TREATISE ON INTERNATIONAL CRIMINAL LAW

Volume II: The Crimes and Sentencing

KAI AMBOS

OXFORD

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For Vânia, Lara, Analu, and Patrick, and my other great Brasilian family

Preface

This book is the second volume of a three-volume treatise on international criminal law (ICL) which is financially supported by the German Research Foundation (*Deutsche Forschungsgemeinschaft*). The first volume appeared in January 2013 and covered the 'Foundations and General Part' of ICL. This second volume completes the substantive part of ICL, dealing with the Crimes ('Special Part') as well as the law of concours (*concursus delictorum*) and sentencing. The third volume will offer a comprehensive analysis of international criminal procedure and the law of legal cooperation. While the focus of the whole treatise is clearly on the International Criminal Court (ICC), the law of the ad hoc tribunals (especially the International Criminal Tribunal for the Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR)) is also considered insofar as it serves as a source of the law of the ICC.

The present volume offers a comprehensive analysis of the international core crimes: genocide (Chapter I), crimes against humanity (Chapter II), war crimes (Chapter III) and aggression (Chapter IV), and relevant treaty crimes (Chapter V). Last but not least, the law of concours and sentencing is analysed and a proposal for a more consistent sentencing regime for the ICC is set out (Chapter VI). Given the broad comparative approach of the work (cf. preface to Volume I), each chapter contains a separate bibliography. For reasons of space and to facilitate research, these bibliographies have been published online rather than in this volume. They can be downloaded from <http://ukcatalogue.oup.com/product/9780199665600.do>. The chapter bibliographies are complemented by a general bibliography provided at the end of this book. In addition, the volume contains a list of abbreviations, a table of cases and legislation, and an index.

I am grateful to various people who have participated in the research on which this book is based, some of whom have also assisted with the drafting of this second volume. Panagiotis Gkaniatsos, Stephanie Kern, and Anina Timmermann have been involved in the research and took part in the drafting of various chapters. Professor Carl-Friedrich Stuckenberg (Bonn) and Dr Jan Christoph Nemitz (The Hague) made critical comments on Chapter VI. Further contributions have been made by Katarzyna Geler-Noch, Hsiang Pan, and Maria Fried. Elizabeth Campbell was in charge of the final proofreading on my end and made various helpful suggestions. My office manager Anett Müller was always ready and quick to help with any technical and other questions. Anthony Hinton, David Lewis, and Ceri Warner assisted me at Oxford University Press.

Kai Ambos
Göttingen, Germany
1 October 2013

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List of Abbreviations

AC	Appeals Chamber
ACHR	American Convention on Human Rights
AFRC	Armed Forces Revolutionary Council
AfrJICompL	African Journal of International and Comparative Law
AIDP	Association Internationale de Droit Pénal
AJCompL	American Journal of Comparative Law
AJICL	African Journal of International and Comparative Law
AJIL	American Journal of International Law
ALC	Annotated Leading Cases
ANC	African National Congress
AmUIntLRev	American University International Law Review
AmUJGenderSocPol'y&L	American University Journal of Gender, Social Policy & the Law
AP	Additional Protocol
APC	Armée Populaire Congolaise
ARIEL	Austrian Review of International & European Law
ArizJICompL	The Arizona Journal of International and Comparative Law
Art.	Article
ASIL Proc	Proceedings of the American Society of International Law
ASP	Assembly of States Parties
AVR	Archiv des Völkerrechts
BayObLG	Bayerisches Oberstes Landesgericht (Bavarian Supreme Court)
BCInt'l&CompLRev	Boston College International and Comparative Law Review
BGH	Bundesgerichtshof (German Federal Court)
BGHSt	Entscheidungen des Bundesgerichtshofs in Strafsachen (Official Collection of Decisions of the German Federal Court in criminal matters)
BCThirdWorldLJ	Boston College Third World Law Journal
BJWA	Brown Journal of World Affairs
Boletim IBCCrim	Boletim Instituto Brasileiro de Ciências Criminais
BR-Drs.	Bundesrats-Drucksache (Printed Matter of the Federal Council of the German Parliament)
BuffCLR	Buffalo Criminal Law Review
BUILJ	Boston University International Law Journal
BverfG	Bundesverfassungsgericht (German Constitutional Court)
BYbIL	British Yearbook of International Law
CalLR	California Law Review
CambLJ	The Cambridge Law Journal
CardozoLR	Cardozo Law Review
CAT	Convention Against Torture
CathULR	Catholic University Law Review
CC	Criminal Code
CCL	Control Council Law
CDF	Civil Defence Forces
CDJ	Cuadernos de derecho judicial
cf.	confer
ChicJIL	Chicago Journal of International Law
ChicKentLR	Chicago Kent Law Review

CIA	Central Intelligence Agency
CLF	Criminal Law Forum
CLJ	Cambridge Law Journal
CLP	Current Legal Problems
CMR	Court-Martial Reports
ColHRLR	Columbia Human Rights Law Review
ColJTransnat'lL	Columbia Journal of Transnational Law
ColLR	Columbia Law Review
ConnJIL	Connecticut Journal of International Law
CornILJ	Cornell International Law Journal
CP	Code Pénal, Código Penal, Codice Penale (French, Spanish, Portuguese, and Italian Criminal Code (France, Spain, Portugal, and Italy))
CWRJIL	Case Western Reserve Journal of International Law
DenverJILP	Denver Journal of International Law & Policy
DPKO	Department of Peacekeeping Operations
DRC	Democratic Republic of Congo
DukeJComp&IL	Duke Journal of Comparative and International Law
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
e.g.	exempli gratia ('for example')
EJCCLCJ	European Journal of Crime, Criminal Law and Criminal Justice
EJCrim	European Journal of Criminology
EJIL	European Journal of International Law
Elements or EOC	Elements of Crimes
et al.	et alii ('and others')
esp.	especially
EuGRZ	Europäische Grundrechte-Zeitschrift
FCP	French Code Pénal
ff.	('and following pages')
FIDH	International Federation for Human Rights
FloridaJIL	Florida Journal of International Law
ForAff	Foreign Affairs
FordhamILJ	Fordham International Law Journal
FPLC	Forces Patriotiques pour la Libération du Congo
FRPI	Force de Resistence Patriotique en Ituri
FRY	Federal Republic of Yugoslavia
FS	Festschrift
FYBIL	Finnish Yearbook of International Law
GA	Goltdammer's Archiv für Strafrecht
GA	General Assembly
GA Res	UN-General Assembly Resolution
GAOR	GA Official Records
GC	Geneva Convention
GoJIL	Göttingen Journal of International Law
GYIL	German Yearbook of International Law
HarvHRJ	Harvard Human Rights Journal
HarvILJ	Harvard International Law Journal
HPCR	Program on Humanitarian Policy and Conflict Research
HRC	Human Rights Committee
HRL	human rights law

HRLJ	Human Rights Law Journal
HRLR	Human Rights Law Review
HRQ	Human Rights Quarterly
HuV-I	Humanitäres Völkerrecht-Informationsschriften
IACtHR	Inter-American Court of Human Rights
IBCCrim	Instituto Brasileiro de Ciências Criminais
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICL	international criminal law
ICLQ	International and Comparative Law Quarterly
ICLR	International Criminal Law Review
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTRS	Statute of the ICTR
ICTY	International Criminal Tribunal for the Former Yugoslavia
ICTYS	Statute of the ICTY
i.e.	id est ('that is')
IHL	international humanitarian law
IJIL	Indian Journal of International Law
ILC	International Law Commission
ILM	International Legal Materials
ILR	International Law Reports
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
IMTFE(S)	International Military Tribunal for the Far East (Statute)
IMT	International Military Tribunal
IMT(S)	International Military Tribunal (Statute)
IndianaI&CLR	Indiana International & Comparative Law Review
IntLawyer	The International Lawyer
IRRC	International Review of the Red Cross
ISAF	International Security Assistance Force
IsYbHR	Israel Yearbook on Human Rights
JA	Juristische Arbeitsblätter
JarmConfL	Journal of Armed Conflict Law
JCE	Joint Criminal Enterprise
JCL&Crim	Journal of Criminal Law & Criminology
JCSL	Journal of Conflict and Security Law
JICJ	Journal of International Criminal Justice
JNA	Jugoslovenska narodna armija (Yugoslavian Army)
JpD	Jueces para la Democracia
JPP	Journal of Political Philosophy
JPR	Journal of Peace Research
Jtransnat'lLPol'y	Journal of Transnational Law and Policy
Jura	Juristische Ausbildung
JZ	Juristenzeitung
KJ	Kritische Justiz
La Ley	La Ley—Revista jurídica española de doctrina, jurisprudencia y bibliografía
LCP	Law and Contemporary Problems
LJIL	Leiden Journal of International Law
LNOJ	League of Nations Official Journal
LRA	Lord's Resistance Army

LRTWC	Law Reports of Trials of War Criminals
MelbJIL	Melbourne Journal of International Law
mn.	margin number
MPEPIL	Max Planck Encyclopedia of Public International Law
MPYbUNL	Max Planck Yearbook for United Nations Law
n. / nn.	note / notes
NATO	North Atlantic Treaty Organization
NewEngJIntCompL	New England Journal of International and Comparative Law
NJW	Neue Juristische Wochenschrift
NordJIL	Nordic Journal of International Law
NStZ	Neue Zeitschrift für Strafrecht
NYUJIL&Pol'y	New York University Journal of International Law & Policy
OGHBrZ	Oberster Gerichtshof für die Britische Zone in Strafsachen (Supreme Court of the British Zone of Occupation)
OGHSt	Entscheidungen des Obersten Gerichtshofes für die Britische Zone in Strafsachen (Official Collection of Decisions of the Supreme Court for the British Zone)
OJLS	Oxford Journal of Legal Studies
OTP	Office of the Prosecutor
para.	paragraph
PC	Penal Code
PCIJ	Permanent Court of International Justice
PennStateILR	Penn State International Law Review
p. / pp.	page / pages
PMC	private military companies
PrepCom	ICC-Preparatory Committee
PrepCommis	Preparatory Commission
PTC	Pre-Trial Chamber
RDPC	Revista de Derecho Penal y Criminología
RDPP	Revista de Derecho y Proceso Penal
Res	Resolution
repr.	reprinted
RFDA	Réseau des Femmes pour un Développement Associatif
RFDP	Réseau des Femmes pour la Défense des Droits et la Paix
RGDIP	Revue Générale de Droit International Public
RPE	Rules of Procedure and Evidence
RSC	Revue de Science Criminelle et de Droit Pénal Comparé
RStGB	Reichsstrafgesetzbuch (Criminal Code of the German Reich)
RUF	Revolutionary United Front
RutLJ	Rutgers Law Journal
s.	section
SchwZStR	Schweizerische Zeitschrift für Strafrecht
SC	Security Council
SCR	Supreme Court Reports (Canada)
SCSL	Special Court for Sierra Leone
SocSciQ	Social Science Quarterly
SPD	Special Panels Dili (East Timor)
SSRN	Social Science Research Network
StGB	Strafgesetzbuch (German Criminal Code)
STL	Special Tribunal for Lebanon
StV	Strafverteidiger
subs.	subsection
Suffolk Transnat'lLR	Suffolk Transnational Law Review

SWGCA	Special Working Group for the Crime of Aggression
SWP	Stiftung Wissenschaft und Politik
SZIER	Schweizerische Zeitschrift für internationales und europäisches Recht
TC	Trial Chamber
Transnat'lLCP	Transnational Law and Contemporary Problems
TulaneJI&CL	Tulane Journal of International and Comparative Law
TWC	Trials of war criminals before the Nuernberg Military Tribunals under Control Council law no. 10
UCLA JIL & ForAff	UCLA Journal of International Law and Foreign Affairs
UK	United Kingdom
ULR	Utrecht Law Review
UN	United Nations
UNCHR	United Nations High Commission for Refugees
UNCLOS	United Nations Convention on the Law of the Sea
UN Doc	United Nations Document
UN GA	UN General Assembly
UN SC	UN Security Council
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNTAET	United Nations Mission in East Timor
UNTS	United Nations Treaty Series
UNWCC	UN War Crimes Commission
US UCMJ	US Uniform Code of Military Justice
US-GPO	United States General Printing Office
USSC	US Sentencing Commission
USSG	US Sentencing Guidelines
VirginiaLRev	Virginia Law Review
VirgJIL	Virginia Journal of International Law
VRS	Vojska Republike Srpske (Bosnian-Serb Army)
vs.	versus
VStGB	Völkerstrafgesetzbuch (German International Criminal Law Code)
WashUGlSLR	Washington University Global Studies Law Review
WCRO	War Crimes Research Office
YaleLJ	The Yale Law Journal
YaleJIL	Yale Journal of International Law
YbIHL	Yearbook of International Humanitarian Law
YbILC	Yearbook of the International Law Commission
ZIS	Zeitschrift für Internationale Strafrechtsdogmatik
ZStW	Zeitschrift für die gesamte Strafrechtswissenschaft

Chapter I
Genocide

*The full chapter bibliography can be downloaded from **http://ukcatalogue.oup.com/product/9780199665600.do.**

A. Introduction

(1) Legal history and definition

Genocide developed from a category of crimes against humanity[1] to an autonomous crime after World War II.[2] The codification was a response to the German Holocaust, the archetypal genocide.[3] The term was coined in 1944 by Raphael Lemkin, from the Greek word *γένος*; (race, tribe) and the combining form '*cide*' from the Latin word *caedere* (kill), in order to 'denote an old practise to its modern development'.[4] Although genocide was not yet codified as a separate crime during the Nuremberg trials,[5] the term was used in the indictment[6] and the defendants charged pursuant to Article 6(c) of the Charter with:

[1] Stressing the distinction between genocide and crimes against humanity, but still recognizing their affinity, see Schabas, *Genocide* (2009), pp. 11, 13 ff., 15 ('genocide stands to crimes against humanity as premeditated murder stands to intentional homicide'); see also Jones, 'Genocide', in Vorah et al., *Inhumanity* (2003), p. 479; Kreß, *JICJ*, 3 (2005), 575–6; for a distinction and criticism of the French approach, see Fournet, *Genocide and Crimes Against Humanity* (2013), pp. 5, 73–4, 111.

[2] Cassese, 'Genocide', in Cassese et al., *Rome Statute*, i (2002), pp. 336–7, 339–40; Cassese et al., *ICL* (2013), pp. 109, 127–8. Mettraux, *HarvILJ*, 43 (2002), 302–6; Ambos and Wirth, *CLF*, 13 (2002), 2–13; Schabas, *Genocide* (2009), pp. 17 ff; Schabas, *Introduction* (2011), p. 100 and n. 140; Kyriakides and Weinstein, *ICLR*, 5 (2005), 383; Lüders, *Völkermord* (2004), p. 253; Wilmshurst, 'Genocide', in Cryer et al., *Introduction ICL* (2010), p. 234; Cherkassky, *ICLR*, 9 (2009), 303; Morrison, *ICLR*, 8 (2008), 393–4; Hagan and Rymond-Richmond, *Darfur* (2009), p. 31; on the evolution of genocidal acts before World War II, see Salter and Eastwood, 'Establishing the Foundations', in Behrens and Henham, *Elements of Genocide* (2013), pp. 23 ff.

[3] Shaw, *Genocide* (2007/2008), p. 3; Wilmshurst, 'Genocide', in Cryer et al., *Introduction ICL* (2010), p. 205.

[4] See Lemkin, *Axis Rule* (1944), p. 79; see also Safferling, *Internationales Strafrecht* (2011), § 6 mn. 6–8; Akhavan, *Reducing Genocide* (2012), pp. 91–101; Salter and Eastwood, 'Establishing the Foundations', in Behrens and Henham, *Elements of Genocide* (2013), pp. 21, 37 ff. (genocide 'articulated, rather than created *ex nihilo*, recognised "principles of humanity"'). See also Volume I of this treatise, p. 10 with n. 57.

[5] Genocide was declared 'a matter of international concern' and 'a crime under international law' on 11 December 1946 by the General Assembly with Resolution 96; see UN GA Res. 96 (11 December 1946) UN Doc. A/RES/96(I).

[6] The terms employed were '*Genocidium*' and 'Genocide' (*Völkermord*); cf. IMG, *Nürnberger Prozess* (1947), xvii, p. 72; xviii, p. 127; xix, pp. 596, 617, 619, 630, 632; xxii, p. 343 ('*Genocidium*'); respectively ii, p. 74; xix, pp. 556, 557, 570; xx, p. 21; xxii, pp. 256, 260, 367 ('*Völkermord*'); cf. also Selbmann, *Genozid* (2002), pp. 39–41; Hübner, *Völkermord* (2004), pp. 57–8; Lüders, *Völkermord* (2004), p. 254; Mettraux, *Crimes* (2005), pp. 194 ff.; on the procedures that followed the Nuremberg Trial, cf. Selbmann, *Genozid* (2002), pp. 41–7. On the genocide in Rwanda, see Magnarella, *JICJ*, 3 (2005), 801 ff.; Aspegren and Williamson, 'Genocide', in Decaux, Dieng, and Sow, *Human Rights* (2007), pp. 203 ff.; Mukimbiri, *JICJ*, 3 (2005), 823 ff.; on the genocide trial in Ethiopia against the ex-President Mengistu, see Kebede, *JICJ*, 5 (2007), 513 ff.

> . . . deliberate and systematic genocide, viz., the extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people, and national, racial or religious groups, particularly Jews, Poles and Gypsies.[7]

The final judgment of the Nuremberg International Military Tribunal (IMT), however, never explicitly used the term, although it described at great length what was later defined as genocide in the Convention on the Prevention and Punishment of the Crime of Genocide of 9 October 1948.[8] In contrast, the US military tribunals sitting at Nuremberg demonstrated the emerging acceptance of the concept by explicitly using the term 'genocide' in both the indictment and the judgment in the *Einsatzgruppen* trial, in order to characterize the activities of the German troops in Poland and the Soviet Union.

Nowadays, there is a widely accepted basis for the prosecution of the 'crime of crimes'.[9] Apart from the definition of genocide in international treaties and national criminal codes,[10] the International Court of Justice (ICJ) recognized the genocide prohibition as 'assuredly a peremptory norm of international law' (*jus cogens*) and an *erga omnes*[11] obligation of states. The International Criminal Tribunal for the Former Yugoslavia (ICTY) Appeals Chamber (AC) characterized it with the following words:

[7] Count Three of the Indictment, cf. The Trial of German Major War Criminals, *Proceedings at Nuremberg*, i (1948), p. 22.

[8] Convention on the Prevention and the Punishment of the Crime of Genocide (9 December 1948), 78 UNTS 277 (1951), entered into force 12 January 1951. On this Convention, cf. Volume I of this treatise, p. 10; critical of its weaknesses, cf. Bassiouni, *Introduction to ICL* (2013), p. 154; cf. also Behrens, 'The Need for a Genocide Law', in Behrens and Henham, *Elements of Genocide* (2013), pp. 237 ff. (with suggestions for reform at pp. 251–3).

