, para. 123 ("systematic attacks means an attack carried out pursuant to a preconceived policy or plan").

[254] *Harun 2007*, para. 62 (citing to *Prosecutor v. Kordic & Cerkez*, Appeal Judgment, Case No. IT-95-14/2-A, para. 94 (Dec. 17, 2004), which in turn cites to *Kunarac 2001*, para. 429); see also *Kenya Authorization Decision 2010*, para. 96; *Ruto 2012*, para. 179; *Katanga 2008*, para. 394.

[255] *Katanga 2008*, para. 397.

[256] *Ntaganda 2012*, para. 31; see also *Ruto 2012*, para. 179.

[257] See also ICC, *Elements of Crimes*, *supra* note 92, at 5.

[258] See, e.g., *Kunarac 2001*, para. 421 ("The expression 'directed against' specifies that in the context of a crime against humanity the civilian population is the primary object of the attack.").

case and the *Kenya Authorization Decision 2010*.[259] In the *Bemba* case, the Chamber found that there was sufficient evidence showing the attack was "directed against" the civilian population of the Central African Republic.[260] The Chamber concluded that Movement for the Liberation of the Congo (MLC) soldiers were aware that their victims were civilians, based on direct evidence of civilians being attacked inside their houses or in their courtyards.[261] The Chamber further found that MLC soldiers targeted *primarily* the civilian population, demonstrated by an attack at one locality where the MLC soldiers did not find any rebel troops that they claimed to be chasing.[262] The term "directed" places its emphasis on the intention of the attack rather than the physical result of the attack.[263] It is the attack, not the acts of the individual perpetrator, which must be "directed against" the target population.[264]

135. The word "any" indicates that "civilian population" is to have a wide definition and should be interpreted broadly.[265] An attack can be committed against any civilian population, "regardless of their nationality, ethnicity or any other distinguishing feature",[266] and can be committed against either national or foreign populations.[267] Those targeted may "include a group defined by its (perceived) political affiliation".[268] In order to qualify as a civilian population during a time of armed conflict, the targeted population must be of a "predominantly" civilian nature;[269] the presence of certain combatants within the population does not change its character.[270] This approach is in accordance with other rules arising under international humanitarian law. For example, Additional Protocol I to the Geneva Conventions states: "The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its

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[259] *Bemba 2009*, para. 76; *Kenya Authorization Decision 2010*, para. 82.

[260] *Bemba 2009*, para. 94; see also *Ntaganda 2012*, paras. 20-21.

[261] *Bemba 2009*, para. 94.

[262] *Ibid*., paras. 95-98. The Pre-Trial Chamber also relied on evidence that at the time of the arrival of the MLC soldiers in this locality, rebel troops had already withdrawn. *Ibid*., para. 98.

[263] See, e.g., *Blaškić 2000*, n. 401.

[264] *Kunarac 2002*, para. 103.

[265] See, e.g., *Mrkšić 2007*, para. 442; *Tadić 1997*, para. 643; *Kupreškić 2000*, para. 547 ("[A] wide definition of civilian and population is intended. This is warranted first of all by the object and purpose of the general principles and rules of humanitarian law, in particular by the rules prohibiting crimes against humanity."); *Kayishema 1999*, para. 127.

[266] *Katanga 2008*, para. 399 (quoting *Prosecutor v. Tadic*, Trial Judgment, Case No. IT-94-1, para. 635 (May 7, 2991)).

[267] See, e.g., *Kunarac 2001*, para. 423.

[268] *Ruto 2012*, para. 164.

[269] See, e.g., *Mrkšić 2007*, para. 442; *Tadić 1997*, para. 638; *Kunarac 2001*, para. 425; *Kordić 2001*, para. 180; *Kayishema 1999*, para. 128.

[270] See, e.g., *Mrkšić 2007*, para. 442; *Tadić 1997*, para. 638; *Kunarac 2001*, para. 425 ("the presence of certain non-civilians in its midst does not change the character of the population"); *Blaškić 2000*, para. 214 ("the presence of soldiers within an intentionally targeted civilian population does not alter the civilian nature of that population"); *Kupreškić 2000*, para. 549 ("the presence of those actively involved in the conflict should not prevent the characterization a population as civilian"); *Kordić 2001*, para. 180; *Akayesu 1998*, para. 582 ("Where there are certain individuals within the civilian population who do not come within the definition of civilians, this does not deprive the population of its civilian character."); *Kayishema 1999*, para. 128.

civilian character."[271] During a time of peace, "civilian" shall include all persons except those individuals who have a duty to maintain public order and have legitimate means to exercise force to that end at the time they are being attacked.[272] The status of any given victim must be assessed at the time the offence is committed;[273] a person should be considered a civilian if there is a doubt as to his or her status.[274]

136. "Population" does not mean that the entire population of a given geographical location must be subject to the attack;[275] rather, the term implies the collective nature of the crime as an attack upon multiple victims.[276] Any particular victim must be targeted not because of his or her individual characteristics, but because of his or her membership in a targeted civilian population.[277] International Criminal Court decisions in the *Bemba* case and the *Kenya Authorization Decision 2010* have adopted a similar approach, declaring that the Prosecutor must establish that the attack was directed against the population, rather than a limited group of individuals.[278]

137. Article 7(2)(a) of the Rome Statute defines "attack directed against any civilian population" for the purpose of paragraph 1. The first part of this definition refers to "a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population". Although no such language was contained in the statutory definition of crimes against humanity for the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, this language reflects jurisprudence from both these tribunals.[279] The *Elements of Crimes* of the International Criminal Court provides that the "acts" referred to in article 7(2)(a) "need not constitute a military attack".[280]

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[271] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 50(3), June 8, 1977, 1125 U.N.T.S. 3.

[272] *Kayishema 1999*, para. 127.

[273] *Blaškić 2000*, para. 214 ("[T]he specific situation of the victim at the moment the crimes were committed, rather than his status, must be taken into account in determining his standing as a civilian."); see also *Kordić 2001*, para. 180 ("[I]ndividuals who at one time performed acts of resistance may in certain circumstances be victims of a crime against humanity."); *Akayesu 1998*, para. 582 (finding that civilian population includes "members of the armed forces who laid down their arms and those persons placed *hors de combat*").

[274] *Kunarac 2001*, para. 426.

[275] See *Kenya Authorization Decision 2010*, para. 82; *Bemba 2009*, para. 77; *Kunarac 2001*, para. 424; *Tadić 1997*, para. 644; see also 1994 ILC Report, at 40 (defining crimes against humanity as "inhumane acts of a very serious character involving widespread or systematic violations aimed at the civilian population *in whole or in part*") (emphasis added).

[276] See *Tadić 1997*, para. 644.

[277] *Ibid.*; see also *Kunarac 2001*, para. 90; *Prosecutor v. Gotovina*, Trial Chamber, Judgment, ICTY Case No. IT-06-90-T, para. 1704 (Apr. 15, 2011) (finding that the attack must be directed at a civilian population, "rather than against a limited and randomly selected number of individuals").

[278] *Bemba 2009*, para. 77; *Kenya Authorization Decision 2010*, para. 81.

[279] See, e.g., *Kunarac 2001*, para. 415 (defining attack as "a course of conduct involving the commission of acts of violence"); *Kayishema 1999*, para. 122 (defining attack as the "event in which the enumerated crimes must form part"); *Akayesu 1998*, para. 581 ("The concept of attack may be defined as a unlawful act of the kind enumerated [in the Statute]. An attack may also be nonviolent in nature, like imposing a system of apartheid ... or exerting pressure on the population to act in a particular manner …").