[9] cf. *Prosecutor v Kambanda*, No. ICTR-97-23-S, Judgment and Sentence, para. 16 (4 September 1998); *Prosecutor v Serushago*, No. ICTR 98-39-S, Sentence, para. 15 (2 February 1999); *Prosecutor v Krstić*, No. IT-98-33-T, Trial Chamber Judgment, para. 699 (2 August 2001); *Prosecutor v Jelisić*, No. IT-95-10-A, Partial Dissenting Opinion of Judge Wald, para. 2 (5 July 2001); *Prosecutor v Stakić*, No. IT-97-24-T, Trial Chamber Judgment, para. 502 (31 March 2003); *Prosecutor v Niyitegeka*, No. ICTR-96-14-A, Appeals Chamber Judgment, para. 53 (9 July 2004); ICJ, *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)*, Dissenting Opinion of Judge Koroma, para. 26 (3 February 2006), ('crime of all crimes', '*le crime absolu*'); cf. however International Commission of Inquiry on Darfur, *Report of the International Commission of Inquiry on Darfur to the Secretary General. Pursuant to SC Res. 1564, 18 September 2004, Annex to letter dated 31 January 2005 from the Secretary General addressed to the President of the SC, S/2005/60* (1 February 2005), para. 522 ('As stated above, genocide is not necessarily the most serious international crime. Depending on the circumstances, *such international offences as crimes against humanity or large-scale war crimes may be no less serious and heinous than genocide*' [emphasis in the original]). Criticizing the characterization of genocide as 'crime of crimes', and the parallel trivialization of crimes against humanity, see Dimitrijević and Milanovic, *LJIL*, 20 (2007), 1–36; in the same vein, see Murray, *GoJIL*, 3 (2011), 589–615; stressing the need for a preventive approach, in addition to the prosecution of genocide, see Akhavan, *CLF*, 22 (2011), 1–33.

[10] See, for example, section 318 Canadian CC, Article 101 Colombian CP, Article 211-1 French CP, § 6 German VStGB, Article 607 Spanish CP, clause 50 UK ICC Act 2001; all and more available at <http://www.preventgenocide.org/law/domestic> accessed 6 March 2013; on the domestic prosecution of genocide, cf. also Wouters and Verhoeven, 'The Domestic Prosecution of Genocide', in Behrens and Henham, *Elements of Genocide* (2013), pp. 177 ff.

[11] ICJ, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)*, Judgment, para. 31 (11 July 1996); ICJ, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, para. 161 (26 February 2007); ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, p. 23 (28 May 1951) ('the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation') ('universal

> . . . the crime of genocide is singled out for special condemnation and opprobrium. The crime is horrific in its scope; its perpetrators identify entire human groups for extinction. Those who devise and implement genocide seek to deprive humanity of the manifold richness its nationalities, races, ethnicities and religions provide. This is a crime against all of humankind, its harm being felt not only by the group targeted for destruction, but by all of humanity.[12]

The crime of genocide is defined in Article 6 of the International Criminal Court (ICC) Statute as follows:

> For the purpose of this Statute, 'genocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such:
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group.

The provision adopted verbatim the definition of the crime of genocide in Article II of the Genocide Convention,[13] which was also adopted by the Statutes of the International Criminal Tribunal for the Former Yugoslavia (ICTYS) and for Rwanda (ICTRS) in Articles 4(2) and 2(2) respectively. Taking all this into account, genocide is a *truly international crime*,[14] probably the most serious one.

(2) Protected legal interests

Genocide protects mainly a *collective* legal interest, that is, the right of certain groups[15] to exist, and to contribute to a pluralistic world.[16] As General Assembly (GA)

in scope'); *Prosecutor v Akayesu*, No. ICTR-96-4-T, Trial Chamber Judgment, para. 495 (2 September 1998); *Prosecutor v Blagojević and Jokić*, No. IT-02-60-T, Trial Chamber Judgment, para. 639 with further references in n. 2053 (17 January 2005); for further references see Mettraux, *Crimes* (2005), p. 199 with n. 30. On *jus cogens* and *obligatio erga omnes* concerning the international crimes, see Bassiouni, *LCP*, 59 (Autumn 1996), 63–74; Bassiouni, *Introduction to ICL* (2013), pp. 155, 236–46. On the customary international law aspect, see Selbmann, *Genozid* (2002), pp. 142 ff.; König, *Legitimation* (2003), pp. 232 ff.; Wouters and Verhoeven, *ICLR*, 5 (2005), 403 ff.; Salter and Eastwood, 'Establishing the Foundations', in Behrens and Henham, *Elements of Genocide* (2013), pp. 26 ff.; Wilmshurst, 'Genocide', in Cryer et al., *Introduction ICL* (2010), p. 204; Zahar and Sluiter, *ICL* (2008), p. 156; Kreß, *ICLR*, 6 (2006), 467–8; Bock and Preis, *HuV-I*, 20 (2007), 149; Gless, *Internationales Strafrecht* (2011), mn. 801. On the application of death penalty for genocide, see Ohlin, *AJIL*, 99 (2005), 747 ff.

[12] *Krstić*, No. IT-98-33-A, para. 36; on this first application of genocide by the ICTY, see Sinatra, *ICLR*, 5 (2005), 417–30.

[13] 78 UNTS 277 (1951).

[14] On the distinction between treaty-based/transnational crimes and supranational, 'true' international crimes, see Volume I of this treatise, p. 54. See also on the criteria by which a crime is labelled as 'international' or 'universal', Einarsen, *Universal Crimes* (2012), pp. 135 ff.; Hiéramente, *GoJIL*, 3 (2011), 551–88.

[15] On the protected groups in more detail, see Section B. (1); on the legal interests protected, see Volume I of this treatise, p. 66.

[16] Lemkin, *Axis Rule* (1944), p. 91 ('What it means to be a human being, what defines the very identity we share as a species, is the fact that we are differentiated by race, religion ethnicity, and individual difference. These differentiations define our identity both as individuals and as a species').

Resolution 96 puts it: 'genocide is a denial of the right of existence to entire human groups, as homicide is the denial of the right to live of individual human beings'.[17] This right of existence extends beyond the mere physical or biological existence of these groups—that is, the physical or biological existence of their members—since such groups are recognized to be *unique social entities*, and not just the aggregate of the individuals who compose them.[18] As a consequence, it suffices that the special intent of the *genocidaire*[19] is directed at the social existence of the group, to destroy it as a social entity,[20] independent of the direction of the objective acts against the physical or biological existence of the individual members of the group.

The extent to which genocide also protects *individual* legal interests is controversial. The case law does not support this view. The International Criminal Tribunal for Rwanda (ICTR) in *Akayesu*[21] held that 'the victim of the crime of genocide is the group itself and not only the individual, since 'the [individual] victim is chosen not because of his individual identity, but rather on account of his membership of a [protected] group'. However, along with collective group interests, the fundamental rights of the individual group members are also harmed by genocidal acts.[22] In fact, the acts against

[17] UN Doc. A/RES/96(I). In this vein, see also Ntanda Nsereko, 'Genocide', in McDonald and Swaak-Goldman, *Substantive and Procedural Aspects* (2000), p. 124 ('While the aim of the law of homicide is to protect the right of an individual to live, that of genocide is to protect the right of groups to physically exist as such').

[18] cf. Luban, *ChicJIL*, 7 (2006), 309.

[19] This special intent is analysed in more detail in Section D. (6)(a).

[20] German Federal Court (BGH), NStZ, 19 (1999), 396, 401; cf. also Werle, *Völkerstrafrecht* (2012), mn. 757 ff.; Werle, *Principles* (2009), mn. 704; Lüders, *Völkermord* (2004), pp. 45 ff., 49 ff. with further references; Satzger, *Internationales Strafrecht* (2013), § 16 mn. 15; Satzger, *ICL* (2012), § 14 mn. 15; Zahar and Sluiter, *ICL* (2008), p. 179; Fletcher, *Grammar* (2007), pp. 337 ('expression of collective conflict'), 338; Demko, *SZIER*, (2009), 243 ff.; dissenting *Krstić*, No. IT-98-33-T, para. 580; *Prosecutor v Semanza*, No. ICTR-97-20-T, Trial Chamber Judgment, para. 315 (15 May 2003); Mettraux, *Crimes* (2005), p. 216 with further references; Kreß, *JICJ*, 3 (2005), 564; Paul, *Analyse* (2008), pp. 296 ff. (encompassing respectively the 'physical and biological' element into the definition of genocide, pp. 320, 323–4); Safferling, *Internationales Strafrecht* (2011), § 6 mn. 38; in the same vein, seemingly, see *Darfur Report*, paras. 515, 517, 518, 520 ('annihilate', 'eradicate'); leaving it open, Schabas, *Introduction* (2011), p. 102.

[21] *Akayesu*, No. ICTR-96-4-T, para. 521 ('Thus, the victim is chosen . . . on account of his membership . . . The victim . . . of the crime of genocide is the group itself and not only the individual.'); *Prosecutor v Al Bashir*, No. ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, para. 70 (4 March 2009); cf. also, *Prosecutor v Kayishema and Ruzindana*, No. ICTR-95-1-T, Trial Chamber Judgment, para. 97 (21 May 1999); *Prosecutor v Ndindabahizi*, No. ICTR-2001-71-I, Trial Chamber Judgment and Sentence, para. 454 (15 July 2004); *Stakić*, No. IT-97-24-T, para. 520; *Prosecutor v Jelisić*, No. IT-95-10-T, Trial Chamber Judgment, para. 66 ff. (14 December 1999); *Krstić*, No. IT-98-33-T, para. 561; *Prosecutor v Sikirica*, No. IT-95-8-T, Judgment on Defence Motions to Acquit, para. 89 (3 September 2001); cf. also Werle, *Völkerstrafrecht* (2012), mn. 760; Werle, *Principles* (2009), mn. 705; Werle, 'Die Zukunft des Völkerstrafrechts', in Grundmann et al., *FS HU* (2010), p. 1228; Lüders, *Völkermord* (2004), p. 92; Mettraux, *Crimes* (2005), pp. 231–2; Paul, *Analyse* (2008), pp. 274 ff.; Kreß, '§ 6', in Joecks and Miebach, *Münchener Kommentar*, viii (2013), mn. 90.

[22] Werle, *Principles* (2009), mn. 706; Werle, *Völkerstrafrecht* (2012), mn. 761; Fronza, 'Genocide', in Lattanzi and Schabas, *Essays* (1999), p. 119; Heintze, *HuV-I*, 13 (2000), 227; Planzer, *Genocide* (1956), pp. 79–80; Triffterer, 'Kriminalpolitische und dogmatische Überlegungen', in Schünemann et al., *FS Roxin* (2001), pp. 1432–3; Tomuschat, 'Duty to Prosecute', in Cremer et al., *FS Steinberger* (2002), p. 329; Kreß, '§ 6', in Joecks and Miebach, *Münchener Kommentar*, viii (2013), mn. 2; Satzger, *Internationales Strafrecht* (2013), § 16 mn. 7; Satzger, *ICL* (2012), § 14 mn. 7; Demko, *SZIER* (2009), 227; Bock, *Opfer* (2010), p. 92; dissenting, Gropengießer, 'Die völkerstrafrechtlichen Verbrechen', in Eser and Kreicker, *Nationale Strafverfolgung*, i (2003), pp. 96–8; Lüders, *Völkermord* (2004), pp. 43–4.

the group members are the intermediate stage on the way to the perpetrator's final objective, which is the destruction of the group. Also, the genesis of genocide from crimes against humanity, and in particular from the crime of persecution,[23] shows that the protection of the individual members of the group underlies the group protection element.

(3) Structure of the crime

As opposed to what is suggested by some of the case law,[24] genocide may be characterized by three constitutive elements:[25]

- the *actus reus* (objective elements) of the offence, which consists of one or several of the acts enumerated under Article 6(2) ICC Statute (see Section B.);
- the corresponding *mens rea* (subjective element), as described in Article 30 ICC Statute (see Section C.);
- an extended (ulterior) mental element, namely the intent to destroy (special subjective element), in whole or in part, a national, ethnical, racial or religious group as such (see Section D.).

B. *Actus Reus* (Objective Elements)

(1) Protected groups

The act of genocide must be directed against a national, ethnical, racial, or religious group as such. A group is a permanent (collective) unity of people, which distinguishes itself from the rest of the population on the grounds of common characteristics shared by its members.[26] As there is no definition of these characteristics in the Convention or elsewhere, they have had to be determined by the jurisprudence.[27] In the view of the *Krstić* Trial Chamber (TC), the classification of protected groups was intended by the drafters of the convention 'more to describe a single phenomenon . . . rather than to refer to several distinct prototypes of human groups',[28] given that these groups are not always clearly distinguishable from each other and very often overlap.[29] According to

[23] Fournet and Pégorier, *ICLR*, 10 (2010), 720 ff; dissenting, Safferling, *Internationales Strafrecht* (2011), § 6 mn. 10.

[24] cf. *Krstić*, No. IT-98-33-T, para. 542, according to which there are only two elements namely the *actus reus* and the intent to destroy; concurring, *Kayishema and Ruzindana*, No. ICTR-95-1-T, para. 90. Generally critical of the ICTR case law (esp. *Akayesu*), Maitra, *ICLR*, 5 (2005), 596 ff.; Zahar and Sluiter, *ICL* (2008), pp. 157 ff. (196: 'emotionally and politically charged', 'weak foundations', 'inconsistent').

[25] Concurring, Triffterer, *LJIL*, 14 (2001), 399 ff.; *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, Trial Chamber Judgment, paras. 56, 60 (7 June 2001); Fronza, 'Genocidio', in Amati et al., *Introduzione* (2010), pp. 384–5; similarly, Mettraux, *Crimes* (2005), p. 208.

[26] Jähnke, '§ 220 a StGB', in Jähnke, Laufhütte, and Odersky, *Leipziger Kommentar*, v (2005), mn. 9.

[27] *Krstić*, No. IT-98-33-T, para. 555.

[28] *Krstić*, No. IT-98-33-T, para. 556.

[29] See fundamentally Schabas, *Genocide* (2009), pp. 124 ff. (arguing, however, at 129, that the four qualifiers 'national' etc. 'not only overlap' but 'also help to define each other, operating much as four corner posts that delimit an area within which a myriad of groups covered by the Convention find protection'); concurring, *Krstić*, No. IT-98-33-T, paras. 555–6; *Prosecutor v Rutaganda*, No. ICTR-96-3-T, Judgment and Sentence para. 55 (6 December 1999); Wilmshurst, 'Genocide', in Cryer et al., *Introduction ICL* (2010),

the settled jurisprudence of the International Tribunals, a national group is a collection of people who possess a common nationality,[30] while the members of an ethnical group share common language and culture.[31] Furthermore, a racial group is bound together by the shared hereditary physical traits of its members, often identified with a geographical region.[32] Last but not least, a 'religious group is one whose members share the same religion, denomination or mode of worship'.[33]

The enumeration of the protected groups in the respective genocide provisions is exhaustive,[34] which is the object of frequent criticism.[35] In any case, it is now settled

pp. 210–11; Kolb, 'Droit international pénal', in Kolb, *Droit international pénal* (2008), pp. 75–6; Kreß, '§ 6', in Joecks and Miebach, *Münchener Kommentar*, viii (2013), mn. 36; Fournet, *Genocide and Crimes Against Humanity* (2013), pp. 105–10; Bock, *Opfer* (2010), p. 81; Wouters and Verhoeven, 'The Domestic Prosecution of Genocide', in Behrens and Henham, *Elements of Genocide* (2013), pp. 182 ff. (recognizing the 'interrelation between the four terms', but stressing the need to understand, with the help of domestic practice, what they 'separately stand for'); critical of the vagueness of the group definition, Paul, *Kritische Analyse* (2008), pp. 120 ff.

[30] *Akayesu*, No. ICTR-96-4-T, para. 512 ('a national group is defined as a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties').

[31] *Akayesu*, No. ICTR-96-4-T, para. 513 ('[a]n ethnic group is generally defined as a group whose members share a common language or culture').

[32] *Akayesu*, No. ICTR-96-4-T, para. 514 ('[t]he conventional definition of racial group is based on, the hereditary physical traits often identified with a geographical region irrespective of linguistic, cultural, national or religious factors').

[33] *Akayesu*, No. ICTR-96-4-T, para. 515. See also Satzger, *Internationales Strafrecht* (2013), § 16 mn. 10; Satzger, *ICL* (2012), § 14 mn. 10; Selbmann, *Genozid* (2002), pp. 171 ff.; Hübner, *Völkermord* (2004), pp. 105 ff.; Lüders, *Völkermord* (2004), pp. 68 ff.; Mettraux, *Crimes* (2005), pp. 227 ff.; Kreß, *ICLR*, 6 (2006), 476 ff.; Kreß, '§ 6', in Joecks and Miebach, *Münchener Kommentar*, viii (2013), mn. 37 ff.; on the case law, see Paul, *Kritische Analyse* (2008), pp. 80 ff. Cherkassky, *ICLR*, 9 (2009), 305; from a comparative law perspective, see Kreicker, 'Völkerstrafrecht im Ländervergleich', in Eser, Sieber, and Kreicker, *Nationale Strafverfolgung*, vii (2006), pp. 47–8; on Tutsi as a (ethnical) group, see Akhavan, *JICJ*, 3 (2005), 999 ff.; critical of *Akayesu* on this aspect, see Wilmshurst, 'Genocide', in Cryer et al., *Introduction ICL* (2010), pp. 210–11; Zahar and Sluiter, *ICL* (2008), pp. 158 ff.; see also Fletcher, *Grammar* (2007), pp. 337–8; critical of the racial groups, considering the notion 'highly questionable, if not altogether racist', see Fournet, *Genocide and Crimes Against Humanity* (2013), p. 106; Fournet, The Actus Reus of Genocide', in Behrens and Henham, *Elements of Genocide* (2013), p. 55; on the ethnical/religious groups in the DRC, Kalere, *ICLR*, 5 (2005), 475 ff.; on the Kurds, especially on the chemical weapons attack (mustard and/or nerve gas(es)) on the Kurdish population in Northern Iraq in 1987, see Frans Van Anraat, The Hague Court of Appeal, Appeal Judgment (9 May 2007); also van der Borght, *CLF*, 18 (2007), 123 ff.; with regard to Chechnya, see Moore, *ICLR*, 5 (2005), 492 ff. (the final result denying genocide, 498).

[34] Werle, Völkerstrafrecht (2012), mn. 777; Werle, *Principles* (2009), mn. 721; Kreß, '§ 6', in Joecks and Miebach, *Münchener Kommentar*, viii (2013), mn. 32; Sunga, *EJCCLCJ* 6 (1998), 383; Hübner, *Völkermord* (2004), p. 104; Lüders, *Völkermord* (2004), p. 65; Kreicker, 'Völkerstrafrecht im Ländervergleich', in Eser, Sieber, and Kreicker, *Nationale Strafverfolgung*, vii (2006), p. 38; Quayle, *ICLR*, 5 (2005), 367; Wilmshurst, 'Genocide', in Cryer et al., *Introduction ICL* (2010), p. 208; Kolb, 'Droit international pénal', in Kolb, *Droit international pénal* (2008), pp. 78–9; Gaeta, 'Genocide', in Schabas and Bernaz, *Routledge Handbook* (2011), p. 112; Cassese et al., *ICL* (2013), p. 119; Safferling, *Internationales Strafrecht* (2011), § 6 mn. 17; Behrens, 'The Need for a Genocide Law', in Behrens and Henham, *Elements of Genocide* (2013), p. 252 (advocating the reform of the provision in order 'to embrace all groups' with 'lawful existence' and 'a minimum of social significance').

[35] See esp. van Schaack, *YaleLJ* 106 (1997), 2259. See also Cassese, 'Genocide', in Cassese et al., *Rome Statute*, i (2002), p. 336; Cassese et al., *ICL* (2013), pp. 110, 113; Heintze, *HuV-I*, 13 (2000), 225, 227; Gómez Benítez, *RDPP*, 4 (2000), 148 ff.; Sunga, *EJCCLCJ*, 6 (1998), 383, pointing out 'that the systematic targeting of a group on the basis of nationality, ethnicity, race or religion, tends to carry a much stronger potential for massive violations, for the very reason that the intended victims can be singled out from the rest of the population with particular ease, on account of their relatively immutable difference'; Ntanda Nsereko, 'Genocide', in McDonald and Swaak-Goldman, *Substantive and Procedural*

that political, economic, and cultural groups were intentionally left out from the scope of the Genocide Convention.[36] While this clearly follows from the *travaux* as the expression of the will of the parties, it may also be deduced from the concept of a 'group, as such', as this concept only embraces 'stable' groups, and distinguishes them from 'mobile' groups, that is, political, economic and cultural groups.[37] This is confirmed by the continued jurisprudence of the ad hoc tribunals.[38]

In *Akayesu*, an ICTR TC referred to 'stable groups', meaning groups which were 'constituted in a permanent fashion and membership of which is determined by birth, with the exclusion of the more "mobile" groups which one joins through individual voluntary commitment, such as political and economic groups'.[39] Accordingly, a common criterion of the groups protected by the Convention is that 'membership in such groups would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner'.[40] In a similar vein, in *Rutaganda* and *Musema* it was stated that political and economic groups had been excluded from the protected groups because they were considered to be 'mobile groups'.[41] In *Jelisić*, an ICTY TC referred to 'stable' groups 'objectively

Aspects (2000), p. 130; Kreß, *ICLR*, 6 (2006), 473–4; Serrano-Piedecasas, 'El delito de genocidio', in Ripollés, *FS Cerezo* (2002), pp. 1505 ff. (on subsuming political groups under 'national' ones); also Fernández-Pacheco, *JpD*, 55 (2006), 53 ff.; Lüders, *Völkermord* (2004), pp. 67–8; Hübner, *Völkermord* (2004), pp. 108 ff. (on extending the protection to political and social groups *de lege ferenda);* Paul, *Kritische Analyse* (2008), pp. 123 ff., 169 ff. ('eine durch irgendein willkürliches Kriterium definierte Gruppe', p. 173); Fournet, The Actus Reus of Genocide', in Behrens and Henham, *Elements of Genocide* (2013), pp. 54 ff. On reform considerations insofar, see also Demko, *SZIER* (2009), 240 ff.; on the problematic subsumption of the acts of the Khmer Rouge against other members of their own 'national' group under genocide, see Williams, ICLR, 5 (2005), 452.

[36] cf. Schabas, 'Article 6', in Triffterer, *Commentary* (2008), mn. 11; Kabatsi, *ICLR*, 5 (2005), 393, 398–9; Schabas, *Genocide* (2009), pp. 119–20; Lüders, *Völkermord* (2004), p. 67; Klann and McKenzie, 'Judge Laïty Kama', in Decaux, Dieng, and Sow, *Human Rights* (2007), p. 25; Paul, *Kritische Analyse* (2008), pp. 225 ff; Bassiouni, *Introduction to ICL* (2013), p. 154.

[37] Cassese, 'Genocide', in Cassese et al., *Rome Statute*, i (2002), p. 345; Cassese et al., *ICL* (2013), pp. 119–20; critical, Ntanda Nsereko, 'Genocide', in McDonald and Swaak-Goldman, *Substantive and Procedural Aspects* (2000), pointing out that it is inconsistent to include religious, but exclude political groups since in both cases the membership 'is a matter of will or choice'; Kreß, '§ 6', in Joecks and Miebach, *Münchener Kommentar*, vi/ii (2009), mn. 34. On the *travaux*, cf. Hübner, *Völkermord* (2004), pp. 108 ff.; Lüders, *Völkermord* (2004), p. 67; Paul, *Kritische Analyse* (2008), p. 123; on this see also Schabas, 'Judicial Activism', in Darcy and Powderly, *Judicial Creativity* (2010), pp. 70 ff.

[38] *Akayesu*, No. ICTR-96-4-T, para. 511; *Rutaganda*, No. ICTR-96-3-T, para. 56; *Jelisić*, No. IT-95-10-T, para. 69; for a detailed overview of the case law, Paul, *Kritische Analyse* (2008), pp. 80 ff.; see also Szpak, *EJIL*, 23 (2012), 155–73; on the ICTR, see Mugwanya, *Genocide* (2007), pp. 64 ff. Extending the *actus reus* to 'any stable and permanent group', *Akayesu*, No. ICTR-96-4-T, para. 516; *Darfur Report*, para. 501; critical, Lüders, *Völkermord* (2004), pp. 85 ff., 254; Mettraux, *Crimes* (2005), p. 230; Satzger, *Internationales Strafrecht* (2013), § 16 mn. 11; Satzger, *ICL* (2012), § 14 mn. 11; Schabas, *LJIL*, 18 (2005), 878–9; Schabas, *CardozoLR*, 27 (2006), 1711 ff.; Wilmshurst, 'Genocide', in Cryer et al., *Introduction ICL* (2010), pp. 208–9; Zahar and Sluiter, *ICL* (2008), p. 161; Sootak and Parmas, 'Definition of Genocide', in Nuotio, *FS Lahti* (2007), p. 65.

[39] *Akayesu*, No. ICTR-96-4-T, para. 511. Critical, Fournet, *Genocide and Crimes Against Humanity* (2013), p. 106 ('. . . twist the letter of law . . . which however fails to convince'); Fournet, 'The Actus Reus of Genocide', in Behrens and Henham, *Elements of Genocide* (2013), p. 56.

[40] *Akayesu*, No. ICTR-96-4-T, para. 511.

[41] *Rutaganda*, No. ICTR-96-3-T, para. 56; *Prosecutor v Musema*, No. ICTR-96-13-T, Trial Chamber Judgment, para. 162 (27 January 2000).

defined and to which individuals belong regardless of their own desires' thereby excluding political groups.[42]

The *Jelisić* decision also explicitly invoked for the first time a so-called *subjective*[43]—instead of an *objective—criterion* to define a group as national, ethnical, etc.[44] As it would be a 'perilous exercise' to determine a group with purely objective and hard 'scientific' criteria, it is 'more appropriate' to evaluate its status from the perspective of those persons 'who wish to single that group out from the rest of the community,' that is, from the perspective of the alleged perpetrators. This approach goes back to the ICTR's *Kayishema* decision where a Trial Chamber distinguished between the 'self-identification' of a group as opposed to its 'identification by others'.[45] In the parallel *Rutaganda* Judgment, however, this criterion was apparently understood more restrictively: while it was recognized that membership is in essence a subjective concept, it was also held that a 'subjective definition alone' is not enough.[46] In the *Krstić* Judgment, the first ICTY conviction for genocide, the subjective criterion again prevailed, identifying the relevant group by way of its stigmatization by the perpetrators.[47] In turn, the *Kamuhanda* TC proposed an equal combination of both objective and subjective criteria.[48] Although it is doubtful whether the subjective approach contributes to greater legal certainty, from a purely technical perspective it may be argued that it is a consequence of the structure of the genocide offence as a specific intent crime (see Section D.). For if the dominant element of the offence is the perpetrator's specific intent to destroy a certain group (i.e. the perpetrator's state of mind with regard to a certain group), this group may also be defined in accordance with this state of mind (i.e. from the perpetrator's

[42] *Jelisić*, No. IT-95-10-T, para. 69.

[43] In this vein, see *Jelisić*, No. IT-95-10-T, para. 70; *Krstić*, No. IT-98-33-T, para. 557 (para. 556: 'scientifically objective criteria' were considered 'inconsistent with the object and purpose of the Convention'); on the case law, see Paul, *Kritische Analyse* (2008), pp. 160 ff.; similar on the Fur, Masalit, and Zwaghawa living in Darfur, cf. *Darfur Report*, para. 508 ff.

[44] *Jelisić*, No. IT-95-10-T, para. 70; for such a combined approach, see *Rutaganda*, No. ICTR-96-3-T, paras. 55–6; *Prosecutor v Kamuhanda*, No. ICTR-95-54A-T, Trial Chamber Judgment, para. 630 (22 January 2004); *Prosecutor v Brđanin*, No. IT-99-36-T, Trial Chamber Judgment, paras. 683–4 (1 September 2004); *Darfur Report*, para. 501. On the other hand, based only on objective criteria, see *Al Bashir*, No. ICC-02/05-01/09, para. 136; thereto Burghardt and Geneuss, *ZIS*, 4 (2009), 132. On the case law, see Lüders, *Völkermord* (2004), pp. 52 ff.; Mettraux, *Crimes* (2005), pp. 223 ff.; Fernández-Pacheco, *La Ley*, 6635 (2007), 3; Mugwanya, *Genocide* (2007), pp. 86 ff.; Demko, *SZIER* (2009), 229 ff.). See also Fournet, *Genocide and Crimes Against Humanity* (2013), p. 112–19, who sees in *family* rather than in the group itself a target 'easier to access objectively' (p. 112).

[45] *Kayishema and Ruzindana*, No. ICTR-95-1-T, para. 98 ('self-identification' vs. 'identification by others'); similar Cayley, *JICJ*, 6 (2008); see also Cherkassky, *ICLR*, 9 (2009), 306; according to *Brđanin*, No. IT-99-36-T, para. 683 'in some instances the victim may perceive himself or herself to belong to the aforesaid group'.

[46] *Rutaganda*, No. ICTR-96-3-T, paras. 55–6; similar *Brđanin*, No. IT-99-36-T, para. 684; concurring, *Musema*, No. ICTR-96-13-T, paras. 161–2.

[47] *Krstić*, No. IT-98-33-T, para. 557 ('using as a criterion the stigmatisation of the group, notably by the perpetrators of the crime').

[48] *Kamuhanda*, No. ICTR-95-54A-T, para. 630; concurring, *Blagojević and Jokić*, No. IT-02-60-T, para. 667 with further references in n. 2111; *Prosecutor v Muvunyi*, No. ICTR-2000-55A-T, Trial Chamber Judgment and Sentence, para. 484 (12 September 2006).

subjective perspective).[49] Of course, the objective (limiting) criteria should, however, not be completely ignored.[50]

In sum, political, economic and cultural groups are not protected by the Convention, or by genocide provisions in the Statutes of the International Tribunals.[51] The resulting loophole may, however, be filled by the crime of persecution which, in any case, was already employed in some cases to punish the extermination of Jews and other ethnic or religious groups in Nazi Germany.[52]

(2) The specific forms of genocide

The ICC Statute lists in Article 6 the following specific objective acts of genocide:

(a) killing members of a protected group;
(b) causing serious bodily or mental harm to members of the group;
(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

[49] For the same view, without reasoning however, see Gómez Benítez, *RDPP* 4 (2000), 149; essentially in a similar vein, see Selbmann, *Genozid* (2002), pp. 188–9; Hartstein, 'Materielles Völkerstrafrecht', in *K*ühne, Esser, Gerding, *Völkerstrafrecht* (2007), p. 87; Wilmshurst, 'Genocide', in Cryer et al., *Introduction ICL* (2010), pp. 211–12; Paul, *Kritische Analyse* (2008), pp. 165 ff.; Gless, *Internationales Strafrecht* (2011), mn. 805; critical, see Zahar and Sluiter, *ICL* (2008), p. 163, neglecting, however, the structure of genocide as a specific intent crime; on the membership in a group according to subjective criteria, see Demko, *SZIER* (2009), 232 ff; cf. also Fournet, *Genocide and Crimes Against Humanity* (2013), pp. 108–9, who considers subjectivity 'intrinsic to the concept of genocide', however not 'sit[ting] well with legal certainty' and, therefore, proposes 'family' as an objective criterion (pp. 112 ff.); Fournet, 'The Actus Reus of Genocide', in Behrens and Henham, *Elements of Genocide* (2013), pp. 54 ff, (58: 'sits at odds with legal predictability').

[50] For a similar combined, objective-subjective, approach, see also Lüders, *Völkermord* (2004), pp. 60 ff.; Satzger, *Internationales Strafrecht* (2013), § 16 mn. 12; Satzger, *ICL* (2012), § 14 mn. 12; Kreß, *ICLR*, 6 (2006), 474; Kreß, *EJIL*, 18 (2007), 625–6; Akhavan, *JICJ*, 3 (2005), 1003; Wilmshurst, 'Genocide', in Cryer et al., *Introduction ICL* (2010), pp. 211–12; Folgueiro, 'Genocidio', in Parenti, Filippini, and Folgueiro, *Los crímenes contra la humanidad* (2007), pp. 169–70; Mugwanya, *Genocide* (2007), pp. 105–6, 109–10; Kolb, 'Droit international pénal', in Kolb, *Droit international pénal* (2008), pp. 76–7; Safferling, *Internationales Strafrecht* (2011), § 6 mn. 21; ICJ, *Bosnia and Herzegovina v Yugoslavia*, Judgment (26 February 2007), para. 191; concurring, Azari, *RSC*, 4 (2007), 760; for a more objective approach, see Kreß, '§ 6', in Joecks and Miebach, *Münchener Kommentar*, viii (2013), mn. 33; Safferling, 'Special Intent Requirement', in Safferling and Conze, *Genocide Convention* (2010), p. 166; critical of a definition based exclusively on negative criteria, see Wilmshurst, 'Genocide', in Cryer et al., *Introduction ICL* (2010), p. 213; Kolb, 'Droit international pénal', in Kolb, *Droit international pénal* (2008), pp. 79–80; Paul, *Kritische Analyse* (2008), pp. 167 ff.; in favour of such an approach, see Azari, *RSC*, 4 (2007), 763.

[51] The national law is sometimes broader, see for example Article 101 Colombian CP, Article 149 Mexican CPF, Article 127 Costa Rican CP, Article 311 Panamanian CP, Article 281 Ethiopian PC, Article 137 Ivory Coast PC, Article 99 Lithuanian PC and Article 118 Polish PC, all including political groups; see also Section 318 Canadian CC ('any identifiable group . . . by colour, race, religion, ethnic origin or sexual orientation'), and Article 211–1 French CP ('groupe déterminé à partir de tout autre critère arbitraire'); (all accessible at <http://www.preventgenocide.org/law/domestic> accessed 1 March 2013); for further references, see Selbmann, *Genozid* (2002), p. 180; Schabas, *Genocide* (2009), pp. 161–2.

[52] Cassese, 'Genocide', in Cassese et al., *Rome Statute*, i (2002), p. 336; Cassese et al., *ICL* (2013), p. 109. Critical on this point, Selbmann, *Genozid* (2002), pp. 179–80; Fournet, 'The Actus Reus of Genocide', in Behrens and Henham, *Elements of Genocide* (2013), p. 59 (pointing out that the provision 'falls short of defining' the underlying acts); in the same vein, see Rebut, *Droit pénal international* (2012), mn. 909 (arguing that the specific forms of genocide are not specified, but constitute a category of acts characterized by their destructive objective or result); cf. also Pégorier, *Ethnic Cleansing* (2013), pp. 63 ff. (referring to the recognition of hate speech (63–5), sexual violence (65–8), and ethnic cleansing (68–71) as acts which could amount to genocide, although not specifically provided for by the provision).

(d) imposing measures intended to prevent births within the group; and
(e) forcibly transferring children of the group to another group.

This list is exhaustive,[53] including with regard to so-called 'ethnic cleansing' (discussed later at subsection (f)). The victims of the specific acts must be members of the national, racial, ethnic, or religious group targeted.[54] While it is clear that the perpetrator must—subjectively—*intend* or *seek* to destroy a significant number of the members of the group, it is controversial whether it is required—objectively—that the perpetrator attacks successfully at least two members[55] or if just one person suffices. The structure of the genocide offence as a specific intent crime speaks in favour of the latter view, that is, it suffices that the perpetrator—objectively—only acts against one member of the group.[56] This interpretation is confirmed by the Elements of Crimes,[57] in which the first element of all five alternatives states: 'The perpetrator (killed etc) *one* or more persons.'[58] However, the use of the plural in Article 6—*members* (para. (a) and (b)) and *children* of the group (para. (e))—calls, in line with the *lex stricta* rule (Article 22(2) ICC Statute),[59] for at least two victims.[60] The Elements of Crimes cannot go against this interpretation because they must be consistent with the ICC Statute (Article 9).[61] In

[53] Ntanda Nsereko, 'Genocide', in McDonald and Swaak-Goldman, *Substantive and Procedural Aspects* (2000), p. 128; Boot, *Nullum Crimen* (2002), para. 415; for a further analysis of cultural genocide, see Section D. (3). See also Hübner, *Völkermord* (2004), pp. 124, 133; Mettraux, *Crimes* (2005), pp. 243–4; Gless, *Internationales Strafrecht* (2011), mn. 810; Folgueiro, 'Genocidio', in Parenti, Filippini, and Folgueiro, *Los crímenes contra la humanidad* (2007), pp. 161 ff.; cf. on the underlying acts, Kreicker, 'Völkerstrafrecht im Ländervergleich', in Eser, Sieber, and Kreicker, *Nationale Strafverfolgung*, vii (2006), pp. 49–53; cf. also Paul, *Kritische Analyse* (2008), pp. 175 ff.; Kolb, 'Droit international pénal', in Kolb, *Droit international pénal* (2008), pp. 80 ff.; on the ICTR jurisprudence, see Mugwanya, *Genocide* (2007), pp. 110 ff.

[54] *Akayesu*, No. ICTR-96-4-T, para. 712 ('such acts as committed against victim V were perpetrated against a Hutu and cannot, therefore, constitute a crime of genocide against the Tutsi group').

[55] Concurring, Cassese, 'Genocide', in Cassese et al., *Rome Statute*, i (2002), p. 345; convincing in this regard the reform proposal by Paul, *Kritische Analyse* (2008), p. 323–4 ('eines oder mehrere Mitglieder' ['one or more members']); Gaeta, 'Genocide', in Schabas and Bernaz, *Routledge Handbook* (2011), p. 111; Cassese et al., *ICL* (2013), pp. 117, 129.