[280] ICC, *Elements of Crimes*, *supra* note 92, at 5.

138. The second part of this definition requires that the attack be "pursuant to or in furtherance of a State or organizational policy to commit such an attack". The requirement of a policy element did not appear as part of the definition of crimes against humanity in the statutes of international tribunals until the adoption of the Rome Statute.[281] The statutes of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda contain no policy requirement in their definition of crimes against humanity,[282] although some early jurisprudence required it.[283] Later jurisprudence, however, downplayed the policy element, regarding it as sufficient simply to prove the existence of a widespread or systematic attack.[284]

139. Prior to the Rome Statute, the work of the International Law Commission in its draft codes tended to require a policy element. The Commission's 1954 draft Code of Offences against the Peace and Security of Mankind defined crimes against humanity as "Inhuman acts such as murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, racial or cultural grounds *by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities*".[285] The Commission decided to include the State instigation or tolerance requirement in order to exclude inhuman acts committed by private persons on their own without any State involvement.[286] At the same time, the definition of crimes against humanity included in the 1954 draft code did not include any requirement of scale ("widespread") or systematicity.

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[281] Article 6(c) of the Nürnberg Charter contains no explicit reference to a plan or policy. The Nürnberg Judgment, however, did use a "policy" descriptor when discussing article 6(c) in the context of the concept of the "attack" as a whole. See IMT, Judgment (Oct. 1, 1946), in *The Trial of German Major War Criminals. Proceedings of the International Military Tribunal sitting at Nürnberg, Germany*, Part 22, at 468 (Aug. 22, 1946 to Oct. 1, 1946) ("The policy of terror was certainly carried out on a vast scale, and in many cases was organized and systematic. The policy of persecution, repression and murder of civilians in Germany before the war of 1939, who were likely to be hostile to the Government, was most ruthlessly carried out.") Article II(1)(c) of Control Council Law No. 10 also contains no reference to a plan or policy in its definition of crimes against humanity. See generally G. Mettraux, "The Definition of Crimes Against Humanity and the Question of a 'Policy' Element, in L. Sadat (ed.), *Forging a Convention for Crimes against Humanity*, *supra* note 7, at 142.

[282] The ICTY Appeals Chamber has determined that there is no policy element on crimes against humanity in customary international law, see *Kunarac 2002*, para. 98 ("There was nothing in the Statute or in customary international law at the time of the alleged acts which required proof of the existence of a plan or policy to commit these crimes."), although that position that has been criticized in writings. See, e.g., W. Schabas, "State Policy as an Element of International Crimes," 98 *J. Crim. L. & Criminology*, vol. 98, p. 953, at 954 (2008).

[283] *Prosecutor v. Tadic*, Judgment, Case No. IT-94-1, paras. 644, 653-55, 626 (May 7, 1997) ("'directed against a civilian population'" … requires that the acts be undertaken on a widespread or systematic basis *and* in furtherance of a policy."(emphasis added)).

[284] See, e.g., *Kordić 2001*, para. 182 (finding that "the existence of a plan or policy should better be regarded as indicative of the systematic character of offences charged as crimes against humanity"); *Kunarac 2002*, para. 98; *Akayesu 1998*, para. 580; *Kayishema 1999*, para. 124 ("For an act of mass victimisation to be a crime against humanity, it must include a policy element. Either of the requirements of widespread or systematic are enough to exclude acts not committed as part of a broader policy or plan.").

[285] Report of the International Law Commission on the work of its sixth session, *Yearbook of the International Law Commission, 1954*, vol. II, at 150 (hereinafter "1954 ILC Report") (emphasis added).

[286] *Ibid.*, at 150.

140. The Commission's 1994 draft statute for an international criminal court did not contain a definition of crimes against humanity. Rather, the draft statute referenced the definitions in article 5 of the statute of the International Tribunal for the Former Yugoslavia and article 21 of the 1991 draft code of crimes against the peace and security of mankind, neither of which contained a State policy requirement.[287] Even so, the Commission did mention the issue of policy when it stated: "The particular forms of unlawful act … are less crucial to the definition than the facts of scale and deliberate policy, as well as in their being targeted against the civilian population in whole or in part."[288] The Commission's 1996 draft Code of Crimes against the Peace and Security of Mankind also recognized a policy requirement, defining crimes against humanity as "any of the following acts, when committed in a systematic manner or on a large scale and *instigated or directed by a Government or by an organization or group*".[289] The Commission included this requirement in order to exclude inhumane acts committed by an individual "acting on his own initiative pursuant to his own criminal plan in the absence of any encouragement or direction from either a Government or a group or organization".[290] In other words, the policy element sought to exclude "ordinary" crimes of individuals acting on their own initiative and without any connection to a State or organization.[291]

141. Article 7(2)(a) of the Rome Statute uses the "policy" element in its definition of an "attack directed against any civilian population". The International Criminal Court's *Elements of Crimes* further provides that "policy to commit such attack" requires that "the State or organization actively promote or encourage such an attack against a civilian population".[292] In a footnote, *Elements of Crimes* provides that "a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack".[293] Other precedents also emphasize that deliberate failure to act can satisfy the policy element.[294]

142. This "policy" element has been addressed in several cases at the International Criminal Court.[295] For example, in its *Kenya Authorization Decision 2010*, Pre-Trial Chamber II of the Court suggested that the meaning of "State" in article 7(a)(2) is "self-explanatory".[296] The Chamber went on to note that a policy adopted by regional or local organs of the State could satisfy the requirement of State policy.[297] Judge Hans-Peter Kaul argued in his dissent that, while acts of regional or

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[287] 1994 ILC Report, at 40.

[288] *Ibid.*

[289] 1996 ILC Report, at 47 (emphasis added).

[290] *Ibid.* In explaining its inclusion of the policy requirement, the Commission notes "It would be extremely difficult for a single individual acting alone to commit the inhumane acts as envisaged in article 18."

[291] See M.C. Bassiouni, "Revisiting the Architecture of Crimes Against Humanity: Almost a Century in the Making, with Gaps and Ambiguities Remaining — the Need for a Specialized Convention," in *Forging a Convention, supra* note 7, at 54-55.

[292] ICC, *Elements of Crimes*, *supra* note 92, at 5.

[293] *Ibid.*

[294] *Kupreškić 2000*, paras. 551-55 ("approved," "condoned," "explicit or implicit approval"); 1954 ILC Draft Code ("toleration"); Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), U.N. Doc. S/1994/674, para. 85 (27 May 1994); Ambos & Wirth, *supra* note 99, at 31-34.

[295] See, e.g., *Ntaganda 2012*, para. 24; *Katanga 2008*, para. 396; *Bemba 2009*, para. 81.

[296] *Kenya Authorization Decision 2010*, para. 89.