[56] *Akayesu*, No. ICTR-96-4-T, para. 521; Werle, *Völkerstrafrecht* (2012), mn. 781; Werle, *Principles* (2009), mn. 725–6; Ntanda Nsereko, 'Genocide', in McDonald and Swaak-Goldman, *Substantive and Procedural Aspects* (2000), pp. 125–6; Schabas, *Genocide* (2009), pp. 178–80; Hübner, *Völkermord* (2004), p. 126; Lüders, *Völkermord* (2004), pp. 137, 168–9; Mettraux, *Crimes* (2005), p. 236; Gropengießer, 'Die völkerstrafrechtlichen Verbrechen', in Eser and Kreicker, *Nationale Strafverfolgung*, i (2003), pp. 99–100; Satzger, *Internationales Strafrecht* (2013), § 16 mn. 19; Satzger, *ICL* (2012), § 14 mn. 19; Fletcher, *Grammar* (2007), p. 336; Safferling, *Internationales Strafrecht* (2011), § 6 mn. 22; Folgueiro, 'Genocidio', in Parenti, Filippini, and Folgueiro, *Los crímenes contra la humanidad* (2007), p. 162; Paul, *Kritische Analyse* (2008), p. 176; Kreß, '§ 6', in Joecks and Miebach, *Münchener Kommentar*, viii (2013), mn. 49, 52; Bock, *Opfer* (2010), p. 82; Rebut, *Droit pénal international* (2012), mn. 908 ('d'un ou de plusieurs'); Kirsch, 'The Social and the Legal Concept of Genocide', in Behrens and Henham, *Elements of Genocide* (2013), p. 10; dissenting, May, *Crimes Against Humanity* (2005), p. 169 who, however, confuses the normative and factual level ('generally implausible to intend to destroy a group by planning to kill just one member'); also critical, Fletcher and Ohlin, *JICJ*, 3 (2005), 546 (with regard to a common-sense and historical understanding of the term). On the *travaux*, see Hübner, *Völkermord* (2004), p. 77; Ntanda Nsereko, 'Genocide', in McDonald and Swaak-Goldman, *Substantive and Procedural Aspects* (2000), pp. 125–6.

[57] Elements of Crimes, ICC-ASP/1/3 (part II-B); as adopted at 9 September 2002, at the First Session of the Assembly of State Parties (3–10 September 2002).

[58] Emphasis added. [59] cf. Volume I of this treatise, pp. 88 ff.

[60] Concurring, Cassese, 'Genocide', in Cassese et al., *Rome Statute*, i (2002), p. 345; Cassese et al., *ICL* (2013), pp. 117, 129.

[61] See Volume I of this treatise, pp. 32–3, 74 with n. 177.

addition, a higher number of victims follows from the 'in whole or in part' element (Section D. (6)(b)).

(a) Killing members of a group

There is little controversy regarding this conduct.[62] The Elements of Crimes state: 'The perpetrator killed one or more persons.'[63] A footnote adds that the term 'killed' is interchangeable with the term 'caused death'.[64] This is supported by the case law of the ad hoc tribunals.[65] The death may, for example, be brought about by mass killings, torching the houses belonging to members of the group, destroying infrastructure and other life-support systems, and forcing members of the group into so-called 'protected' or concentration camps where they are massacred or left to die.[66]

(b) Causing serious bodily or mental harm to members of the group

According to the *Eichmann* Judgment the following acts may constitute serious bodily or mental harm: '[T]he enslavement, starvation, deportation and persecution and the detention of individuals in ghettos, transit camps and concentration camps in conditions which were designed to cause their degradation, deprivation of their rights as human beings and to suppress them and cause them inhumane suffering and torture.'[67] An ICTR TC has previously taken causing serious bodily or mental harm 'to mean acts of torture, be they bodily or mental, inhumane or degrading treatment, persecution' as well as acts of sexual violence, rape, mutilations, and interrogations combined with beatings and/or threats of death.[68] In *Krstić*, ICTY TC I held that 'inhuman treatment, torture, rape, sexual abuse and deportation are among the acts which may cause serious bodily or mental injury'.[69] The *Kamuhanda* TC stated that the bodily or mental harm inflicted on members of the group must be of such serious nature as to threaten its

[62] The relevant writings and case law concentrate, therefore, on the subjective side of this alternative, see, for example, Schabas, *Genocide* (2009), pp. 287–90; Boot, *Nullum Crimen* (2002), paras. 441–3.

[63] Elements of Crimes, ICC-ASP/1/3 (part II-B), Article 6(a).

[64] Elements of Crimes, ICC-ASP/1/3 (part II-B), Article 6(a), n. 2.

[65] *Akayesu*, No. ICTR-96-4-T, para. 500; *Rutaganda*, No. ICTR-96-3-T, para. 49; *Musema*, No. ICTR-96-13-T, para. 155; *Muvunyi*, No. ICTR-2000-55A-T, para. 486; cf. also Slade, 'The Prohibition of Genocide', in Henham and Behrens, *The Criminal Law of Genocide* (2007), p. 157; Paul, *Kritische Analyse* (2008), pp. 177 ff.

[66] See Ntanda Nsereko, 'Genocide', in McDonald and Swaak-Goldman, *Substantive and Procedural Aspects* (2000), p. 128.

[67] *The Israeli Government Prosecutor General v Adolph Eichmann*, Jerusalem District Court, 12 December 1961, *ILR*, 36 (1968), p. 340; on this judgment, see Volume I of this treatise, p. 8.

[68] *Akayesu*, No. ICTR-96-4-T, paras. 504, 706–7; concurring *Kayishema and Ruzindana*, No. ICTR-95-1-T, para. 108; *Bagilishema*, No. ICTR-95-1A-T, para. 59; *Muvunyi*, No. ICTR-2000-55A-T, para. 487; critical, Fournet, 'The Actus Reus of Genocide', in Behrens and Henham, *Elements of Genocide* (2013), pp. 61–4 (pointing out that the extensive interpretation of this form of genocide 'trivialised its definitional scope').

[69] *Krstić*, No. IT-98-33-T, para. 513; thereto also Mettraux, *Crimes* (2005), pp. 237–8; Slade, 'The Prohibition of Genocide', in Henham and Behrens, *The Criminal Law of Genocide* (2007), p. 158. Especially on rape as a form of genocide, see Seibert-Fohr, 'Kriegerische Gewalt gegen Frauen', in Hankel, *Die Macht und das Recht* (2008), pp. 166 ff.

destruction in whole or in part. Yet, it does not necessarily have to be permanent or irremediable, it embraces non-mortal acts as well.[70] Of course, the expression 'serious bodily or mental harm' leaves room for divergent opinions as to the *seriousness of the harm* inflicted upon the individuals concerned. We have just seen that the harm need not be permanent and irremediable, but there is a certain controversy with respect to *mental* harm.[71] Causing serious mental harm may, for example, involve forcing members of the target group to use narcotic drugs in order to weaken the members of the group mentally.[72]

This specific form of genocide was born out of the practice of the Japanese during World War II who administered drugs to their Chinese victims,[73] and also encompasses impairments of a person's mental state.[74] The *Krstić* Judgment held that 'serious harm need not cause permanent and irremediable harm, but it must involve harm that goes beyond temporary unhappiness, embarrassment, or humiliation. It must be harm that results in a grave and long-term disadvantage to a person's ability to lead a normal and constructive life.'[75] The *Bagilishema* TC held that 'serious harm entails more than minor impairment on mental or physical faculties, but it need not amount to permanent or irremediable harm'.[76] The case law of the ad hoc tribunals determines the seriousness on a case-by-case basis.[77]

Contrary to some of the case law,[78] it is irrelevant whether the physical or mental harm inflicted on the members of the group suffices to threaten the destruction of the group.[79] Such a restrictive interpretation is not required by the plain wording of the

[70] *Kamuhanda*, No. ICTR-95-54A-T, paras. 633, 634; *Bagilishema*, No. ICTR-95-1A-T, para. 59; *Prosecutor v Muhimana*, No. ICTR-95-1B-T, Trial Chamber Judgment and Sentence, para. 502 (28 April 2005); *Muvunyi*, No. ICTR-2000-55A-T, para.487; *Prosecutor v Krajišnik*, No. IT-00-39-T, Trial Chamber Judgment, para. 862 (27 September 2006); similar Lüders, *Völkermord* (2004), pp. 183 ff. (185 ff.).

[71] Schabas, *Genocide* (2009), p. 184.

[72] Ntanda Nsereko, 'Genocide', in McDonald and Swaak-Goldman, *Substantive and Procedural Aspects* (2000), p. 129; Schabas, *Genocide* (2009), p. 181; Lüders, *Völkermord* (2004), pp. 176 ff.

[73] Ntanda Nsereko, 'Genocide', in McDonald and Swaak-Goldman, *Substantive and Procedural Aspects* (2000), p. 129; Hübner, *Völkermord* (2004), p. 127; Lüders, *Völkermord* (2004), p. 176.

[74] *Muhimana*, No. ICTR-95-1B-T, para. 502 and the references in n. 463 ('Similarly, serious mental harm can be construed as some type of impairment of mental faculties or harm that causes serious injury to the mental state of the victim').

[75] *Krstić*, No. IT-98-33-T, para. 513. Concurring Werle, Völkerstrafrecht (2012), mn. 786; Werle, *Principles* (2009), mn. 729; Kreß, *ICLR*, 6 (2006), 481; further Lüders, *Völkermord* (2004), pp. 180 ff; Gaeta, 'Genocide', in Schabas and Bernaz, *Routledge Handbook* (2011), p. 111; Cassese et al., *ICL* (2013), p. 116.

[76] *Bagilishema*, No. ICTR-95-1A-T, para. 59; concurring *Prosecutor v Seromba*, No. ICTR-2001-66-A, Appeals Chamber Judgment, para. 46 (12 March 2008).

[77] *Kayishema and Ruzindana*, No. ICTR-95-1-T, paras. 108–13; *Rutaganda*, No. ICTR-96-3-T, para. 51; *Musema*, No. ICTR-96-13-T, para. 156; *Krstić*, No. IT-98-33-T, para. 513; *Prosecutor v Rukundo*, No. ICTR-2001-70-T, Trial Chamber Judgment, para. 260 (27 February 2009); *Brđanin*, No. IT-99-36-T, para. 690.

[78] *Seromba*, No. ICTR-2001-66-A, para. 46, with further references in n. 117 according to which 'the bodily harm or the mental harm inflicted on members of a group must be of such a serious nature as to threaten its destruction in whole or in part'.

[79] Schabas, 'Article 6', in Triffterer, *Commentary* (2008), mn. 18; Schabas, *Genocide* (2009), p. 182; Boot, *Nullum Crimen* (2002), para. 417; Mettraux, *Crimes* (2005), p. 238; Fournet, 'The Actus Reus of Genocide', in Behrens and Henham, *Elements of Genocide* (2013), pp. 63–4; but see Report of the ILC on the Work of its Forty-Eighth Session 6 May-26 July 1996, UN Doc. A/51/10, p. 91.

provision and, more importantly, ignores the structure of genocide as a specific intent crime, which implies that the perpetrator's mens rea exceeds the *actus reus*.[80]

(c) *Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part*

This form of genocide refers to the destruction of a group by 'slow death'.[81] It includes methods such as denying members of a group nutrition (food and water), subjecting them to systematic expulsion from homes and the reduction of essential medical services below a minimum vital standard, and excessive work or physical exertion.[82] It is clear that the methods of destruction need not immediately kill any member of the group, but must (subjectively) be calculated to, ultimately, physically destroy the (members of the) group.[83]

According to German jurisprudence, it suffices that the methods are (objectively) apt ('*geeignet*') to destroy the group; yet, this interpretation is based on an incorrect translation of the term 'calculated to' into the German term '*geeignet*' which only requires acts causing abstract danger for the legal interests protected.[84] The ad hoc tribunals and the Elements of Crimes are silent on the matter.[85] The Preparatory Commission rejected the US proposal to require 'that the conditions of life contributed to the physical destruction of that group'.[86] The Prosecution in the *Kayishema* case submitted that Article 2(2)(c) ICTR Statute applies to situations *likely* to cause death regardless of whether death actually occurs.[87] This is similar to the German approach.

[80] Schabas, 'Article 6', in Triffterer, *Commentary* (2008), mn. 19; Schabas, *Genocide* (2009), p. 182; Fournet, *Genocide and Crimes Against Humanity* (2013), p. 92.

[81] Ntanda Nsereko, 'Genocide', in McDonald and Swaak-Goldman, *Substantive and Procedural Aspects* (2000), p. 129, gives the example of the German extermination of the Hereros ('when Germans drove the Hereros of Namibia into the arid and waterless Omaheke Desert and then, sealing it off by a 250-kilometre cordon, made it impossible for anyone to escape it') citing Drechsler, *Struggle* (1980), p. 156, who recounts the consequences as follows: 'This cordon was maintained until about mid-1905. The bulk of the Hereros met a slow, agonising death. The Study of the General Staff noted that the Omaheke had inflicted a worse fate on the Hereros than German arms could ever have done, however bloody and costly the battle.'

[82] *Akayesu*, No. ICTR-96-4-T, para. 506; *Kayishema and Ruzindana*, No. ICTR-95-1-T, paras. 115, 116; *Rutaganda*, No. ICTR-96-3-T, para. 51; *Musema*, No. ICTR-96-13-T, para. 157; cf. also Selbmann, *Genozid* (2002), p. 161–2; Lüders, *Völkermord* (2004), pp. 187 ff.; Mettraux, *Crimes* (2005), pp. 238 ff.; Kreß, *ICLR*, 6 (2006), 481 ff.; Vest, *Gerechtigkeit* (2006), p. 144; Paul, *Kritische Analyse* (2008), pp. 195 ff.; Bock, *Opfer* (2010), p. 84; Hübner, *Völkermord* (2004), pp. 130–1.

[83] *Akayesu*, No. ICTR-96-4-T, para. 505. Satzger, *Internationales Strafrecht* (2013), § 16 mn. 21; Satzger, *ICL* (2012), § 14 mn. 21; Gless, *Internationales Strafrecht* (2011), mn. 814; Cassese et al., *ICL* (2013), p. 116.

[84] cf. Ambos and Wirth, 'Genocide and War Crimes', in Fischer et al., *Prosecution* (2001), pp. 784–9; concurring, Paul, *Kritische Analyse* (2008), p. 194; dissenting, Hübner, *Völkermord* (2004), p. 128 (offence of abstract endangerment); Lüders, *Völkermord* (2004), pp. 189 ff.; Kreß, *ICLR*, 6 (2006), 481; Kreß, '§ 6', in Joecks and Miebach, *Münchener Kommentar*, viii (2013), mn. 54.

[85] Elements of Crimes, ICC-ASP/1/3 (part II-B), Article 6(c).

[86] Rückert and Witschel, 'Genocide and CaH', in Fischer et al., *Prosecution* (2001), p. 68.

[87] *Kayishema and Ruzindana*, No. ICTR-95-1-T, para. 114 and n. 56.

(d) Imposing measures intended to prevent births within the group

The words 'imposing measures' indicate the necessity of an element of coercion.[88] The prevention of births within the group, a so-called 'biological genocide', is accomplished by denying the group the means of self-propagation. The measures usually include forced sterilization of the sexes, sexual mutilation, forced birth control, separation of the sexes, and prohibition of marriage.[89] The *Akayesu* TC stated that:

> [i]n patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group.[90]

Furthermore, the Chamber noted that:

> . . . measures intended to prevent births within the group may be physical, but can also be mental.[91] For instance, rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate,[92] in the same way that members of a group can be led, through threats or trauma, not to procreate.[93]

(e) Forcibly transferring children of the group to another group

This genocidal conduct is a very controversial one. As already mentioned, and to be discussed more thoroughly later,[94] some scholars argue that the general tenor and aim of the law of genocide is the protection of the rights of a group with a view to its mere *physical* but not cultural or other forms of *existence*. According to this view, non-physical forms of a group's existence are (primarily) protected under international human rights and minority rights law.[95] Thus, apparently, acts aimed at destroying the *identity* of a group, without physically destroying its members, cannot be considered as genocide.

[88] Boot, *Nullum Crimen* (2002), para. 422; Kreß, '§ 6', in Joecks and Miebach, *Münchener Kommentar*, viii (2013), mn. 63.

[89] *Akayesu*, No. ICTR-96-4-T, para. 507; Ntanda Nsereko, 'Genocide', in McDonald and Swaak-Goldman, *Substantive and Procedural Aspects* (2000), p. 129 (giving the example of Germany's occupation of Poland where 'marriage between Poles was forbidden without permission from the German Governor. An indirect method of lowering the birth rate of the Poles was to underfeed parents, thus lowering the survival capacity of the children of such parents.'); Selbmann, *Genozid* (2002), p. 163; Lüders, *Völkermord* (2004), pp. 195 ff.; Mettraux, *Crimes* (2005), p. 242; Kreß, *ICLR*, 6 (2006), 483; cf. also Kreß, '§ 6', in Joecks and Miebach, *Münchener Kommentar*, viii (2013), mn. 60; Paul, *Kritische Analyse* (2008), pp. 202 ff.

[90] *Akayesu*, No. ICTR-96-4-T, para. 507.

[91] *Rutaganda*, No. ICTR-96-3-T, para. 53; *Prosecutor v Popović et al.*, No. IT-05-88-T, Trial Chamber Judgment, para. 818 (10 June 2010).

[92] On rapes and sexual abuse in general as a form of genocide, cf. *Akayesu*, No. ICTR-96-4-T, paras. 507–8; also Lüders, *Völkermord* (2004), pp. 213 ff.; Askin, *JICJ*, 3 (2005), 1011–12; Bensouda, 'Gender and Sexual Violence', in Decaux, Dieng, and Sow, *Human Rights* (2007), pp. 405–6; critically, Zahar and Sluiter, *ICL* (2008), pp. 170 ff.

[93] *Akayesu*, No. ICTR-96-4-T, para. 508; *Rutaganda*, No. ICTR-96-3-T, para. 52; *Popović et al.*, No. IT-05-88-T, para. 818.

[94] See Section A. (2) and Section D. (6)(a).

[95] See Vrdoljak, *EJIL*, 22 (2011), 39 ff.

Applied to the forcible transfer of children (i.e. persons below the age of eighteen years),[96] it may be argued that the transfer leads to a loss of cultural identity by assimilation of the children of one group to another group, but it does not per se lead to the physical destruction of the group. In fact, the transfer is a form of cultural genocide and thereby brings into contrast the decision of the drafters to exclude cultural genocide from the scope of the Convention.[97] The *Akayesu* TC held that:

> . . . as in the case of measures intended to prevent births, the objective is not only to sanction a direct act of forcible physical transfer, but also to sanction acts of threats or trauma which would lead to the forcible transfer of children from one group to another.[98]

If the purpose of the transfer of the children to another group is to subject them to slave labour, this would amount to imposing on the group conditions of life calculated to bring about its physical destruction and therefore fall under alternative (c) discussed earlier.[99]

(f) So-called 'ethnic cleansing': an additional form of genocide?

The expression 'ethnic cleansing' is relatively new and its origin is difficult to establish. It appeared in 1981 in the Yugoslav media, which talked of 'ethnically clean territories' in Kosovo, and in documents of international bodies in 1992.[100] Since then there have been a number of attempts to define the concept.[101] According to the Commission of Experts' Report 'ethnic cleansing' includes murder, torture, arbitrary arrest and detention, extra-judicial executions, sexual assault, confinement of civilian population in ghetto areas, forcible removal, displacement and deportation of civilian populations,

[96] Elements of Crimes, ICC-ASP/1/3 (part II-B), Article 6(e)Nr. 5; Article 1 of the UN Convention on the Rights of the Child, GA Res. 44/25 (20 November 1989); thereto Lüders, *Völkermord* (2004), p. 202; Satzger, *Internationales Strafrecht* (2013), § 16 mn. 24; Satzger, *ICL* (2012), § 14 mn. 24; Kreß, *ICLR*, 6 (2006), 484. Generally on children in the 'international criminal justice system', see Beresford, *JICJ*, 3 (2005), 721 ff.

[97] Boot, *Nullum Crimen* (2002), para. 422. Similarly Vest, *Gerechtigkeit* (2006), p. 144; Paul, *Kritische Analyse* (2008), pp. 175, 206 ff.; Selbmann, *Genozid* (2002), p. 164; Lüders, *Völkermord* (2004), pp. 172, 199–200; Safferling, *Internationales Strafrecht* (2011), § 6 mn. 28; on this contradiction, see also Sootak and Parmas, 'Definition of Genocide', in Nuotio, *FS Lahti* (2007), p. 65. If one follows this view, the 'cultural genocide' blamed on the Chinese Government by the Dalai Lama regarding the situation in Tibet is not genocide in a legal sense; cf. also Selbmann, *Genozid* (2002), pp. 219 ff.; Hübner, *Völkermord* (2004), pp. 66, 73, 134–5; Paul, *Kritische Analyse* (2008), pp. 211 ff.; generally see also O'Keefe, *MelbourneJIL* 11 (2010), 386 ff. Dissenting, Cassese et al., *ICL* (2013), pp. 116–17 (arguing that this form of genocide causes 'the disappearance of the group through the severance of the links of the youngest generation with the group of origin', although it 'skirts alongside the borderline of "cultural genocide"').

[98] *Akayesu*, No. ICTR-96-4-T, para. 509; concurring, *Kayishema and Ruzindana*, No. ICTR-95-1-T, para. 118; *Rutaganda*, No. ICTR-96-3-T, para. 53; *Musema*, No. ICTR-96-13-T, para. 159; *Krajišnik*, No. IT-00-39-T, para. 854.

[99] Ntanda Nsereko, 'Genocide', in McDonald and Swaak-Goldman, *Substantive and Procedural Aspects* (2000), p. 130; critically, Lüders, *Völkermord* (2004), p. 200; cf. also Garner, *Law Dictionary* (2009), p. 718, according to which 'forcibly' 'is used in a wide and somewhat unnatural sense'; essentially in the same vein, Lüders, *Völkermord* (2004), pp. 202 ff.; Satzger, *Internationales Strafrecht* (2013), § 16 mn. 23; cf. also Kreß, '§ 6', in Joecks and Miebach, *Münchener Kommentar*, vi/ii (2009), mn. 65.

[100] Petrovic, *EJIL*, 5 (1994), 342–3; on its origins, cf. also Pégorier, *Ethnic Cleansing* (2013), pp. 1–12.

[101] Schabas, *Genocide* (2009), pp. 221 ff. In more detail, Selbmann, *Genozid* (2002), p. 211; Lüders, *Völkermord* (2004), pp. 221 ff.

deliberate military attacks or threats of attack on civilians and civilian areas, and wanton destruction of property.[102] The Special Rapporteur of the Commission on Human Rights, Tadeusz Mazowiecki, equated ethnic cleansing with 'a systematic purge of the civilian population with a view to forcing it to abandon the territories in which it lives'.[103]

It has always been debated whether ethnic cleansing constitutes genocide,[104] since it cannot be subsumed readily under the offence definition. Taking the available definitions together, ethnic cleansing is aimed at displacing a population of a given territory in order to render the territory ethnically homogeneous. Thus, ethnic cleansing pursues a different aim to genocide; it is not directed at the destruction of a group.[105] While the material acts performed to commit these crimes may often resemble each other, the main difference lies in the different specific intents: ethnic cleansing is intended to displace a population, genocide to destroy it.[106] Therefore, it is clear that 'ethnic cleansing' need not per se amount to genocide.[107] It would only do so if the perpetrators intended to destroy a protected group in order to render the territory ethnically homogeneous.[108] Of course, even without the special genocidal intent, ethnic cleansing remains punishable, namely as a crime against humanity (Article 7I(d)) and a war crime (Article 8(2)(b) (viii) ICC Statute).[109]

[102] First Interim Report of the Commission of Experts, 10 February 1993, UN Doc. S/25274 (1993), para. 56.

[103] Periodic Reports on the Situation of Human Rights in the Territory of the Former Yugoslavia Submitted by Mr Tadeusz Mazowiecki, Sixth Report, 21 February 1994, E/CN.4/1994/110, para. 283. The Prosecutor of the ICTY defined ethnic cleansing as: 'a practice which means that you act in such a way that in a given territory the members of a given ethnic group are eliminated. It means a practice that aims at such and such a territory be, as they meant, ethnically pure. [I]n other words, that that territory would no longer contain only members of the ethnic group that took the initiative of cleansing the territory' (*Prosecutor v Karadžić and Mladić*, No. IT-95-18-R61 and No. IT-95-5-R61, Transcript of Hearing, p. 128 (28 June 1996)); Cassese, 'Genocide', in Cassese et al., *Rome Statute*, i (2002), p. 338 defines 'ethnic cleansing' as 'the forcible expulsion of civilians belonging to a particular group from an area, village, or town'; cf. also Cassese et al., *ICL* (2013), p. 117; Pégorier, *Ethnic Cleansing* (2013), pp. 84 ff.

[104] On this debate, see also Jones, *Practice of ICTY and ICTR* (2000), pp. 99–102; in more detail Hübner, *Völkermord* (2004), pp. 167 ff.; Lüders, *Völkermord* (2004), pp. 223 ff.; Schabas, 'Article 6', in Triffterer, *Commentary* (2008), mn. 14 ff.; Schabas, *LJIL*, 18 (2005), 875; Schabas, 'Judicial Activism', in Darcy and Powderly, *Judicial Creativity* (2010), pp. 74 ff.; Shaw, *Genocide* (2007/2008), pp. 50 ff.; May, *Genocide* (2010), pp. 105 ff.; Pégorier, *Ethnic Cleansing* (2013), pp. 58 ff.

[105] Schabas, *Genocide* (2009), pp. 232–3; König, *Legitimation* (2003), p. 374; Mettraux, *Crimes* (2005), pp. 241, 247.

[106] Schabas, *Genocide* (2009), pp. 234.

[107] Cassese, 'Genocide', in Cassese et al., *Rome Statute*, i (2002), p. 342; Selbmann, *Genozid* (2002), pp. 211, 215 ff.; Werle, Völkerstrafrecht (2012), mn. 798; Werle, *Principles* (2009), mn. 742; Lüders, *Völkermord* (2004), pp. 223–4; Mettraux, *Crimes* (2005), p. 247; Satzger, *Internationales Strafrecht* (2013), § 16 mn. 18; Satzger, *ICL* (2012), § 14 mn. 18; Wilmshurst, 'Genocide', in Cryer et al., *Introduction ICL* (2010), p. 216; Cassese et al., *ICL* (2013), p. 118; Paul, *Kritische Analyse* (2008), p. 219 (also against an inclusion into the definition of the crime, pp. 223 ff.); Rebut, *Droit pénal international* (2012), mn. 909; dissenting, Hübner, *Völkermord* (2004), pp. 208 ff. cf. also Kreß, '§ 6', in Joecks and Miebach, *Münchener Kommentar*, vi/ii (2009), mn. 57; Gless, *Internationales Strafrecht* (2011), mn. 810. In a different vein, however, see UN GA Res. 47/121 of 18 December 1992, para. 9: 'in pursuit of the abhorrent policy of "ethnic cleansing", which is a form of genocide'; Pégorier, *Ethnic Cleansing* (2013), pp. 70, 82–3, who is in favour, however, of prosecuting ethnic cleansing as an independent crime (pp. 134 ff., 146 ff.).

[108] See Safferling, *Internationales Strafrecht* (2011), § 6 mn. 26.

[109] In the same vein, see Zahar and Sluiter, *ICL* (2008), pp. 197–8; on its relation to crimes against humanity, see Pégorier, *Ethnic Cleansing* (2013), pp. 106 ff.

(3) A context element in genocide?

Although the wording of Article 6 ICC Statute clearly does not require a context element, the Elements of Crimes state at the end of each of the definitions of the specific forms of genocide: 'The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.'[110] Also, the German *Oberlandesgericht* (Appeals Court) of Düsseldorf argued in *Jorgić* that genocide requires a 'structurally organized centralized guidance'. The German Federal Constitutional Court (*Bundesverfassungsgericht*) adopted the same view.[111] However, while this requirement may be present in most cases, it is not *legally* required.[112] Thus, the ad hoc tribunals have repeatedly and correctly affirmed that the existence of a plan or policy is not a legal ingredient of the crime of genocide; it may only become an important factor to prove the specific intent.[113] The same view has been adopted by the ICJ.[114] From this perspective, the Elements go against the wording of Article 6 ICC Statute and should, in line with Article 9(3) ICC Statute, be considered void.[115]

[110] Elements of Crimes, ICC-ASP/1/3 (part II-B), Article 6(a)Nr. 4, 6(b)Nr. 4, 6(c)Nr. 5, 6(d)Nr. 5, 6(e) Nr. 7; thereto also *Al Bashir*, No. ICC-02/05-01/09, paras. 117 ff.

[111] On the German jurisprudence, see Ambos and Wirth, 'Genocide and War Crimes', in Fischer et al. *Prosecution* (2001), p. 769; German Federal Constitutional Court (BVerfG), Judgment, 12 December 2000—2 BvR 1290/99, at III. 4 a), available at <http://www.bverfg.de/entscheidungen/frames/2000/12/12> accessed 12 July 2013, reprinted in *EuGRZ*, 28 (2001), 76–82 and *NJW*, 54 (2001), 1850; in this vein, see also *Darfur Report*, para. 519; critical thereto, Loewenstein and Kostas, *JICJ*, 5 (2007), 851.

[112] Ambos and Wirth, 'Genocide and War Crimes', in Fischer et al., *Prosecution* (2001), pp. 789–90; Triffterer, *LJIL*, 14 (2001), 406–8; Hübner, *Völkermord* (2004), pp. 162 ff.; Lüders, *Völkermord* (2004), pp. 157 ff. (163 ff.); Satzger, *Internationales Strafrecht* (2013), § 16 mn. 14; Satzger, *ICL* (2012), § 14 mn. 14; Werle and Jessberger, *JICJ*, 3 (2005), 51; Werle, Völkerstrafrecht (2012), mn. 465, 799–800; Werle, *Principles* (2009), mn. 436, 743–4; Safferling, *Internationales Strafrecht* (2011), § 6 mn. 13; Zahar and Sluiter, *ICL* (2008), p. 175; Wilmshurst, 'Genocide', in Cryer et al., *Introduction ICL* (2010), pp. 206 ff; Slade, 'The Prohibition of Genocide', in Henham and Behrens, *The Criminal Law of Genocide* (2007), p. 159; Loewenstein and Kostas, *JICJ*, 5 (2007), 850 ff.; O'Connor and Rausch, *Model Criminal Code* (2007), p. 198; Kolb, 'Droit international pénal', in Kolb, *Droit international pénal* (2008), p. 84; Paul, *Kritische Analyse* (2008), pp. 270 ff.; Cassese et al., *ICL* (2013), pp. 123–5; Kirsch, 'The Social and the Legal Concept of Genocide', in Behrens and Henham, *Elements of Genocide* (2013), p. 18; also critical, Mettraux, *Crimes* (2005), p. 204; Moneta, 'Elementi Constitutivi', in Cassese et al., *Problemi* (2005), pp. 16 ff. (20); Cassese, 'The Policy Element', in Safferling and Conze, *Genocide Convention* (2010), pp. 133 ff.; Einarsen, *Universal Crimes* (2012), pp. 69–70.

[113] *Jelisić*, No. IT-95-10-A, para. 48; *Krstić*, No. IT-98-33-A, para. 225; *Jelisić*, No. IT-95-10-T, paras. 100, 101; *Prosecutor v Kayishema and Ruzindana*, No. ICTR-95-1-A, Judgment (Reasons), para. 138 (1 June 2001); *Kayishema and Ruzindana*, No. ICTR-95-1-T, para. 276; *Prosecutor v Simba*, No. ICTR-01-76-A, Appeals Chamber Judgment, para. 260 (27 November 2007); *Popović et al.*, No. IT-05-88-T, para. 830; critical, Kirsch, 'The Social and the Legal Concept of Genocide', in Behrens and Henham, *Elements of Genocide* (2013), pp. 18–19 (setting a higher threshold, i.e. 'the individual misconduct … [should be] equally part' and 'not only occur[ing] in the background' of a collective attack).

[114] cf. ICJ, *Bosnia and Herzegovina v Yugoslavia*, Judgment (26 February 2007), paras. 373 and 376; thereto Loewenstein and Kostas, *JICJ*, 5 (2007), 855. Generally on the relationship between the ICJ and the other international courts and tribunals with respect to the case law on international humanitarian law, see Zyberi, *Humanitarian Face* (2008), pp. 353 ff.

[115] In this vein, see Ambos and Wirth, 'Genocide and War Crimes', in Fischer et al., *Prosecution* (2001). Critical, see Werle, Völkerstrafrecht (2012), mn. 809 ff.; Werle, *Principles* (2009), mn. 749 ff.; Lüders, *Völkermord* (2004), pp. 164–5; Gless, *Internationales Strafrecht* (2011), mn. 804; *Simba*, No. ICTR-01-76-A, para. 260; thereto Mettraux, *Crimes* (2005), pp. 210–11; in the same vein, see Kolb, 'Droit international pénal', in Kolb, *Droit international pénal* (2008), p. 84 and Cryer, *JICJ*, 7 (2009), 290–1.

Despite this quite straightforward legal situation, a teleological interpretation could call for a context element since the commission of crimes with genocidal intent reaches the demanded gravity threshold only when carried out in an organized and systematic fashion.[116] Thus, the *Al Bashir* Pre-Trial Chamber (PTC) affirmed the necessity of a contextual element, since only then the 'threat against the existence of the targeted group . . . becomes concrete and real';[117] it therefore did not see an 'irreconcilable contradiction' between the Elements of Crime and the ICC Statute.[118] If one follows this view, the legal impasse may arguably be resolved by construing the context element as part of the (subjective) offence definition, more concretely, the 'intent to destroy' requirement, as its 'carrier' or 'holder'.[119] We will now have to look more closely at this subjective side of the crime of genocide.

C. General *Mens Rea* (Subjective Elements)

According to Article 30 ICC Statute 'a person shall be criminally responsible and liable for punishment for a crime (. . .) only if the material elements are committed with intent and knowledge'. The complex questions involved in the interpretation of this provision and the mental element in general have been analysed in the first Volume of this treatise.[120] Here it suffices to state therefore that, as a general rule, 'genocide', that is, the chapeau and the different forms of commission, must be performed with intent and knowledge. In other words, the perpetrator's intent and knowledge must cover all (material) elements of the chapeau and the specific act. According to the case law, the perpetrator must in particular, on the one hand, know that the victim is a member of the group[121] and, on the other, act with the intent to further the destruction of

[116] In this vein, see Wilmshurst, 'Genocide', in Cryer et al., *Introduction ICL* (2010), pp. 218–19, who interprets the Elements of Crimes as offering a necessary 'threshold of objective scale and gravity' (219); similarly, Borsari, *Diritto punitivo* (2007), p. 314; Kreß, '§ 6', in Joecks and Miebach, *Münchener Kommentar*, vi/ii (2009), mn. 78; Kirsch, 'Two Notions of Genocide', in Safferling and Conze, *Genocide Convention* (2010), p. 147; Kirsch, 'The Social and the Legal Concept of Genocide', in Behrens and Henham, *Elements of Genocide* (2013), p. 12; cf. also Schabas, 'Genocide in Darfur?', in Henham and Behrens, *The Criminal Law of Genocide* (2007), 47; Einarsen, *Universal Crimes* (2012), p. 70, finding it 'harder to imagine such acts [Article 6(c), (d) and (e)] being commited without being part of a larger plan or policy', however, against the necessity of adding a 'third legal ingredient'.

[117] *Al Bashir*, No. ICC-02/05-01/09, para. 124.

[118] *Al Bashir*, No. ICC-02/05-01/09, para. 128 ff. See thereto Burghardt and Geneuss, *ZIS*, 4 (2009), 132 ff; Schabas, *ICC Commentary* (2010), 124–5; Kreß, *JICJ*, 7 (2009), 297 ff.; for a differentiation according to the acts, and recognizing a 'policy element' only for the last three underlying acts (Article 6(c), (d), (e)), see Cassese, 'The Policy Element', in Safferling and Conze, *Genocide Convention* (2010), pp. 137 ff.; Cassese et al., *ICL* (2013), p. 125.

[119] Lüders, *Völkermord* (2004), pp. 93 ff.; cf. also Ambos, *IRRC* 91 (2009), 845–6 with further references; Kreß, '§ 6', in Joecks and Miebach, *Münchener Kommentar*, vi/ii (2009), mn. 15–16, 78; Demko, *SZIER* (2009), 228–9. See also note 215 and accompanying text.

[120] See Volume I, Chapter VII, pp. 266 ff. See for a detailed analysis, Eser, 'Articles 30, 32', in Cassese et al., *Rome Statute*, i (2002), pp. 889 ff.; Ambos, *Der Allgemeine Teil* (2002/2004), pp. 757 ff.; Triffterer, *LJIL*, 14 (2001), 400.