[297] *Ibid.*

local organs could be imputed to the State, nevertheless "considerations of attribution do not answer the question of who can establish a State policy".[298] Even so, he found that, "considering the specific circumstances of the case, a policy may also be adopted by an organ which, albeit at the regional level, such as the highest official or regional government in a province, has the means to establish a policy within its sphere of action".[299]

143. In its *Katanga 2014* decision, Trial Chamber II of the International Criminal Court found that the policy need not be formally established or promulgated in advance of the attack, and can be deduced from the repetition of acts, from preparatory activities or from a collective mobilization.[300] Moreover, the policy need not be concrete or precise, and may evolve over time as circumstances unfold.[301] The Trial Chamber stressed that the policy requirement should not be seen as synonymous with "systematic", since doing so would contradict the disjunctive requirement in article 7 of a "widespread" or "systematic" attack.[302] Rather, while "systematic" refers to a repetitive scheme of acts with similar features, the "policy" requirement points more toward such acts being intended as a collective attack on the civilian population.[303]

144. In its decision confirming the indictment of Laurent Gbagbo, Pre-Trial Chamber I of the International Criminal Court found that

> the "policy", for the purposes of the Statute, must be understood as the active promotion or encouragement of an attack against a civilian population by a State or organisation. The Chamber observes that neither the Statute nor the Elements of Crimes include a certain rationale or motivations of the policy as a requirement of the definition. Establishing the underlying motive may, however, be useful for the detection of common features and links between acts. Furthermore, in accordance with the Statute and the Elements of Crimes, it is only necessary to establish that the person had knowledge of the attack in general terms. Indeed, the Elements of Crimes clarify that the requirement of knowledge "should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization".[304]

In the *Bemba* case, Pre-Trial Chamber II of the International Criminal Court found that the attack was pursuant to an organizational policy on the basis of evidence

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[298] *Kenya Authorization Decision 2010*, Dissenting Opinion of Judge Hans-Peter Kaul, Situation in the Republic of Kenya, ICC-01/09, para. 43 (Mar. 31, 2010) (hereinafter *Kenya Authorization Decision 2010, Dissent*).

[299] *Ibid.*, para. 43.

[300] *Katanga 2014*, para. 1109; see also *Prosecutor v. Gbagbo*, Pre-Trial Chamber I, Decision on the Confirmation of Charges against Laurent Gbagbo, ICC-02/11-01/11, paras. 211-12, 215 (June 12, 2014) (hereinafter *Gbagbo 2014*).

[301] *Katanga 2014*, para. 1110.

[302] *Ibid.*, para. 1112; see *also ibid*. para. 1101; *Gbagbo 2014*, para. 208.

[303] *Katanga 2014*, para. 1113 ("Établir une « politique » vise uniquement à démontrer que l'État ou l'organisation entend mener une attaque contre une population civile."); *Gbagbo 2014*, para. 216 ("evidence of planning, organisation or direction by a State or organisation may be relevant to prove both the policy and the systematic nature of the attack, although the two concepts should not be conflated as they serve different purposes and imply different thresholds under article 7(1) and (2)(a) of the Statute").

[304] *Gbagbo 2014*, para. 214 (footnotes omitted).

establishing that the MLC troops "carried out attacks following the same pattern".[305] Such decisions are being thoughtfully analysed in the scholarly literature.[306]

C. Non-State actors

145. The Commission, commenting in 1991 on the draft provision on crimes against humanity for what would become the 1996 draft code of crimes, stated that "the draft article does not confine possible perpetrators of the crimes to public officials or representatives alone" and that it "does not rule out the possibility that private individuals with *de facto* power or organized in criminal gangs or groups might also commit the kind of systematic or mass violations of human rights covered by the article; in that case, their acts would come under the draft Code".[307] Even so, a debate existed within the Commission with respect to this issue. The 1995 ILC Report discusses the debate, with some members taking the position that the code should only apply to State actors and others favouring the inclusion of non-State perpetrators.[308] As discussed previously, the 1996 Draft Code added the requirement that, to be crimes against humanity, the inhumane acts must be "instigated or directed by a Government or by any organization or group".[309] In its commentary to this requirement, the Commission noted: "The instigation or direction of a Government or any organization or group, which may not be affiliated with a Government, gives the act its great dimension and makes it a crime against humanity imputable to private persons or agents of a State."[310]

146. Jurisprudence of the International Tribunal for the Former Yugoslavia accepted the possibility of non-State actors being prosecuted for crimes against humanity. For

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[305] *Bemba 2009*, para. 115.

[306] See, e.g., M. Halling, "Push the Envelope — Watch It Bend: Removing the Policy Requirement and Extending Crimes Against Humanity," *Leiden J. Int'l L.*, vol. 23, p. 827 (2010); W. Schabas, "Prosecuting Dr. Strangelove, Goldfinger, and the Joker at the International Criminal Court: Closing the Loopholes," *Leiden J. Int'l L.*, vol. 23, p. 847 (2010); C. Kress, "On the Outer Limits of Crimes against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC *Kenya* Decision," *Leiden J. Int'l L.*, vol. 23, p. 855 (2010); G. Mettraux, "The Definition of Crimes Against Humanity and the Question of a 'Policy' Element," in *Forging a Convention*, *supra* note 7, at 142; C. Jalloh, "Case Report: Situation in the Republic of Kenya," *American J. Int'l L.*, vol. 105, p. 540 (2011); T. Hansen, "The Policy Requirement in Crimes Against Humanity: Lessons from and for the Case of Kenya," *George Washington University Int'l L. Rev.*, vol. 43, p. 1 (2011); G. Werle & B. Burghardt, "Do Crimes Against Humanity Require the Participation of a State or a 'State-like' Organization?," *J. Int'l Crim. Just.*, vol. 10, p. 1151 (2012); Sadat, *supra* note 37, at 335-36, 368-74; C. Jalloh, "What Makes a Crime Against Humanity a Crime Against Humanity," *American University Int'l L. Rev.*, vol. 28, p. 381 (2013); D. Robinson, "The Draft Convention on Crimes Against Humanity: What to Do With the Definition?", in Bergsmo & Song, *supra* note 7, p. 103; D. Robinson, "Crimes Against Humanity: A Better Policy on 'Policy,'" in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (Oxford University Press, 2015) (forthcoming).

[307] 1991 ILC Report, at 103-04.

[308] 1995 ILC Report, at 25 ("While some members held that the Code should only deal with crimes committed by agents or representatives of the State or by individuals acting with the authorization, the support or the acquiescence of the State, other members favoured encompassing the conduct of individuals even if they had no link with the State.").

[309] 1996 ILC Report, at 47.

[310] *Ibid.*

example, the Trial Chamber in the *Tadić* case stated that "the law in relation to crimes against humanity has developed to take into account forces which, although not those of the legitimate government, have de facto control over, or are able to move freely within, defined territory".[311] That finding was echoed in the *Limaj* case, where the Trial Chamber viewed the defendant members of the Kosovo Liberation Army (KLA) as prosecutable for crimes against humanity. Among other things, the Trial Chamber stated:

> Although not a legal element of Article 5 [of the statute of the International Tribunal for the Former Yugoslavia], evidence of a policy or plan is an important indication that the acts in question are not merely the workings of individuals acting pursuant to haphazard or individual design, but instead have a level of organisational coherence and support of a magnitude sufficient to elevate them into the realm of crimes against humanity. It stands to reason that an attack against a civilian population will most often evince the presence of policy when the acts in question are performed against the backdrop of significant State action and where formal channels of command can be discerned. … Special issues arise, however, in considering whether a sub-state unit or armed opposition group, whether insurrectionist or trans-boundary in nature, evinces a policy to direct an attack. One requirement such an organisational unit must demonstrate in order to have sufficient competence to formulate a policy is a level of *de facto* control over territory.[312]

Ultimately, the Trial Chamber found that while "the KLA evinced a policy to target those Kosovo Albanians suspected of collaboration with the Serbian authorities, … there was no attack directed against a civilian population, whether of Serbian or Albanian ethnicity."[313]

147. Since article 7(a)(2) of the Rome Statute requires that the attack be "pursuant to or in furtherance of a State *or organizational policy* to commit such an attack", article 7 expressly contemplates crimes against humanity by non-State perpetrators. Jurisprudence from the International Criminal Court suggests that "organizational" includes any organization or group with the capacity and resources to plan and carry out a widespread or systematic attack. For example, Pre-Trial Chamber I stated in *Katanga*: "Such a policy may be made either by groups of persons who govern a specific territory or by any organization with the capability to commit a widespread or systematic attack against a civilian population."[314]

148. In its *Kenya Authorization Decision 2010*, Pre-Trial Chamber II of the International Criminal Court took a similar approach, stating "the formal nature of a group and the level of its organization should not be the defining criterion. Instead, as others have convincingly put forward, a distinction should be drawn about whether a group has the capability to perform acts which infringe on basic human values".[315] In 2012, the Pre-Trial Chamber stated that, when determining whether a particular group qualifies as an "organization" under Rome Statute article 7,

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[311] *Tadić 1997,* para. 654. For further discussion of non-State perpetrators, see *ibid.*, para. 655.

[312] *Prosecutor v. Limaj et al*., ICTY Trial Chamber II, Case No. IT-03-66-T, para. 212-13 (Nov. 30, 2005).

[313] *Ibid.*, para. 228.

[314] *Katanga 2008*, para. 396 (citing to ICTY and ICTR case law, as well as the Commission's 1991 Draft Code); see also *Bemba 2009*, para. 81.

[315] *Kenya Authorization Decision 2010*, para. 90.

> the Chamber may take into account a number of factors, *inter alia*: (i) whether the group is under a responsible command, or has an established hierarchy; (ii) whether the group possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population; (iii) whether the group exercises control over part of the territory of a State; (iv) whether the group has criminal activities against the civilian population as a primary purpose; (v) whether the group articulates, explicitly or implicitly, an intention to attack a civilian population; (vi) whether the group is part of a larger group, which fulfils some or all of the abovementioned criteria.[316]

149. In its 2010 decision, the majority expressly rejected the idea that "only State-like organizations may qualify" as organizations for the purpose of article 7(a)(2).[317] In his dissent, Judge Kaul agreed that "it is permissive to conclude that an 'organization' may be a private entity (a nonstate actor) which is not an organ of a State or acting on behalf of a State", but he argued that "those 'organizations' should partake of some characteristics of a State".[318]

150. In the *Ntaganda* case, charges were confirmed against a defendant associated with two paramilitary groups, the Union des Patriotes Congolais (UPC) and the Forces Patriotiques pour la Libération du Congo (FPLC) in the Democratic Republic of the Congo. In that instance, the prosecutor contended "that the UPC/FPLC was a sophisticated and structured political-military organization, akin to the government of a country, through which Mr. Ntaganda was able to commit crimes against humanity".[319] Similarly, in *Callixte Mbarushimana*, the prosecutor pursued charges against a defendant associated with the Forces Démocratiques pour la Liberation du Rwanda (FDLR), described as an "armed group seeking to 'reconquérir et défendre la souveraineté nationale' of Rwanda."[320] While in that case the majority and the dissent disagreed on whether there existed a policy of FDLR to attack the civilian population, there appeared to be common ground that FDLR, as a group, could fall within the scope of article 7. In the case against Joseph Kony relating to the situation in Uganda, the defendant is allegedly associated with the Lord's Resistance Army, "an armed group carrying out an insurgency against the Government of Uganda and the Ugandan Army"[321] which "is organised in a military-type hierarchy and operates as an army".[322] With respect to the situation in Kenya, Pre-Trial

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[316] *Ruto 2012*, para. 185; see also *Kenya Authorization Decision 2010*, para. 93; Corrigendum to *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire*, ICC-02/11-14-Corr., paras. 45-46 (Oct. 3, 2011).

[317] *Kenya Authorization Decision 2010*, para. 90; see also G. Werle & B. Burghardt, "Do Crimes Against Humanity Require the Participation of a State or a 'State-like' Organization?," *J. of Int'l Crim. Just.*, vol. 10, p. 1151 (2012).

[318] *Kenya Authorization Decision 2010, Dissent,* paras. 45 and 51. The characteristics identified by Judge Kaul were: (a) a collectivity of persons; (b) which was established and acts for a common purpose; (c) over a prolonged period of time; (d) which is under responsible command or adopted a certain degree of hierarchical structure, including, as a minimum, some kind of policy level; (e) with the capacity to impose the policy on its members and to sanction them; and (f) which has the capacity and means available to attack any civilian population on a large scale.

[319] *Ntaganda 2012*, para. 22.

[320] *Prosecutor v. Mbarushimana*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, ICC-01/04-01/10, para. 2 (Dec. 16, 2011).

[321] Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005, ICC-02/04-01/05, para. 5 (Sept. 27, 2005).

[322] *Ibid.*, para. 7.

Chamber II confirmed charges of crimes against humanity against defendants owing to their association in a "network" of perpetrators "comprised of eminent ODM [Orange Democratic Movement] political representatives, representatives of the media, former members of the Kenyan police and army, Kalenjin elders and local leaders".[323] Likewise, charges were confirmed with respect to other defendants associated with "coordinated attacks that were perpetrated by the Mungiki and pro-Party of National Unity ('PNU') youth in different parts of Nakuru and Naivasha" that "were targeted at perceived [ODM] supporters using a variety of means of identification such as lists, physical attributes, roadblocks and language".[324]

D. "With knowledge of the attack"

151. The third general requirement is that the perpetrator must commit the act "with knowledge of the attack". Jurisprudence from the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda concluded that the perpetrator must have knowledge that there is an attack on the civilian population and, further, that his or her act is a part of that attack.[325] This two-part approach is reflected in the International Criminal Court's *Elements of Crimes*, which for each of the proscribed acts requires as that act's last element: "The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population." Even so,

> the last element should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization. In the case of an emerging widespread or systematic attack against a civilian population, the intent clause of the last element indicates that this mental element is satisfied if the perpetrator intended to further such an attack.[326]

It need not be proven that the perpetrator knew the specific details of the attack;[327] rather, the perpetrator's knowledge may be inferred from circumstantial evidence.[328] Thus, when finding in the *Bemba* case that the MLC troops acted with knowledge of the attack, Pre-Trial Chamber II of the International Criminal Court stated that the troops' knowledge could be "inferred from the methods of the attack they followed", which reflected a clear pattern.[329] In the *Katanga* case, the Court's Pre-Trial Chamber I found that

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[323] *Ruto 2012*, para. 182.

[324] *Prosecutor v. Muthaura et al*., Pre-Trial Chamber II, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-02/11, para. 102 (Jan. 23, 2012).

[325] See, e.g., *Kunarac 2001*, para. 418; *Kayishema 1999*, para. 133.

[326] ICC, *Elements of Crimes, supra* note 92, at 5.

[327] *Kunarac 2001*, para. 434 (finding that the knowledge requirement "does not entail knowledge of the details of the attack").