[121] *Rutaganda*, No. ICTR-96-3-T, para. 59; *Musema*, No. ICTR-96-13-T, para. 165; *Bagilishema*, No. ICTR-95-1A-T, para. 61; *Jelisić*, No. IT-95-10-T, para. 66; *Semanza*, No. ICTR-97-20-T, para. 427. Triffterer, *LJIL*, 14 (2001), 400 requires knowledge of the membership of the victim of the group and that the victim is 'attacked in this capacity by the perpetrator'.

the group.[122] While the former requirement refers to the general *mens rea* since the membership of the group is a material element in the form of a circumstance and as such the perpetrator must be aware of it (Article 30(3) ICC Statute), the intent to further the destruction of the group constitutes a separate specific intent to be discussed later (Section D.).[123] Unfortunately, the case law does not always precisely distinguish between the *general mens rea* and the *specific* intent as an additional mental element (*subjektives Tatbestandsmerkmal*).[124]

(1) Killing members of a group

The term 'killing' is broader than the term 'murder' since the latter requires, according to some national laws, more than the intention to cause death, namely premeditation.[125] As to the English and French versions of the wording of alternative (a), the ICTR *Kayishema* TC held 'that there is virtually no difference between the term "killing"…and "*meurtre*"…', but 'killing or *meurtre* should be considered along with the specific intent of genocide', and, hence, both concepts require intentional homicide.[126] Other Chambers argued that '[t]he concept of killing includes both intentional and unintentional homicide, whereas *meurtre* refers exclusively to homicide committed with the intent to cause death'. These Chambers, however, came to the same result considering that 'pursuant to the general principles of criminal law, the version more favourable to the Accused [i.e. the requirement of intent] must be adopted'.[127] Hence, the killing must be committed—in accordance with Article 30 ICC Statute—with intent, though not necessarily with premeditation.[128] Any lower intent requirement, such as would suffice for serious injuries to be inflicted in 'reckless disregard of human life',[129] can be justified neither by customary international law nor by generally recognized principles of law.

[122] cf. *Jelisić*, No. IT-95-10-T, para. 79 ('perpetrator…commits this act as part of a wider-ranging intention to destroy the…group of which the victim is a member'); see also *Semanza*, No. ICTR-97-20-T, para. 312; Paul, *Kritische Analyse* (2008), p. 240 (dolus eventualis sufficient); cf. also Safferling, 'Special Intent Requirement', in Safferling and Conze, *Genocide Convention* (2010), pp. 169–70.

[123] See on this distinction, Volume I of this treatise, p. 279 (on the object of reference of the mental element with regard to genocide).

[124] Dissenting, Kolb, 'Droit international pénal', in Kolb, *Droit international pénal* (2008), p. 85; Paul, *Kritische Analyse* (2008), pp. 237 ff.

[125] See Volume I of this treatise, p. 294; see also Boot, *Nullum Crimen* (2002), para. 416. Schabas, *Genocide* (2009), pp. 267 ff., 287 ff.; Kittischaisaree, *ICL* (2001/2002), pp. 103–4.

[126] *Kayishema and Ruzindana*, No. ICTR-95-1-T, para. 104.

[127] *Bagilishema*, No. ICTR-95-1A-T, paras. 57, 58; *Akayesu*, No. ICTR-96-4-T, para. 501; *Rutaganda*, No. ICTR-96-3-T, para. 49; *Musema*, No. ICTR-96-13-T, para. 155; *Kayishema and Ruzindana*, No. ICTR-95-1-A, para. 151. See also Ambos, *Der Allgemeine Teil* (2002/2004), pp. 795, 796.

[128] Boot, *Nullum Crimen* (2002), para. 416. Concurring *Kamuhanda*, No. ICTR-95-54A-T, para. 632; *Brđanin*, No. IT-99-36-T, paras. 689, with n. 1702 ('wilful killing'), 386; *Kayishema and Ruzindana*, No. ICTR-95-1-A, para. 151; *Stakić*, No. IT-97-24-T, para. 515; Selbmann, *Genozid* (2002), p. 158; Wilmshurst, 'Genocide', in Cryer et al., *Introduction ICL* (2010), p. 214; Fournet, *Genocide and Crimes Against Humanity* (2013), pp. 88–9; Fournet, 'The Actus Reus of Genocide', in Behrens and Henham, *Elements of Genocide* (2013), p. 60; Cassese et al., *ICL* (2013), p. 118.

[129] Cassese et al., *ICL* (2013), p. 118; cf. however, Werle, *Principles* (2009), mn. 751, 826, 1033, who sees, on the one hand, lower requirements for the mental element—as compared to Article 30 of the ICC Statute—arising from the Elements of Crimes and customary law, while rejecting, on the other hand, that *dolus eventualis* is sufficient for all acts of genocide (mn. 709).

(2) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part

By using the term 'deliberately' the drafters of the Convention wanted to express that this specific form of genocide does not only require general intent, but a kind of plan or prior reflection within the meaning of the French concept of 'premeditation'.[130] However the term 'deliberately' only refers, as the French and Spanish translations show ('*intentionnelle*', '*intencional*'), to the general intent requirement.[131]

Against this background it is more convincing, as already argued in Volume I of this treatise,[132] to consider '*calculated*' as the keyword of this alternative.[133] It indicates that the imposition of the respective conditions must be the principal mechanism by which the group is to be destroyed, rather than some form of ill-treatment that accompanies or is incidental to the crime.[134] The ICTR requires that the 'methods of destruction (. . .) are, ultimately, aimed at their [the group members'] physical destruction'.[135]

(3) Imposing measures intended to prevent births within the group

Any measures imposed must be 'intended' to prevent births, that is, birth prevention must be the main purpose of the measure.[136] It suffices, however, that partial birth prevention is the purpose of the measures in question.[137] Although public birth control programmes are indeed intended to (partially) prevent births, they do not fall under the provision as long as participation is voluntary, in other words, they do not exert undue pressure or coercion. Even if they are compulsory—as for example the forced sterilization of women in Peru during the Fujimori regime or China's one-child policy—they do not constitute genocide since the perpetrators do not intend to destroy a group.[138]

[130] Robinson, *Genocide Convention* (1960), 60; dissenting Schabas, *Genocide* (2009), p. 291 ('the word "deliberately" is a pleonasm'); Werle, *Völkerstrafrecht* (2012), mn. 790; Werle, *Principles* (2009), mn. 733; Lüders, *Völkermord* (2004), pp. 193–4; dissenting, Behrens, 'The Mens Rea of Genocide', in Behrens and Henham, *Elements of Genocide* (2013), p. 74 ('it would go too far to read requirement of prior planning into the adjective').

[131] Ambos and Wirth, 'Genocide and War Crimes', in Fischer et al., *Prosecution* (2001), pp. 785, 796.

[132] Volume I of this treatise, pp. 294–5.

[133] The Elements of Crimes, ICC-ASP/1/3 (part II-B), do not even mention this term. cf. Ambos and Wirth, 'Genocide and War Crimes', in Fischer et al., *Prosecution* (2001), p. 785; concurring, Gropengießer, 'Die völkerstrafrechtlichen Verbrechen', in Eser and Kreicker, *Nationale Strafverfolgung*, i (2003), p. 102; Schabas, *Genocide* (2009), p. 291.

[134] Schabas, *Genocide* (2009), p. 269; Gropengießer, 'Die völkerstrafrechtlichen Verbrechen', in Eser and Kreicker, *Nationale Strafverfolgung*, i (2003), pp. 102–3. On the French *préméditation* in this context, see Ambos, *Der Allgemeine Teil* (2002/2004), p. 796.

[135] cf. *Rutaganda*, No. ICTR-96-3-T, para. 51; *Musema*, No. ICTR-96-13-T, para. 157; similar *Akayesu*, No. ICTR-96-4-T, para. 505; *Stakić*, No. IT-97-24-T, para. 517; *Brđanin*, No. IT-99-36-T, para. 691; ICJ, *Bosnia and Herzegovina v Yugoslavia*, Judgment (26 February 2007), para. 190.

[136] On the strong volitional component of this alternative, see Volume I of this treatise, p. 295; in the same vein, see Fournet, 'The Actus Reus of Genocide', in Behrens and Henham, *Elements of Genocide* (2013), p. 67 ('emphasising the determining aspect of the intent'); dissenting, Behrens, 'The Mens Rea of Genocide', in Behrens and Henham, *Elements of Genocide* (2013), p. 74 (advocating a lower threshold).

[137] Boot, *Nullum Crimen* (2002), para. 422. Lüders, *Völkermord* (2004), p. 198.

[138] Schabas, *Genocide* (2009), pp. 291–2; in the same vein, see Werle, Völkerstrafrecht (2012), mn. 791; Werle, *Principles* (2009), mn. 734; 'emphasizing the determining aspect of the intent of the perpetrator(s)', Fournet, *Genocide and Crimes Against Humanity* (2013), p. 95.

(4) Forcibly transferring children of the group to another group

If one conceives this alternative as a form of cultural genocide,[139] it may be argued that the perpetrator's intent only needs to refer to destruction of the group in its cultural dimension, and not necessarily in a biological sense.[140] This would imply, however, that the nature of the specific intent depended on the underlying form of commission. As will be shown later,[141] the nature of the destruction depends on the interpretation of the term 'destroy' and the interest or object protected by the offence. This approach is more convincing because it relates the perpetrator's conduct to the crime of genocide as a whole and not only to the—sometimes accidental—performance of one or the other alternative.

D. Specific *Mens Rea* (Specific Intent)

(1) General considerations

As already explained in the first Volume of this treatise, a 'specific' or 'special' genocidal intent[142] to destroy one of the protected groups is characterized and distinguished by a 'surplus' of intent which makes genocide an international crime and a crime of special intent.[143] In common law, the concept of specific intent is used to distinguish from offences of 'general intent', that is, offences for which no particular level or degree of intent is required. In the civil law tradition, specific intent corresponds to *dolus directus* of first degree, that is, it emphasizes the volitive element of the dolus. It has been said that a specific intent offence requires performance of the *actus reus*, but in association with an intent or purpose that goes beyond the mere performance of the act, that is, a surplus of, or ulterior intent ('*überschießende Innententenz*').[144] It has also been stated,

[139] cf. Werle, Völkerstrafrecht (2012), mn. 793; Werle, *Principles* (2009), mn. 736; Schabas, *Genocide* (2009), pp. 201 ff.; Wilmshurst, 'Genocide', in Cryer et al., *Introduction ICL* (2010), p. 217 ('close'); Fournet, 'The Actus Reus of Genocide', in Behrens and Henham, *Elements of Genocide* (2013), p. 67 ('the last remainder').

[140] Schabas, *Genocide* (2009), pp. 271 ff.

[141] See Section D. (6)(a).

[142] Volume I of this treatise, pp. 292–4.

[143] cf. *Stakić*, No. IT-97-24-T, para. 520. See also Triffterer, *LJIL*, 14 (2001), 399 ff.; Arnold, *CLF*, 14 (2003), 132 ff.; Safferling, *Internationales Strafrecht* (2011), §6 mn. 36; Selbmann, *Genozid* (2002), pp. 165 ff.; Gropengießer, 'Die völkerstrafrechtlichen Verbrechen', in Eser and Kreicker, *Nationale Strafverfolgung*, i (2003), pp. 105 ff.; Lüders, *Völkermord* (2004), pp. 112 ff.; Mettraux, *Crimes* (2005), pp. 210 ff. (212 ff.); May, *Crimes Against Humanity* (2005), pp. 165, 167 ff.; Wilmshurst, 'Genocide', in Cryer et al., *Introduction ICL* (2010), pp. 203, 220; Roßkopf, *Tatseite* (2007), pp. 111 ff.; Azari, *RSC*, 4 (2007), 741 ff.; Ambos, *IRRC* 91 (2009), 835; Behrens, 'The Mens Rea of Genocide', in Behrens and Henham, *Elements of Genocide* (2013), p. 76; essentially in a similar vein, see Hübner, *Völkermord* (2004), pp. 136 ff. (157). On the *travaux*, see Hübner, *Völkermord* (2004), pp. 138 ff.; on the case law, see Aptel, *CLF*, 13 (2002), 273 ff.; Tournaye, *ICLQ*, 52 (2003), 447 ff.; on the ICTR case law, see Mugwanya, *Genocide* (2007), pp. 127 ff; Fournet, *Genocide and Crimes Against Humanity* (2013), pp. 88–96 (p. 88, '. . . the acts . . . while inherently criminal . . . can only be considered as such [genocidal]) if, and only if, perpetrated with the very specific intent to destroy the group as such').

[144] Schabas, *Genocide* (2009), pp. 256–7, 270 ff.; Triffterer, *LJIL*, 14 (2001), p. 402 ('so-called crimes with an extended mental element'); Ambos, *Der Allgemeine Teil* (2002/2004), p. 789; Ambos, *IRRC*, 91 (2009), 835; Selbmann, *Genozid* (2002), p. 168; Gropengießer, 'Die völkerstrafrechtlichen Verbrechen', in Eser and Kreicker, *Nationale Strafverfolgung*, i (2003), p. 107; Lüders, *Völkermord* (2004), p. 90; Satzger, *Internationales Strafrecht* (2013), § 16 mn. 8, 15; Satzger, *ICL* (2012), § 14 mn. 8, 15; Werle, Völkerstrafrecht (2012),

less precisely, that genocide consists of 'an aggravated criminal intent that must exist in addition to the criminal intent accompanying the underlying offence'.[145]

Yet, the details are highly controversial. If one takes the quite successful cognitivist theory[146] seriously, the volitional element is no longer part of the *dolus*, at least not of the *dolus eventualis* as its weakest form, and, consequently, the specific intent only implies (positive) knowledge of the constituent elements of the *actus reus*. This theory is, in fact or by accident, the basis of the different and diverse attempts by some writers to lower the subjective threshold of genocide by way of a 'knowledge-based interpretation'.[147] This interpretation also led to a proposal during the negotiations of the Elements of Crimes requiring only that the perpetrator 'knew or should have known' that the conduct would destroy a group.[148] Although this proposal was finally rejected, the discussion is by no means over since the followers of the knowledge-based interpretation would argue that the issue is not one of *rewriting* the genocide offence but only of correctly *interpreting* the specific intent requirement. In the following I will propose a teleological interpretation[149] which combines the knowledge-based approach with the special structure of the crime of genocide, making the specific subjective requirement dependant on the status and role of the perpetrators in the genocidal plan and differentiating among top- /mid- and low-level perpetrators. It rests upon a criminological analysis published elsewhere.[150] Before turning to this proposal in detail (Section D. (4) and (5)), the relevant jurisprudence (Section D. (2)) and literature (Section D. (3)) will be analysed.

mn. 424; Werle, *Principles* (2009), mn. 394; Roßkopf, *Tatseite* (2007), p. 111; Safferling, 'Special Intent Requirement', in Safferling and Conze, *Genocide Convention* (2010), p. 170 (arguing that Article 30(2)(b) ICC Statute is not applicable).

[145] Cassese, 'Genocide', in Cassese et al., *Rome Statute*, i (2002), p. 338; similar, *Darfur Report*, para. 491; Cassese et al., *ICL* (2013), p. 119.

[146] See for a fundamental analysis of knowledge with regard to risks caused by an act and mere wishes, hopes, or desires with regard to future results, Frisch, *Vorsatz und Risiko* (1983), 101–2, 255 ff., 300 ff. and *passim* ('Notwendig ist das Wissen um das der Handlung eignende und (normative) ihre Tatbestandsmäßigkeit begründende Risiko . . . ').

[147] Gil Gil, *Derecho Penal Internacional* (1999), pp. 231 ff., 236 ff.; Greenawalt, *ColLR* 99 (1999), 2265 ff.; Triffterer, 'Kriminalpolitische und dogmatische Überlegungen', in Schünemann et al., *FS Roxin* (2001), pp. 1422, 1438 ff., 1441 ff.; Vest, *Genozid (*2002), p. 101; summarizing: Ambos, *Der Allgemeine Teil* (2002/2004), pp. 790–5; Lüders, *Völkermord* (2004), pp. 106 ff; Kreß, *JICJ*, 3 (2005), 566 ff. (576–7); Kreß, '§ 6', in Joecks and Miebach, *Münchener Kommentar*, vi/ii (2009), mn. 82 ff.; critically, Moneta, 'Elementi Constitutivi', in Cassese et al., *Problemi* (2005), pp. 24 ff.; Roßkopf, *Tatseite* (2007), pp. 113 ff.; Azari, *RSC*, 4 (2007), 744; Safferling, 'Special Intent Requirement', in Safferling and Conze, *Genocide Convention* (2010), pp. 171 ff; cf. also Kreß, '§ 220a StGB/§ 6 VStGB', in Joecks and Miebach, *Münchener Kommentar*, iii (2003), mn. 86 ff.; Arnold, *CLF* 14 (2003), 138 ff.; Jones, 'Genocide', in Vorah et al., *Inhumanity* (2003), p. 479; van der Wilt, *JICJ*, 4 (2006), 244–5 (taking into consideration the rank of the perpetrators); Borsari, *Diritto punitivo* (2007), pp. 333–4; see also Mugwanya, *Genocide* (2007), pp. 131 ff., 158–9; for a development of this approach regarding the special structure of genocide (*Einzel-/Gesamttat*), see Vest, *JICJ*, 5 (2007), 781 (790 ff.); Paul, *Kritische Analyse* (2008), pp. 255 ff. ('*sicheres Wissen*') suggesting a concrete reform proposal (pp. 273, 323–4); Ambos, *IRRC*, 91 (2009), 839 ff.; against this approach, see Kirsch, 'Two Notions of Genocide', in Safferling and Conze, *Genocide Convention* (2010), p. 144–5; Kirsch, 'The Social and the Legal Concept of Genocide', in Behrens and Henham, *Elements of Genocide* (2013), pp. 11–12.

[148] UN-Doc. PCNICC/1999IWGEC/RT.1.

[149] This section draws on Ambos, *IRRC* 91 (2009), 842 ff.

[150] cf. Ambos, 'Criminologically Explained Reality of Genocide', in Smeulers, *Collective Violence* (2008), pp. 153 ff.

(2) Jurisprudence

The seminal *Akayesu* Judgment understood the 'intent to destroy' as a 'special intent' or '*dolus specialis*', defining it as 'the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged'[151] or, in other words, has 'the clear intent to cause the offence'.[152] The Chamber described the genocidal intent as the 'key element' of an intentional offence which is 'characterized by a psychological relationship between the physical result and the mental state of the perpetrator'.[153] The subsequent ICTR case law basically followed the *Akayesu* findings, requiring in addition the aim to destroy one of the protected groups.[154]

The ICTY's case law took the same path. Rejecting the Prosecutor's attempt to introduce a mere knowledge standard,[155] the *Jelisić* TC applied the *Akayesu* definition. *In casu*, however, the Chamber was not convinced that *Jelisić* was 'motivated' (sic!) by the *dolus specialis* of the crime[156] as he performed the executions only randomly[157] and acted by virtue of his disturbed personality.[158] Thus, 'he killed arbitrarily rather than with the clear intent to destroy a group'.[159] The Appeals Chamber confirmed, dismissing again the Prosecutor's knowledge approach,[160] that the 'specific intent requires that the perpetrator … seeks to achieve'[161] the destruction of a group. Further, the Appeals Judges made clear that the existence of personal motives, for example personal economic benefits or political advantage, do not exclude the perpetrator's specific intent.[162] Equally, the Chamber conceded, in line with the Prosecutor but contrary to the Trial Chamber, that a disturbed or borderline personality, as identified in *Jelisić*, does not per se exclude 'the ability to form an intent to destroy a particular protected group'.[163] Similarly, the Chamber considered that a certain randomness in the perpetrator's killings does not rule out the specific intent.[164] Moreover, the Appeals Chamber confirmed the irrelevance of motive,[165] thereby implicitly criticizing the Trial Chamber's use of the term 'motivated' in relation to intent.