[328] See *Tadić 1997*, para. 657 ("While knowledge is thus required, it is examined on an objective level and factually can be implied from the circumstances."); see also *Kayishema 1999*, para. 134 (finding that "actual or constructive knowledge of the broader context of the attack" is sufficient); *Blaškić 2000*, para. 259 (finding that knowledge of the broader context of the attack may be surmised from a number of facts, including "the nature of the crimes committed and the degree to which they are common knowledge").

[329] *Bemba 2009*, para. 126.

> knowledge of the attack and the perpetrator's awareness that his conduct was part of such attack may be inferred from circumstantial evidence, such as: the accused's position in the military hierarchy; his assuming an important role in the broader criminal campaign; his presence at the scene of the crimes; his references to the superiority of his group over the enemy group; and the general historical and political environment in which the acts occurred.[330]

152. Further, the personal motive of the perpetrator for taking part in the attack is irrelevant; the perpetrator does not need to share the purpose or goal of the broader attack.[331] According to the Appeals Chamber of the International Tribunal for the Former Yugoslavia in *Kunarac*, evidence that the perpetrator committed the prohibited acts for personal reasons could at most "be indicative of a rebuttable assumption that he was not aware that his acts were part of that attack".[332] It is the perpetrator's knowledge or intent that his or her act is part of the attack that is relevant to satisfying this requirement. Additionally, this element will be satisfied where it can be proven that the underlying offence was committed by directly taking advantage of the broader attack, or where the commission of the underlying offence had the effect of perpetuating the broader attack.[333] For example, in the *Kunarac* case, the perpetrators were accused of various forms of sexual violence, acts of torture and enslavement against Muslim women and girls. The Trial Chamber of the Court found that the accused had the requisite knowledge because they not only knew of the attack against the Muslim civilian population, but also perpetuated the attack "by directly taking advantage of the situation created" and "fully embraced the ethnicity-based aggression."[334]

E. Types of prohibited acts

153. Article 7(1) of the Rome Statute, in subparagraphs (a) to (k), lists the underlying prohibited acts for crimes against humanity. These prohibited acts also appear as part of the definition of crimes against humanity contained in article 18 of the Commission's 1996 Draft Code of Crimes against the Peace and Security of Mankind, although the language differs slightly. Article 7(2), in subparagraphs (b) to (i), provides further definitions of these prohibited acts. An individual who commits one of these acts can commit a crime against humanity; the individual need not have committed multiple acts, but the individual's act must be "a part of" a widespread or systematic attack directed against any civilian population.[335] The underlying offence does not need to be committed in the heat of the attack against the civilian population to satisfy this requirement; the underlying offence can be part of the attack if it can be sufficiently connected to the attack.[336]

154. *Murder*. Article 7(1)(a)of the Rome Statute identifies murder as a prohibited act. According to the International Criminal Court's *Elements of Crimes*, the act of

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[330] *Katanga 2008*, para. 402.
[331] See, e.g., *Kunarac 2002*, para. 103; *Kupreškić 2000,* para. 558.
[332] *Kunarac 2002*, para. 103.
[333] See, e.g., *Kunarac 2001*, para. 592.
[334] *Ibid*.
[335] See, e.g., *Tadić 1997,* para. 649; *Kunarac 2002*, para. 100.
[336] See, e.g., *Mrkšić 2007*, para. 438; *Tadić 1999,* para. 248; *Prosecutor v. Naletillić,* Trial Chamber, Judgment, ICTY Case No. IT-98-34-T, para. 234 (Mar. 31, 2003).

murder means that "the perpetrator killed one or more persons".[337] The term "killed" can be used interchangeably with "caused death".[338] Murder was included as an act falling within the scope of crimes against humanity in article 6(c) of the Nuremberg Charter; Control Council Law No. 10; the statutes of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda; and the 1954 draft Code of Offences against the Peace and Security of Mankind and 1996 draft Code of Crimes against the Peace and Security of Mankind of the International Law Commission.[339]

155. *Extermination*. Article 7(1)(b) of the Rome Statute identifies extermination as a prohibited act. Article 7(2)(b) provides that extermination "includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population". To commit the act of extermination, according to the International Criminal Court's *Elements of Crimes*, the perpetrator must have "killed one or more persons, including by inflicting conditions of life calculated to bring about the destruction of part of a population".[340] These conditions "could include the deprivation of access to food and medicine".[341] Killing, in the context of the act of extermination, can be either direct or indirect, and can take various forms.[342] The conduct must also have "constituted, or [taken] place as part of, a mass killing of members of a civilian population".[343] Although extermination, like genocide, involves an element of mass destruction, it differs from the crime of genocide in that it covers situations in which a group of individuals who do not have any shared characteristics are killed as well as situations in which some members of a group are killed while others are not.[344] Extermination was included as an act falling within the scope of crimes against humanity in article 6(c) of the Nuremberg Charter; Control Council Law No. 10; the statutes of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda; and the draft codes of the International Law Commission.[345]

156. *Enslavement*. Article 7(1)(c) of the Rome Statute identifies enslavement as a prohibited act. Article 7(2)(c) defines enslavement as "the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children". The International Criminal Court's *Elements of Crimes* provides that such an exercise of power includes "purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty".[346] *Elements of Crimes* also notes: "It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to

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[337] ICC, *Elements of Crimes, supra* note 92, at 5.
[338] *Ibid.*, n.7.
[339] *See* 1996 ILC Report, at 48.
[340] ICC, *Elements of Crimes*, *supra* note 92, at 6.
[341] *Ibid.*, n.9.
[342] *Ibid.*, n.8.
[343] *Ibid.*, at 6.
[344] 1996 ILC Report, at 48.
[345] *Ibid.*
[346] ICC, *Elements of Crimes*, *supra* note 92, at 6.

Slavery of 1956."[347] Enslavement was included as an act falling within the scope of crimes against humanity in article 6(c) of the Nuremberg Charter; Control Council Law No. 10; the statutes of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda; and the draft codes of the International Law Commission.[348] Article 3(a) of the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime,[349] defines "trafficking in persons" as the "recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation".

157. *Deportation or forcible transfer of population*. Article 7(1)(d) of the Rome Statute identifies forcible transfer of population as a prohibited act. Article 7(2)(d) defines deportation or forcible transfer of population 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." The International Criminal Court's *Elements of Crimes* states that the term "forcibly" is not limited to physical force, and may include the threat of coercion or force, "such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment".[350] According to *Elements of Crimes*, the perpetrator must also be aware of the factual circumstances establishing that the persons are lawfully present in the area from which they were displaced.[351] *Elements of Crimes* also notes that "deported or forcibly transferred" can be used interchangeably with "forcibly displaced".[352] "Grounds permitted under international law" can include legitimate reasons for transfer such as public health or welfare.[353] Deportation was included as an act falling within the scope of crimes against humanity in article 6(c) of the Nuremberg Charter; Control Council Law No. 10; the statutes of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda; and the draft codes of the International Law Commission.[354]

158. *Imprisonment or other severe deprivation of physical liberty*. Article 7(1)(e) of the Rome Statute identifies as a prohibited act imprisonment or other severe deprivation of physical liberty. To commit this prohibited act under the Rome Statute, the perpetrator must have "imprisoned one or more persons or otherwise severely deprived one or more persons of physical liberty".[355] Additionally, the conduct must be "in violation of the fundamental rules of international law".[356] Arbitrary imprisonment is a violation of individual human rights recognized in

[347] *Ibid.*, n.11.
[348] 1996 ILC Report, at 48.
[349] Nov. 15, 2000, 2237 U.N.T.S. 319.
[350] ICC, *Elements of Crimes, supra* note 92, n.12.
[351] *Ibid.*, at 7.
[352] *Ibid.*, n.13.
[353] 1996 ILC Report, at 49.
[354] *Ibid.*
[355] ICC, *Elements of Crimes, supra* note 92, at 7.
[356] *Ibid.*

article 9 of the Universal Declaration of Human Rights and article 9 of the International Covenant on Civil and Political Rights.[357] Subparagraph (e) also includes large-scale or systematic cases of imprisonment, such as concentration camps.[358] According to the International Criminal Court's *Elements of Crime*s, the perpetrator must also be "aware of the factual circumstances that established the gravity of the conduct".[359] Imprisonment was included as an act falling within the scope of crimes against humanity in Control Council Law No. 10, the statutes of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda; and the 1996 draft code of the International Law Commission.[360]

159. *Torture*. Article 7(1)(f) of the Rome Statute identifies torture as a prohibited act. Article 7(2)(e) 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." The International Criminal Court's *Elements of Crimes* provides that "no specific purpose need be proved for this crime".[361] This definition of torture mirrors the definition found in article 1(1) of the Convention against Torture, but removes the specific purposes requirement.[362] Torture was included as an act falling within the scope of crimes against humanity in Control Council Law No. 10, the statutes of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda and the 1996 draft code of the International Law Commission.[363]

160. *Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity*. Article 7(1)(g) of the of the Rome Statute identifies as prohibited acts rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity. Each of these acts is addressed below.

161. *Rape*. Rape was included as an act falling within the scope of crimes against humanity in Control Council Law No. 10, the statutes of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda and

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[357] 1996 ILC Report, at 49. ICCPR, article 9 provides that: "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law." International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (hereinafter ICCPR).

[358] 1996 ILC Report, at 49.

[359] *Ibid.*

[360] *Ibid.*

[361] ICC, *Elements of Crimes, supra* note 92, n.14.

[362] Convention against Torture, Article 1(1) provides that: "the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions." *Ibid.*

[363] 1996 ILC Report, at 48.

the 1996 draft code of the International Law Commission.[364] Owing to the accounts of rape committed in a widespread or systematic manner in the former Yugoslavia, the General Assembly in 1995 unanimously reaffirmed that rape falls within the scope of crimes against humanity when the other elements of the offence are satisfied.[365]

162. The International Criminal Court's *Elements of Crimes* defines the act of rape as an act by which "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."[366] This invasion must be "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".[367] *Elements of Crimes* notes that a person may be incapable of giving genuine consent for reasons such as "natural, induced, or age-related incapacity".[368] *Elements of Crimes* also notes that the act of rape under crimes against humanity in the Rome Statute is intended to be gender-neutral.[369] These elements were interpreted in some depth for the first time by Trial Chamber II in the *Katanga* and *Ngudjolo Chui* cases.[370]

163. *Sexual slavery*. Sexual slavery is listed as a separate prohibited act in article 7(1)(g) of the Rome Statute, rather than as a form of enslavement under article 7(1)(c). The International Criminal Court's *Elements of Crimes* defines sexual slavery as an act by which the "perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty".[371] Such a deprivation of liberty could include "exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956".[372] Additionally, the perpetrator must have "caused such person or persons to engage in one or more acts of a sexual nature".[373] *Elements of Crimes* also notes that due to the "complex nature of this crime, it is recognized that its commission could involve more than

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[364] N. Weiss, "Vergewaltigung und erzwungene Mutterschaft als Verbrechen gegen die Menschlichkeit, Kriegsverbrechen und Genozid," *MenschenRechtsMagazin*, vol. 6, p. 132 (2001); A. Adams, *Der Tatbestand der Vergewaltigung im Völkerstrafrecht* (Duncker & Humblot, 2013).

[365] G.A. Res. 50/192, U.N. GAOR, 50th sess., U.N. Doc. A/RES/50/192 (Feb. 23, 2004).

[366] ICC, *Elements of Crimes, supra* note 92, at 8.

[367] *Ibid.*

[368] *Ibid.*, n.16.

[369] *Ibid.*, n.15.

[370] *Katanga 2014*, paras. 963-72. The Trial Chamber found that during an attack on the village of Bogoro in February 2003, Ngiti combatants from militia camps committed rape as war crimes and crimes against humanity. The two defendants before the Court, however, were acquitted as an accessory to such rape (and to sexual slavery thereafter). Among other things, the Trial Chamber found unproven that these particular crimes formed part of the common purpose of the attack.

[371] ICC, *Elements of Crimes, supra* note 92, at 8.

[372] *Ibid.*, n.18.

[373] *Ibid.*, at 8.

one perpetrator as a part of a common criminal purpose".[374] These elements were also interpreted in some depth for the first time by the Trial Chamber II in the *Katanga* and *Ngudjolo Chui* cases.[375]

164. *Enforced prostitution*. It has been suggested that the crime of "enforced prostitution" was included in the Rome Statute "to capture those situations that lack slavery-like conditions".[376] The International Criminal Court's *Elements of Crimes* defines enforced prostitution as an act by which

> the perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.[377]

Elements of Crimes also identifies an additional element: that "the perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature".[378] Enforced prostitution was included as an act falling within the scope of crimes against humanity in the International Law Commission's 1996 draft Code of Crimes against the Peace and Security of Mankind.[379]

165. *Forced pregnancy*. Article 7(2)(f) of the Rome Statute defines forced pregnancy[380] 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. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy".[381]

166. *Enforced sterilization*. Following the Second World War, several defendants were found guilty of war crimes and crimes against humanity for medical experiments, including sterilization, conducted in concentration camps.[382] Forced sterilization can also amount to genocide when committed with the requisite intent to destroy a particular group in whole or in part, as a form of "imposing measures intended to prevent births within the group" under article 6(d) of the Rome Statute.[383] The International Criminal Court's *Elements of Crimes* defines enforced sterilization as an act by which the "perpetrator deprived one or more persons of biological reproductive capacity".[384] Additionally, *Elements of Crimes* establishes that the conduct must not have been "justified by the medical or hospital treatment

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[374] *Ibid.*, n.17.

[375] *Katanga 2014*, paras. 975-84.

[376] C.K. Hall, et al., "Article 7, Crimes against Humanity," in *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, p. 213 (2d ed. 2008).

[377] ICC, *Elements of Crimes, supra* note 92, at 9.

[378] *Ibid.*

[379] 1996 ILC Report.

[380] See generally N. Weiss, "Vergewaltigung und erzwungene Mutterschaft als Verbrechen gegen die Menschlichkeit, Kriegsverbrechen und Genozid," *MenschenRechtsMagazin*, vol. 6, p. 132 (2001).

[381] The *Elements of Crimes* does not elaborate any further on this definition.

[382] Hall et al., *supra* note 90, at 213-24, n.255.

[383] Rome Statute, *supra* note 5, art. 6(d).