[151] *Akayesu*, No. ICTR-96-4-T, para. 498.

[152] *Akayesu*, No. ICTR-96-4-T, para. 518; critical but misleading, Zahar and Sluiter, *ICL* (2008), pp. 163–4.

[153] *Akayesu*, No. ICTR-96-4-T, para. 518; *Prosecutor v Gacumbitsi*, No. ICTR-2001-64-A, Appeal Chamber Judgment, Separate Opinion of Judge Shahabuddeen, para. 8 (7 July 2006) ('the essence of the crime of genocide is an intent to destroy a group').

[154] *Rutaganda*, No. ICTR-96-3-T, para. 61; *Bagilishema*, No. ICTR-95-1A-T, para. 62; *Musema*, No. ICTR-96-13-T, para. 164 ('clearly intended the result charged'); *Kambanda*, No. ICTR-97-23-S, para. 16; *Kayishema and Ruzindana*, No. ICTR-95-1-T, para. 89.

[155] *Prosecutor v Jelisić*, No. No. IT-95-10-PT, Prosecutor's Pre-Trial Brief, para. 3.1 (19 November 1998) (perpetrator 'knew the likely consequence' that the committed acts would destroy a group in whole or in part). See also *Jelisić*, No. IT-95-10-T, para. 42; *Krstić*, No. IT-98-33-T, para. 569 ('consciously desired' the destruction of the group or 'knew his acts were destroying').

[156] *Jelisić*, No. IT-95-10-T, para. 108.

[157] *Jelisić*, No. IT-95-10-T, para. 106.

[158] *Jelisić*, No. IT-95-10-T, para. 105.

[159] *Jelisić*, No. IT-95-10-T, para. 108.

[160] *Jelisić*, No. IT-95-10-A, para. 52.

[161] *Jelisić*, No. IT-95-10-A, para. 46.

[162] *Jelisić*, No. IT-95-10-A, para. 49, citing *Prosecutor v Duško Tadić*, No. IT-94-1-A, Appeals Chamber Judgment, para. 269 (15 July 2009).

[163] *Jelisić*, No. IT-95-10-A, para. 70.

[164] *Jelisić*, No. IT-95-10-A, para. 71.

[165] *Jelisić*, No. IT-95-10-A, para. 71.

Following the same approach, the *Krstić* TC held that genocide embraces only acts 'committed with the goal of destroying all or part of a group'.[166] It convicted *Krstić* of genocide, and his intent to kill the 'military aged Bosnian Muslim men of Srebrenica' was based on the finding that *Krstić* was 'undeniably . . . aware of the fatal impact' that the killings would have on the community.[167] However, the Appeals Chamber, while reaffirming the 'stringent requirement of specific intent' in light of the seriousness of the genocide offence and explicitly rejecting a mere knowledge requirement,[168] overturned *Krstić's* conviction for genocide. As the Appeals Judges could not find special intent, but only *Krstić's* knowledge of the other perpetrators' genocidal intent, he was merely convicted of aiding and abetting genocide.[169] The *Sikirica* TC immediately dismissed 'an examination of theories of intent', since it considered the special intent to be a 'relatively simple issue of interpretation' (sic!) and held further that the offence 'expressly identifies and explains the intent that is needed'.[170] In substance, the Chamber followed the *Jelisić* Appeals Judgment's 'seeks to achieve' standard.[171] The *Blagojević* and *Brđanin* Judgments also called for a goal–oriented approach[172] and rejected a mere knowledge requirement,[173] a view shared by the *Popović et al.* Judgment, where the Chamber found that 'the killing of all of the male members of a population' and its consequent 'impact on the community' were not only 'evident to, but intended by' the perpetrators.[174]

In sum, the case law's approach is predicated on the understanding, as originally suggested by the *Akayesu* case, that 'intent to destroy' means a special or specific intent which, in essence, expresses the *volitional element* in its most intensive form and is *purpose-based*. This position is shared by other authorities. Thus, the ICJ also speaks, citing the ICTY jurisprudence, of a 'special or specific intent' as an 'extreme form of wilful and deliberate acts designed to destroy a group or part of a group'.[175] The Court of Bosnia-Herzegovina held in the *Kravica* cases involving genocide charges in connection with the events in *Srebrenica* that genocidal 'intent can only be the result of a deliberate and conscious aim'.[176] The Darfur Commission of Inquiry similarly speaks, on the one hand, of 'an aggravated criminal intent, or *dolus specialis*' that 'implies that the perpetrator consciously desired the prohibited acts he committed to result in the destruction' of a protected group. On the other hand however, it additionally requires

[166] *Krstić*, No. IT-98-33, para. 571.
[167] *Krstić*, No. IT-98-33, para. 634.
[168] *Krstić*, No. IT-98-33, para. 134.
[169] *Krstić*, No. IT-98-33, paras. 135 ff.
[170] *Sikirica*, No. IT-95-8-T, paras. 58 and 59.
[171] *Sikirica*, No. IT-95-8-T,, para. 59, n. 165; for this standard, see *Jelisić*, No. IT-95-10-A, para. 46.
[172] *Blagojević and Jokić*, No. IT-02–60-T, para. 656 ('destruction . . . must be the aim of the underlying crime'); *Brđanin*, No. IT-99-36-T, para. 695.
[173] *Blagojević and Jokić*, No. IT-02–60-T ('not sufficient that the perpetrator simply knew that the underlying crime would inevitably or likely result in the destruction of the group').
[174] *Popović et al.*, No. IT-05-88-T, paras. 864-6.
[175] ICJ, *Bosnia and Herzegovina v Serbia and Montenegro*, Judgment (26 February 2007), para. 188 (citing *Prosecutor v Kupreškic et al.*, No. IT-95-16-T, Trial Chamber Judgment, para. 636 (14 January 2000)); thereto Azari, *RSC*, 4 (2007), 745–6. See also ILC, Report on the Work of its Forty-Eighth-Session, UN GAOR, 51st session, Supp. No. 10, UN Doc. A/51/10 (1996), p. 88 ('intention . . . to destroy').
[176] *Prosecutor v Stupar et al.*, No. X-KR-05/24, First Instance Verdict, para. 56 (29 July 2008); available at <http://www.sudbih.gov.ba/files/docs/presude/2008/Milos_Stupar_i_dr_-_1st_instance_verdict.pdf> accessed 16 July 2012.

that the perpetrator knows 'that his acts would destroy, in whole or in part, the group as such'.[177] Last but not least, in the *Al Bashir* arrest warrant decision, ICC PTC I, while taking note of the 'knowledge-based approach' (discussed later), followed the traditional approach with regard to top-level perpetrators and denied genocidal intent.[178]

(3) Dissenting views in the literature

Some scholars have recently challenged the mainstream special intent or *dolus specialis* view.[179] In her fundamental work on the genocide offence, Alicia Gil Gil argues that the concept of intention ('*intención*') must be understood in a wider sense and encompasses the concept of *dolus eventualis*[180] or conditional intent.[181] She justifies this for genocide by invoking the parallels between its structure and that of attempt. Attempt, correctly qualified by Gil Gil as an inchoate crime,[182] requires, on the one hand, general intent, including *dolus eventualis*, with regard to the *actus reus* of the attempted crime and, on the other hand, unconditional will ('*voluntad incondicionada*') or intention ('*intención*') as a transcending subjective element ('*elemento subjetivo trascendente*') with regard to the constituent acts of the offence and the criminal result.[183] As to these constituent acts, for example the killing of a member of the group (in the case of genocide), *dolus eventualis* would be sufficient. It must, however, be accompanied by intention in the sense of an unconditional will with regard to the remaining acts, that is, the killing of other members of the group, necessary to bring about the final result of

[177] *Darfur Report*, para. 491. The Commission ultimately rejected a genocidal intent, since it found 'more indicative elements' which speak against it (*Darfur Report*, paras. 513 ff.), for example the selective killings (para. 513) and the imprisonment of survivors in camps where they received humanitarian assistance (para. 515). Thus, it found, rather, an 'intent to drive the victims from their homes, primarily for purposes of counter-insurgency warfare' (para. 518). For the same result, see Cayley, *JICJ*, 6 (2008), 837 ff. Critical of the *Darfur Report*'s findings, see Shaw, *Genocide* (2007/2008), pp. 168 ff. (essentially following Reeves, *Report* (2005) (<http://www.sudanreeves.org/2005/02/11/report-of-the-international-commission-of-inquiry-on-darfur-a-critical-analysis-part-i-february-2-2005/> accessed 10 July 2013).

[178] *Al Bashir*, No. ICC-02/05-01/09, paras. 139-40 with n. 154 following the ICJ position in ICJ, *Bosnia and Herzegovina v Serbia and Montenegro*, Judgment (26 February 2007), and stating (in n. 154) that the 'knowledge-based approach' would only make a difference as to low- or mid-level perpetrators and is, therefore, not relevant for the ICC.

[179] Apart from the authors quoted in the following text, Schabas, *Genocide* (2009), also now follows the knowledge-based approach, p. 254 ('An approach to the knowledge requirement that considers recklessness about the consequences of an act to be equivalent to full knowledge provides an answer to such an argument.'), 264 ('The knowledge-based approach, . . . , whereby the mens rea of both perpetrator and accomplice is assessed not by their goal or purpose but by their knowledge of the plan or policy, avoids these difficulties.'); critical of 'the exceedingly narrow conclusions' of the jurisprudence, see also Behrens, 'The Mens Rea of Genocide', in Behrens and Henham, *Elements of Genocide* (2013), p. 78 (following, however, a volitional, but less strict approach, taking into account five broad considerations, for example, availability of a genuine choice and degree of probability of destructive consequences, at pp. 78–80). See also Behrens, *ICC Commentary* (2010), pp. 126–7.

[180] On the continental concept of *dolus eventualis* that can be situated somewhere between purpose/knowledge and recklessness/negligence, see Fletcher, *Basic Concepts* (1998), p. 123 and Ambos, *CLF*, 10 (1999), 21 with further references.

[181] Gil Gil, *Derecho Penal Internacional* (1999), pp. 236 ff., 259 with reference to her teacher Cerezo Mir in nn. 124 and 127 and further references in n. 136. See also for a summary of her position, Gil Gil, *ZStW*, 111 (2000), 395.

[182] See on the general structure of attempt, see Volume I of this treatise, pp. 240 ff.

[183] Gil Gil, *Derecho Penal Internacional* (1999), p. 241.

the crime, or, at least, knowledge of the co-perpetrators' intention to that effect, and, at the same time, considering the realization of these acts as possible. Otto Triffterer arrives at the same conclusion, allowing in principle for *dolus eventualis*, but his argument is based less on doctrinal than policy considerations.[184] In essence, he argues that a literal and historical interpretation of the intent requirement is not conclusive, but that, from a teleological perspective, it does not make a difference if one acts with a special intent or only with *dolus eventualis* with regard to the destruction of the group.[185] His view is motivated mainly by the difficulty of proving a special intent and, thus, bringing about convictions for genocide.[186]

Other authors have argued that the 'intent to destroy' encompasses the entire scope of direct intent, in other words that it also includes positive knowledge (*dolus directus* of the second degree). Alexander Greenawalt makes the case for such a knowledge-based approach on the basis of a historical and literal interpretation of the intent concept in the Genocide Convention and in national (criminal) law which he finds inconclusive, leading to 'multiple interpretations'.[187] Greenawalt argues that 'principal culpability should extend to those who may lack a specific genocidal purpose, but who commit genocidal acts while understanding the destructive consequences of their actions'.[188] In cases in which a 'perpetrator is otherwise liable' for genocide, the requirement of genocidal intent is fulfilled if he '*acted in furtherance* of a campaign targeting members of a protected group and knew that the goal or manifest effect of the campaign was the destruction of the group'.[189] Greenawalt's reading of the intent requirement of the Convention combines two elements: selection of group members based on their membership of the group and knowledge of the destructive consequences of the respective conduct for the survival of the group.[190] Hans Vest follows the knowledge-based approach and takes it further, focusing on the twofold structure of genocidal intent.[191] According to Vest, this structure consists of the 'mixed individual–collective point of reference' of the intent: while the general intent refers to the individual acts of the genocide definition ('*Einzeltat*'), the 'intent to destroy' refers to the collective or broader action inherent in any genocidal conduct,[192] that is, to 'the overall conduct of the genocidal campaign and its consequences' ('*Gesamttat*').[193] As to this 'collective' or 'contextual' intent, 'practical certainty' on the side of the perpetrator as to the genocidal consequence of the collective operation he is participating in, suffices as an intent standard: 'the knowledge-based standard of genocidal intent is established when the perpetrator's knowledge of the consequences of the overall conduct reaches the *level of practical certainty*'.[194] In fact, before Vest, John

[184] Triffterer, *LJIL*, 14 (2001), 403 ff.
[185] Triffterer, *LJIL*, 14 (2001), 404–5. See also Triffterer, 'Elements of Crimes', in Stahn and Sluiter, *Emerging Practice* (2009), p. 390 where he argues that with regard to the context element (as defined in the Elements of Crimes), 'general intent' would be sufficient.
[186] Triffterer, *LJIL*, 14 (2001), 405–6 ('much more difficult to be proven . . . ').
[187] Greenawalt, *ColLR*, 99 (1999), 2279. [188] Greenawalt, *ColLR*, 2259, 2265.
[189] Greenawalt, *ColLR*, 99 (1999), 2288 (emphasis added). [190] Greenawalt, *ColLR*, 2289.
[191] Vest, *JICJ*, 5 (2007), 790 ff. Originally Vest, *Genozid* (2002), pp. 101 ff.; Vest, *ZStW*, 113 (2001), 480 ff.
[192] Vest, *JICJ*, 5 (2007), 785–6, 789–90. [193] Vest, *JICJ*, 5 (2007), 790.
[194] Vest, *JICJ*, 5 (2007), 793 (emphasis in the original).

Jones had suggested a similar distinction between intent as an attribute of the genocidal plan and of the individual participating in it.[195] He argued that the intent to destroy is (only) an attribute of the genocidal plan while the individual participating in this plan only needs—as in the case of crimes against humanity—to possess intent with regard to the underlying acts (e.g. Article 6(a)–(e) ICC Statute) and knowledge with regard to the genocidal context. Claus Kreß follows, in essence, this structure-based approach, distinguishing between the 'collective level of genocidal activity' and the 'individual genocidal conduct'.[196] Accordingly, in the 'typical case' of genocide, the low-level perpetrator must, on the one hand (drawing a parallel to crimes against humanity), act with knowledge of the collective genocidal attack,[197] and on the other (following Gil Gil), with *dolus eventualis* as to the, at least, partial destruction of a protected group.[198]

(4) The structure- and knowledge-based approaches combined

The knowledge-based approach rests on the premise that the concept of 'intent' is not limited to a purely volitional or purpose-based reading. This is correct. Greenawalt demonstrates convincingly that the historical and literal interpretation of the Genocide Convention is not conclusive in that regard.[199] As to a literal interpretation, the wording of Article 6 ICC Statute (modelled on Article 2 Genocide Convention) is by no means clear: while the French and Spanish versions seem to suggest a volitional interpretation by employing a terminology which, *prima facie*, expresses purpose-based conduct ('*l'intention de détruire*'; '*intención de destruir*'); the English version ('intent to destroy') is already in its wording unclear, since the meaning of 'intent'—as has been shown—is ambiguous. Thus, a literal interpretation of the term 'intent' does not indicate any *clear* preference for a purpose- or knowledge-based approach.[200] To be sure, genocide requires a general 'intent to destroy', not a 'special' or 'specific' intent in the sense of a '*dolus specialis*'. While the 'intent to destroy' may be understood, as explained at the beginning of this section, as an *ulterior intent* in the sense of the double intent structure of genocide, it is quite another matter to give this requirement a purpose-based meaning by reading into the offence definition the qualifier 'special' or 'specific'. Even if this qualifier was part of the offence definition, it does not necessarily refer to the *degree or intensity* of the intent.[201] Instead, it may also be interpreted, as opposed to 'general' intent, in the sense of the double intent structure,

[195] Jones, 'Genocide', in Vorah et al., *Inhumanity* (2003), pp. 468, 471, 473, 477, 479–80.

[196] Kreß, *JICJ*, 3 (2005), 572 ff.; see also Kreß, '§ 6', in Joecks and Miebach, *Münchener Kommentar*, vi/ii (2009), mn. 82 ff. With essentially the same argument in favour of the knowledge-based approach, see Paul, *Analyse* (2008), pp. 255 ff., especially referring to Vest (258) and suggesting a concrete reform proposal (273, 323–4). Also, van Sliedregt, *JICJ*, 5 (2007), 192–3 finds the approach taken by Kreß 'appealing', but ultimately sticks to the ICTY/ICTR's under-theorized view with the mere formal argument that it 'cannot be ignored'.

[197] Kreß, *JICJ*, 3 (2005), 573 ff.

[198] Kreß, *JICJ*, 3 (2005), 576–7.

[199] See note 187 and accompanying text.

[200] For the same view, see Kreß, *JICJ*, 3 (2005), 567 ff. (570, 572); Kreß, '§ 6', in Joecks and Miebach, *Münchener Kommentar*, vi/ii (2009), mn. 83.

[201] This is, however, the prevailing view in the general criminal law doctrine as regards the meaning of 'specific intent', see for example Fiandaca and Musco, *Diritto Penale* (2009), pp. 367 ff.

thus, it would merely clarify that the 'special' intent to destroy must be distinguished from the 'general' intent referring to the underlying acts.[202] If one follows this view, that is, that a literal reading of the intent concept does not unambiguously determine the meaning of the 'intent to destroy', a solution must be sought by means of a systematic and teleological interpretation. Clearly, such an interpretation must not, abiding to the *lex stricta* principle pursuant to Article 22(2),[203] stretch beyond the boundaries fixed by the letter of the (criminal) law; yet, if these boundaries are not, as demonstrated in the preceding section, precisely determined, recourse to other methods of interpretation is not only legitimate but also necessary.