[384] ICC, *Elements of Crimes, supra* note 92, at 9.

of the person or persons concerned nor carried out with their genuine consent".[385] *Elements of Crimes* includes a footnote to the first element, stating: "The deprivation is not intended to include birth-control measures which have a non-permanent effect in practice."[386]

167. *Any other form of sexual violence of comparable gravity*. In the *Akayesu* case at the International Criminal Tribunal for Rwanda, the defendant was prosecuted for sexual violence as crimes against humanity, on the basis that such violence fell within the scope of "other inhumane acts".[387] The Trial Chamber in *Akayesu*, in defining "sexual violence" in the context of crimes against humanity, said:

> The Tribunal considers sexual violence, which includes rape, as any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.[388]

The Tribunal found that the act of forcing a woman to undress and perform gymnastics in front of a crowd constituted sexual violence amounting to inhumane acts.[389] The Tribunal also noted that in this context, evidence of physical force is not necessary to demonstrate coercive circumstances.[390] The 1996 draft Code of Crimes against the Peace and Security of Mankind also included "other forms of sexual abuse" as a prohibited act in its definition of crimes against humanity.[391] The International Criminal Court's *Elements of Crimes* defines this prohibited act as one in which the "perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent".[392] This element appears consistent with the Trial Chamber's approach in *Akayesu* and incorporates the same broad definition of coercion. Additionally, the conduct must be of comparable gravity to the other offences enumerated in article 7, paragraph 1(g), of the Rome Statute.[393] *Elements of Crimes* also provides that the perpetrator must have been "aware of the factual circumstances that established the gravity of the conduct".[394]

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[385] *Ibid.*, at 9.

[386] *Ibid.*, n.19.

[387] *Akayesu 1998*, para. 688.

[388] *Ibid.*

[389] *Ibid.*

[390] *Ibid.* ("Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence of Interahamwe among refugee Tutsi women at the bureau communal."); see also *Prosecutor v. Brima, Kamara & Kanu*, Judgment, Case No. SCSL–2004–16–A (Feb. 22, 2008).

[391] 1996 ILC Report, at 50.

[392] ICC, *Elements of Crimes, supra* note 92, at 10.

[393] *Ibid.*

[394] *Ibid.* For a recent statement on the ICC Prosecutor's approach to such crimes, see ICC, Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes* (June 2014).

168. *Persecution against any identifiable group or collectivity*. Article 7(1)(h) of the Rome Statute identifies as a prohibited act "persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in" paragraph 1 as a whole or in connection with acts of genocide or war crimes. Article 7(2)(g) defines persecution as "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity". The International Criminal Court's *Elements of Crimes* clarifies that the crime of persecution includes targeting individuals because of their membership in the group or collectivity, as well as targeting the group or collectivity as a whole.[395] Persecution may take many forms, with its central characteristic being the denial of fundamental human rights that every individual is entitled to without distinction.[396] The importance of this notion can be seen in Article 1(3) of the Charter of the United Nations, which provides for "respect for human rights and for fundamental freedoms of all without distinction as to race, sex, language, or religion", as well as article 2 of the International Covenant on Civil and Political Rights.[397] Article 7(1)(h) of the Rome Statute applies to acts of persecution that do not have the specific intent necessary to constitute the crime of genocide.[398] Persecution on political, racial or religious grounds was included as an act falling within the scope of crimes against humanity in article 6(c) of the Nuremberg Charter; Control Council Law No. 10; the statutes of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda; and the draft codes of the International Law Commission.[399]

169. Article 7(1)(h) of the Rome Statute prohibits persecution against any identifiable group or collectivity on several grounds, including gender. The Rome Statute was the first international legal instrument to explicitly list gender persecution as a crime.[400] Article 7(3) defines gender as "the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above". In United Nations usage, "the word 'sex' is used to refer to physical and biological characteristics of women and men, while gender is used to refer to the explanations for observed differences between women and men based on socially assigned roles."[401] The phrase "in the context of society" in

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[395] ICC, *Elements of Crimes*, *supra* note 92, at 10 ("1. The perpetrator severely deprived, contrary to international law, *one or more persons* of fundamental rights. 2. The perpetrator *targeted such person or persons* by reason of the identity of a group or collectivity or targeted the group or collectivity as such.") (emphasis added).

[396] 1996 ILC Report, at 49.

[397] Charter of the United Nations, June 26, 1945, 1 U.N.T.S. XVI; ICCPR, *supra* note 355, art. 2 ("Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.").

[398] 1996 ILC Report, at 49.

[399] *Ibid.*; see also R. Ana Alija Fernández, *La persecución como crimen contra la humanidad* (2011).

[400] V. Oosterveld, "The Making of a Gender-Sensitive International Criminal Court," *International Law Forum du Droit International*, vol. 1, at 38, 40 (1999); see V. Oosterveld, "Gender-Based Crimes against Humanity, in L. Sadat (ed.), *Forging a Convention for Crimes against Humanity*, *supra* note 7, p. 78.

[401] Implementation Of The Outcome Of The Fourth World Conference On Women, Report of the Secretary General, U.N. Doc. A/51/322, para. 9 (1996).

paragraph 3 then can be interpreted to refer to these socially constructed roles and differences assigned to both sexes.[402] Hence, the use of "gender" as opposed to "sex" in the Statute is more inclusive.[403]

170. *Enforced disappearance of persons*. Article 7(1)(i) of the Rome Statute identifies enforced disappearance of persons as a prohibited act. Article 7(2)(i) defines enforced disappearance of persons as "the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time". In 1992, the General Assembly adopted the Declaration on the Protection of All Persons from Enforced Disappearance, stating that "enforced disappearance undermines the deepest values of any society committed to respect for the rule of law, human rights and fundamental freedoms" and that "*the systematic practice of such acts is of the nature of a crime against humanity*".[404] The definition of enforced disappearance of persons in article 7(2)(i) of the Rome Statute uses nearly the same language as appears in the 1992 United Nations declaration.[405]

171. Forced disappearance was included as an act falling within the scope of crimes against humanity in the 1996 draft Code of Crimes against the Peace and Security of Mankind, whose commentary referred to the 1992 United Nations Declaration and the Inter-American Convention on the Forced Disappearance of Persons for definitions of the prohibited act.[406] The Commission stated in its commentary that forced disappearance was included as an act falling within the scope of crimes against humanity "because of its extreme cruelty and gravity".[407] As noted in paragraph 86 above, in 2006 the General Assembly adopted the International Convention for the Protection of All Persons from Enforced Disappearance. Article 5 of the Convention provides: "The widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law."[408]

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[402] Hall et al., *supra* note 90, at 273.

[403] Oosterveld, *supra* note 400, at 40.

[404] *Declaration on the Protection of All Persons from Enforced Disappearance*. G.A. Res. 47/133, 47 U.N. GAOR Supp. No. 49, U.N. Doc. A/RES/47/133, at 207 (Dec. 18, 1992) (emphasis added).

[405] The 1992 U.N. Declaration defines enforced disappearance as situations in which "persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law." *Ibid.*

[406] 1996 ILC Report, at 50.

[407] *Ibid.*

[408] International Convention for the Protection of All Persons from Enforced Disappearance, Dec. 20, 2006, 2716 U.N.T.S. 3; see also Working Group on Enforced or Involuntary Disappearances, United Nation Human Rights Council, "General Comment on Enforced Disappearances as a Crime Against Humanity," in Report of the Working Group on Enforced or Involuntary Disappearances, U.N. Doc. A/HRC/13/31 (Dec. 21, 2009), *available at* http://www.ohchr.org/Documents/Issues/Disappearances/GCas_crime_against_humanity.pdf.

172. The International Criminal Court's *Elements of Crimes* does not separately address the elements for perpetrators involved in the deprivation of liberty and the elements pertaining to perpetrators involved in the refusal or denial; rather, the two types of conduct are addressed together. According to the first element, the perpetrator must have either "arrested, detained, or abducted one or more persons" or "refused to acknowledge the arrest, detention or abduction, or to give information on the fate or whereabouts of such person or persons".[409] Footnotes clarify that the term "detained" includes "a perpetrator who maintained an existing detention" and that "under certain circumstances an arrest or detention may have been lawful".[410] The second element requires that the arrest, detention or abduction be followed or accompanied by a refusal to acknowledge or to give information, or that the "refusal was preceded or accompanied by that deprivation of freedom".[411] The third element requires that the perpetrator be aware that either the "arrest, detention or abduction would be followed in the ordinary course of events by a refusal" or that the "refusal was preceded or accompanied by that deprivation of freedom".[412] The fourth element requires that the "arrest, detention or abduction was carried out by, or with the authorization, support or acquiescence of, a State or a political organization", while the fifth element requires that the refusal be with "authorization or support of, such State or political organization".[413] The sixth element requires that the "perpetrator intended to remove such person or persons from the protection of the law for a prolonged period of time".[414] A footnote indicates: "Given the complex nature of this crime, it is recognized that its commission will normally involve more than one perpetrator as a part of a common criminal purpose."[415]

173. *Apartheid*. Article 1 of the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid provides: "The States parties to the present Convention declare that apartheid is a crime against humanity."[416] The 1996 draft code included what the Commission called "the crime of apartheid under a more general denomination"[417] by referring to institutionalized discrimination on racial, ethnic or religious grounds as crimes against humanity.

174. Article 7(1)(j) of the Rome Statute expressly identifies the crime of apartheid as a prohibited act. Article 7(2)(h) defines the crime of apartheid as "inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime".

175. *Other inhumane acts*. Article 7(1)(k) of the Rome Statute identifies as prohibited acts other inhumane acts of a similar character intentionally causing great

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409 ICC, *Elements of Crimes*, *supra* note 92, at 11.

410 *Ibid.*, nn. 25-26.

411 *Ibid.*, at 11.

412 *Ibid.*

413 *Ibid.*

414 *Ibid.*

415 *Ibid.*

416 International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, 1015 U.N.T.S. 243.

417 *Ibid.* Specifically, the 1996 Draft Code made "institutionalized discrimination on racial, ethnic or religious grounds involving the violation of fundamental rights and freedoms and resulting in seriously disadvantaging a part of the population" a crime against humanity. *Ibid.*

suffering or serious injury to body or to mental or physical health. In the commentary to its 1996 draft code, the Commission explained the inclusion of "other inhumane acts" by recognizing that "it was impossible to establish an exhaustive list of the inhumane acts which might constitute crimes against humanity".[418] The 1996 draft code includes two examples of the types of acts that would qualify as "other inhumane acts" as crimes against humanity: mutilation and severe bodily harm.[419] Article 6(c) of the Nuremberg Charter, Control Council Law No. 10 and the statutes of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda included "other inhumane acts" in their definitions of crimes against humanity.[420]

F. Draft article 2: Definition of crimes against humanity

176. The definition of crimes against humanity as set forth in article 7 of the Rome Statute represents a widely-accepted definition of settled international law.[421] As such, for the present draft articles, it should be used verbatim except for three non-substantive changes, which are necessary given the different context in which the definition is being used. First, the opening phrase of paragraph 1 should read "For the purpose of the present draft articles" rather than "For the purpose of this Statute". Second, the same change is necessary in the opening phrase of paragraph 3. Third, article 7(1)(h) Rome Statute criminalizes acts of persecution when undertaken "in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court". Again, to adapt to the different context, this phrase should instead read "in connection with any act referred to in this paragraph or in connection with acts of genocide or war crimes".[422]

177. Bearing these considerations in mind, the Special Rapporteur proposes the following draft article:

Draft article 2
Definition of crimes against humanity

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

(a) Murder;

(b) Extermination;

(c) Enslavement;

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[418] 1996 ILC Report, at 50.

[419] *Ibid.*

[420] *Ibid.*

[421] See, e.g., Report of the Commission of Inquiry on Human Rights in the Democratic Peoples' Republic of Korea, U.N. Doc. A/HRC/25/63, para. 21 (2014) ("Matters relating to crimes against humanity were assessed on the basis of definitions set out by customary international law and in the Rome Statute of the International Criminal Court.").

[422] In due course, the crime of aggression may be added to the jurisdiction of the ICC, in which case this language may be revisited by the Commission. At a minimum, this issue might be flagged in the Commission's commentary for consideration by States when negotiating and adopting a convention on crimes against humanity.

(d) Deportation or forcible transfer of population;

(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

(f) Torture;

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or in connection with acts of genocide or war crimes;

(i) Enforced disappearance of persons;

(j) The crime of apartheid;

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

2. For the purpose of paragraph 1:

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

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

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

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

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

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

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

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

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

3. For the purposes of the present draft articles, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

VII. Future programme of work

178. A tentative "road map" for the completion of work on this topic is as follows.

179. A second report, to be submitted in 2016, will likely address the obligation of a State party to take any necessary measures to ensure that crimes against humanity constitute an offence under national law; the obligation to take any necessary measures to establish the State party's competence to exercise jurisdiction over the offence; the obligation of each State party to take an alleged offender in any territory under its jurisdiction into custody and carry out an investigation of the alleged offence; the obligation to submit the case to its competent authorities for the purpose of prosecution, unless the person is extradited to another State or surrendered to an international court or tribunal; and the entitlement of the alleged offender to fair treatment, including a fair trial.

180. The subsequent programme of work on the topic will be for the members of the Commission elected for the quinquennium 2017-2021 to determine. A possible timetable would be for a third report to be submitted in 2017, which could address a State Party's obligation to investigate an alleged offence in circumstances where the alleged offender is not present; rights and obligations applicable to the extradition of the alleged offender; and rights and obligations applicable to mutual legal assistance in connection with criminal proceedings brought in respect of an alleged offence of crimes against humanity.

181. A fourth report, to be submitted in 2018, could address all further matters, such as dispute settlement, as well as a preamble and concluding articles to the convention.

182. If such a timetable is maintained, it is anticipated that a first reading of the entire set of draft articles could be completed by 2018 and a second reading could be completed by 2020.

Annex

Proposed draft articles

Draft article 1
Prevention and punishment of crimes against humanity

1. Each State Party confirms that crimes against humanity, whether committed in time of peace or in time of war, are crimes under international law which it undertakes to prevent and punish.

2. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent crimes against humanity in any territory under its jurisdiction.

3. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of crimes against humanity.

Draft article 2
Definition of crimes against humanity

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

a. Murder;

b. Extermination;

c. Enslavement;

d. Deportation or forcible transfer of population;

e. Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

f. Torture;

g. Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

h. Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or in connection with acts of genocide or war crimes;

i. Enforced disappearance of persons;

j. The crime of apartheid;

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

2. For the purpose of paragraph 1:

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

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

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

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

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

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

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

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

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

3. For the purposes of the present draft articles, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.