Such an interpretation must start, systematically, from the structure-based approach as developed by Vest and Kreß. This approach rests on the distinction between the general intent with regard to the individual acts ('*Einzeltaten*') and the 'intent to destroy' with regard to the collective genocidal action ('*Gesamttat*').[204] Both forms of intent encompass the *mens rea* of the genocide offence but must, as explained at the beginning of this section, be distinguished. The—here relevant—'intent to destroy' refers to the collective genocidal action and, thus, includes the context element of the crime of genocide. In other words, while the objective offence definition lacks—contrary to the definition of the ICC's Elements of Crimes[205]—a context element,[206] this element, as already argued,[207] becomes part of the (subjective) offence definition by means of the 'intent to destroy' requirement as its 'carrier' or 'holder'. Turning to the teleological interpretation, the crucial question then goes to the *rationale* of the 'intent to destroy' requirement. As stated at the beginning of this section, the main purpose of this requirement is to distinguish genocide from other crimes, especially 'general' crimes against humanity. This purpose, however, does not predetermine the precise meaning or contents of this requirement. In fact, while this particular requirement turns genocide into a special crime against humanity, that is, a crime not only directed against individuals but against a group as such, it fulfils this function independently of either its purpose- or knowledge-based meaning. In other words, the status of genocide as the 'crime of the crimes', characterized by a special degree of wrongfulness, is not predicated on either a purpose- or knowledge-based reading of the 'intent to destroy' element,[208]

[202] In this spirit, see also Triffterer, 'Kriminalpolitische und dogmatische Überlegungen', in Schünemann et al., *FS Roxin* (2001), pp. 1423, 1438 ff.

[203] See on this principle, Volume I of this treatise, pp. 88 ff.

[204] The *Krstić* TC also distinguished, albeit not with the necessary precision, between, on the one hand, the 'individual intent' and 'the intent involved in the conception and commission of the crime' and, on the other, the 'intent to destroy' and the 'intent of particular perpetrators' (*Krstić*, No. IT-98-33, para. 549; also referred to by Vest, *JICJ*, 5 (2007), 794 with n. 47 and Kreß, *JICJ*, 3 (2005), 573 with n. 45).

[205] See the last Element (no. 4 or 5) to each act requiring that 'the conduct took place in the context of a manifest pattern of similar conduct . . . ' (Elements of Crimes, ICC-ASP/1/3, part II-B).

[206] Against a context element for this reason, see Triffterer, *LJIL*, 14 (2001), 407.

[207] Note 119 and main text.

[208] For a purpose-based interpretation, however, see the prevailing view in the German doctrine, for example Roxin, *Strafrecht I* (2006), § 10 mn. 74, § 12 mn. 15 discussing the respective provision in the German law (previously § 220a of the German Criminal Code [*Strafgesetzbuch*], now § 6 VStGB). For, apparently, a different view, see Triffterer, *LJIL*, 14 (2001), 404–5 who does not, however, really discuss the teleological argument.

but on its specificity in protecting certain groups from attacks and, ultimately, destruction.[209]

Against this background it is now possible to suggest a *twofold solution distinguishing between low-level and mid-/high-level perpetrators*.[210] As to *low-level perpetrators*—the easily interchangeable 'footsoldiers' of a genocidal campaign who normally lack the means to destroy a group alone[211]—it is neither necessary nor realistic to expect that they always act with purpose or desire to destroy. Indeed, it is possible to conceive of a collective genocidal campaign without any or only some individual (low-level) perpetrators acting with a destructive purpose or desire.[212] In fact, as these individuals cannot, on their own, contribute in any meaningful way to the ultimate destruction of a group, they can neither express any meaningful, act-oriented will as to the overall result. Thus, it should suffice for genocide liability that these perpetrators act with *knowledge*, that is, that they know that they are a part of a genocidal campaign and, thus, contribute to the materialization of the collective intent to destroy.[213] There are at least four arguments in support of this approach. First of all, the incorporation of a context element in the offence definition by way of its special subjective requirement[214] corresponds to the criminological reality of genocidal conduct and campaigns, since a genocide cannot be committed by a few crazy individuals alone, but needs intellectual masterminds and an organizational apparatus to implement the evil plans.[215] Secondly, these low-level perpetrators are, albeit carrying out the underlying genocidal acts with their own hands, in terms of their overall contribution to the genocidal campaign only secondary participants—more precisely, aiders or assistants.[216] In other words, while they are the direct executors of the genocidal plan and, therefore, should be convicted as such (i.e. as principals), their executive acts receive only their full 'genocidal meaning' because there a plan exists in the first place. As the executors were not involved in designing this plan, but are, in a normative sense, only used as mere instruments to implement it, they need not, even according to the mainstream view in international criminal law (ICL) jurisprudence and doctrine, possess the destructive special intent themselves, but need only know of its existence. Admittedly, this may be

[209] In the same vein, see Kreß, *JICJ*, 3 (2005), 576.

[210] For a similar, albeit not further elaborated, 'differential approach', see also van der Wilt, *JICJ*, 4 (2006), 243 ff. A similar distinction was already made by Jorgensen, *ICLR*, 1 (2001), 309. For a much more sophisticated typology of perpetrators of international crimes which may also be applied to genocide, see Smeulers, 'Perpetrators', in Smeulers and Haveman, *Supranational Criminology* (2008), pp. 240 ff.

[211] Kreß, *JICJ*, 3 (2005), 577 with n. 61 speaks insofar of 'the typical case'.

[212] See Vest, *ZStW*, 113 (2001), 486; concurring, Kreß, *JICJ*, 3 (2005), 573.

[213] The underlying distinction was recognized in a first draft of the ICC Elements of Crimes (see the last element [no. 3 or 4] to each underlying act, here 'Genocide by killing': 'The accused knew . . . that the conduct would destroy . . . such group . . . ' [Elements of Crimes, ICC-ASP/1/3, part II-B]), but the final version retained only the (special) intent requirement (see Elements of Crimes, Article 6, third element in each case).

[214] See note 119 with accompanying text.

[215] cf. *Krstić*, No. IT-98-33, para. 549 ('The gravity and scale of the crime of genocide ordinarily presume that several protagonists were involved in its perpetration'). See also Schabas, *Genocide* (2009), pp. 243 (a 'knowledge-based' approach highlights 'the collective dimension of the crime of genocide'), 244 ('genocide presents itself as the archetypical crime of State, requiring organization and planning'); Shaw, *Genocide* (2007/2008), p. 82 ('Genocide has been seen legally as an organized, not a spontaneous, crime; it could not be committed by an individual acting alone').

[216] For a similar complicity approach, see also Kreß, *JICJ*, 3 (2005), 574–5.

different in cases of a 'spontaneous' genocide, if one assumes, *arguendo* and against our first argument, that such cases may exist. Yet, at any rate, in such cases the direct perpetrators will possess the special intent themselves and, thus, fulfil an even higher threshold of the subjective requirements of being a principal to genocide. Thirdly, although there is, of course, a structural difference between genocide and crimes against humanity as to the scope of protection, the former has, as already said at the beginning of this chapter,[217] developed out of the latter and remains, in essence, a (special) crime against humanity. This 'structural congruity'[218] justifies the idea of structuring genocide as crime against humanity with regard to the 'knowledge-of-the-attack' requirement stipulated in Article 7 ICC Statute. Fourthly, in terms of the direct perpetrator's (hostile) attitude towards the group, it does not make a difference whether he acts himself with purpose or knowledge of the overall genocidal purpose.[219] He may even act with a kind of indirect purpose by not distancing himself completely from the overall genocidal purpose. In all these cases the low-level perpetrator expresses his contempt for the respective group and takes a clear decision against the legal interest protected by the genocide offence.

In the result, all this means that a simple, low-level *genocidaire* as well as a perpetrator of a crime against humanity must (only) act with knowledge of the respective context required by both crimes. He may also possess a purpose-based intent, for example in the case of a 'spontaneous' genocide, but this is not a prerequisite of his (subjective) liability. The context serves in both cases as the object of reference of the perpetrator's knowledge, in other words, the knowledge needs not to be directed at the ultimate destruction of the group in the future, but only at the overall genocidal context. Indeed, the ultimate destruction of the group is only a future expectation which as such cannot be known, but only hoped for or desired.[220] As to genocide as a whole, the low-level perpetrator participates in the respective plan or enterprise, that is, his individual acts constitute, together with the acts of the other low-level perpetrators, the realization of the genocidal will or purpose represented by the leaders or masterminds of the enterprise. The existence of the enterprise interconnects the acts of the low-level perpetrators and, at the same time, links them to the mastermind's will, the acts of the subordinate and the thoughts of the superiors complement each other.

From this it follows further, indeed as a corollary, that the *purpose-based approach* must be upheld for *top-level perpetrators*—those who are the intellectual and factual leaders of the genocidal enterprise. They are the brain of the 'genocidal operation' and have the power to catalyze the process in the first place. They are the ones that can and must act with the ulterior intent which is, as explained at the beginning of this section, characteristic of the crime of genocide and which turns it into a goal-oriented crime.

[217] See Section A. (1).

[218] Kreß, *JICJ*, 3 (2005), 575–6;Kreß, '§ 6', in Joecks and Miebach (eds.), *Münchener Kommentar*, vi/ii (2009), mn. 87.

[219] See also Paul, *Analyse* (2008), pp. 259 ff. with further references.

[220] See note 146. See also Triffterer, *LJIL*, 14 (2001), 406, admitting that the 'particular intent is directed towards the realization of the expectations of the perpetrator in the future', but failing to acknowledge that these future expectations can only be desired or wanted, in other words, be the object of hope but not of certainty or knowledge.

Who, if not the top-level perpetrators, can realistically possess the ulterior intent directed at the ultimate destruction of a protected group? The more difficult question is what to require with regard to the *mid-level perpetrators*—those persons who, like Adolf Eichmann, have an important organizational or administrative function without which the genocidal campaign could not have been implemented. These persons must act on *purpose*, since they do not execute the underlying acts—as the low-level perpetrators do—but are, rather, intellectual perpetrators and more resemble, therefore, top-level perpetrators. Thus, they can be qualified as *genocidaires* only if they share the top perpetrators' purpose-based intent.

The distinction between top-/mid-level and low-level perpetrators according to their status and role in the genocidal enterprise is also convincing from a *policy perspective*. By retaining the requirement of a purpose-based intent with regard to the top-/mid-level perpetrators, it avoids the arbitrary expansion and politicization of the genocide offence along a slippery slope that ultimately leads to the classification of 'ordinary' crimes against humanity as genocide,[221] thereby devaluating the abhorrent character of the latter. In this sense the purpose–based approach has an important function as a 'preventative bulwark'.[222] Indeed, the discriminatory selection and targeted persecutions of persons or even members of a group alone does not, contrary to what an *absolute* knowledge–based approach—extending the knowledge requirement to all levels of perpetrators—suggests,[223] constitute genocide, but 'only' persecutions as a crime against humanity.

The combination of the structure- and knowledge-based approaches suggested here calls for a knowledge-based reading of the 'intent to destroy' requirement in the case of low-level perpetrators with regard to the genocidal context as the object of reference of the intent to destroy. Insofar, a *lower mental standard*, for example *dolus eventualis* or even recklessness,[224] cannot be admitted, since it would radically change the character of the genocide offence in terms of its wrongfulness and speciality *vis-a-vis* crimes against humanity. Also, the argument concerning the parallel structures of attempt and genocide, as submitted by Gil Gil in support of *dolus eventualis*,[225] is not cogent: while it can be argued that the *actus reus* of genocide is structurally identical to that of an attempt crime, this does not mean that it must have the same subjective requirements. On the contrary, an attempt crime does not necessarily contain a special subjective element that is in any way comparable to the intent to destroy. Further, recognizing a *dolus eventualis* with regard to the genocidal context would be in contradiction to the suggested structural congruity between genocide and crimes against humanity. For if this congruity allows, on the one hand, for a knowledge-based approach for genocide with regard to low-level perpetrators—drawing on the knowledge-of-the-attack requirement in crimes against humanity—this standard constitutes, on the other hand, a minimum which would be undermined by a lower standard, such as *dolus eventualis*, as to the context element.

[221] The distinction is also emphasized by *Akayesu*, No. ICTR-96-4-T, para. 469.
[222] See in the same vein, Rajković, *LJIL*, 21 (2008), 904.
[223] Greenawalt, *ColLR*, 99 (1999), 2287–8 and 2293–4 (stressing the threat to the survival of the group).
[224] Against *dolus eventualis*, see also Paul, *Analyse* (2008), pp. 262–3.
[225] See note 181 and main text.

However, the interpretation of the 'intent to destroy' with regard to the *ultimate destruction* of the group *in the future* is a different matter. As already explained, such a future expectation cannot be known, but only hoped for or desired.[226] Take, for example, the case of a soldier who knowingly participates in the destruction of a certain ethnical group, so that he satisfies the knowledge-based interpretation as to the genocidal context, but acts only with indifference as to its ultimate destruction, that is, with *dolus eventualis*.[227] It would not make sense to require knowledge from this soldier as to the ultimate destruction of the group, since he simply cannot possess this knowledge. As to this future event, he can only act with purpose or desire, that is, with *dolus directus* in the first degree. Surely, he may also take it into account as a possibility or even approve of it in the sense of *dolus eventualis*,[228] but to allow for this lower mental standard would not only be inconsistent with the interpretation of the terms '*intent*', '*intention*', '*intención*', or '*Absicht*', but would also constitute a forbidden analogy at the expense of the accused and, therefore, violate the *nullum crimen* principle.[229] Thus, if any mental state as to the ultimate destruction is required at all, it must be a purpose-based state.

(5) Consequences of the combined structure- and knowledge-based approach for other forms of participation in genocide

(a) The jurisprudence

While the case law, as shown in the previous section, requires a purpose-based intent for any form of perpetration in genocide, it is not completely clear as to whether secondary participants must also act with this kind of intent. As to *complicity*, the *Akayesu* TC held that an accomplice to genocide in the sense of Article 2(3)(e) ICTRS need not necessarily possess the *dolus specialis* himself,[230] it is enough that he knows or has reason to know that the principal acted with the specific intent,[231] because accomplice liability is accessorial to principal liability ('borrowed criminality', '*criminalité d'emprunt*').[232] Surprisingly, however, the *Akayesu* TC demanded proof of special intent where a person is accused of aiding and abetting, planning, preparing, or executing genocide in the sense of Article 6(1) ICTRS,[233] that is, it rejected the specific intent requirement for the special genocide complicity, but demanded it for the general forms of secondary participation. This inconsistency was rightly dismissed by the *Musema* TC which held that complicity in genocide—independent of its legal basis and form—requires only knowledge of the genocidal intent.[234] In a similar vein, the *Krstić* AC argued that the general participation provision of Article 7(1) ICTYS should

[226] See note 220 and main text.
[227] cf. Gil Gil, *Derecho Penal Internacional* (1999), pp. 262–3 and 261 ff. for further examples.
[228] See also Kreß, *JICJ*, 3 (2005), 577 considering it 'more realistic' to require *dolus eventualis* instead of positive knowledge with regard to the effective destruction of the group. It is, however, a different matter whether Article 30 ICC Statute provides for *dolus eventualis* in the first place (contra Volume I of this treatise, pp. 276 ff.).
[229] cf. Volume I of this treatise, pp. 88 ff.
[230] *Akayesu*, No. ICTR-96-4-T, paras. 540, 545, 548.
[231] *Akayesu*, No. ICTR-96-4-T, para. 541.
[232] *Akayesu*, No. ICTR-96-4-T, para. 528.
[233] *Akayesu*, No. ICTR-96-4-T, para. 546.
[234] *Musema*, No. ICTR-96-13-T, paras. 181 ff.

be read into the special genocide provision of Article 4(3)(e) ICTYS, leading to a common form of 'aiding and abetting genocide'.[235] Thus, the case law unanimously takes the view that an aider or assistant to genocide need not possess the specific intent himself, it is enough if he is aware of such an underlying intent.[236] It goes too far, however, to lower this knowledge requirement to mere culpable ignorance ('had reason to know').[237]

Regarding *incitement* to commit genocide (Article 2(3)(c) ICTRS), the *Akayesu* TC called for proof of the specific intent to destroy held by the inciter himself.[238] This was confirmed by other ICTR judgments.[239] There is no reason to hold otherwise for 'instigation' as a form of (secondary) participation within the meaning of Article 6(1) ICTRS. Although the view expressed by the *Akayesu* AC that incitement is a synonym for instigation[240] has been rejected by other jurisprudence,[241] it does not bear on the fact that a specific intent is required, for there is a structural similarity between instigation and incitement which remains unchanged by the inchoate nature of the latter.[242]

Regarding *conspiracy* to commit genocide, a specific intent is required too since 'it rests on the concerted intent to commit genocide', that is, 'the requisite intent for the

[235] *Krstić*, No. IT-98-33-A, paras. 138–9. See also *Stakić*, No. IT-97-24-T, para. 531; *Semanza*, No. ICTR-97-20-T, para. 394; *Blagojević and Jokić*, No. IT-02-60-T, para. 679.

[236] **ICTY:** *Krstić*, No. IT-98-33, para. 140; *Duško Tadić*, No. IT-94-1-A, para. 229; *Blagojević and Jokić*, No. IT-02-60-T, para. 782; *Prosecutor v Blagojević and Jokić*, No. IT-02-60-A, Appeals Chamber Judgment, para. 127 (9 May 2007); *Brđanin*, No. IT-99-36-T, para. 730; *Prosecutor v Brđanin*, No. IT-99-36-T, Decision on Motion for Acquittal pursuant to Rule 98*bis*, para. 66 (28 November 2003); *Prosecutor v Brđanin*, No. IT-99-36-A, Decision on Interlocutory Appeal, para. 7 (19 March 2004); *Prosecutor v Krnojelac*, No. IT-97-25-A, Appeals Chamber Judgment, para. 52 (17 September 2003) concerning the crime of persecution ('. . . the aider and abettor in persecution, an offence with a specific intent, must be aware not only of the crime whose perpetration he is facilitating but also of the discriminatory intent of the perpetrators of that crime. He need not share the intent but he must be aware of the discriminatory context in which the crime is to be committed . . . '). See also *Prosecutor v Vasiljević*, No. IT-98-32-A, Appeals Chamber Judgment, para. 142 (25 February 2004); *Prosecutor v Mrkšić and Šljivančanin*, No. IT-95-13/1-A, Appeals Chamber Judgment, para. 49 (5 May 2009); *Prosecutor v Haradinaj, Balaj and Brahimaj*, No. IT-04-84-A, Appeals Chamber Judgment, para. 57 (19 July 2010). **ICTR:** *Bagilishema*, No. ICTR-95-1A-T, para. 71; *Prosecutor v Elizaphan and Gérard Ntakirutimana*, No. ICTR-96-10-A and ICTR-96-17-A, Appeals Chamber Judgment, para. 500 (13 December 2004); *Semanza*, No. ICTR-97-20-T, paras. 394-5; *Seromba*, No. ICTR-2001-66-A, para. 56.

[237] But see in this vein, *Akayesu*, No. ICTR-96-4-T, para. 541; concurring, *Musema*, No. ICTR-96-13-T, para. 182.

[238] *Akayesu*, No. ICTR-96-4-T, para. 560 ('. . . desire on the part of the perpetrator to create by his actions a particular state of mind necessary to commit such a crime in the minds of the person(s) he is so engaging. That is to say that the person who is inciting to commit genocide must have himself the specific intent to commit genocide . . . '). Generally on incitement, see Benesch, *VirgJIL*, 48 (2008), 485–528; see also Volume I of this treatise, pp. 132 ff., 170.

[239] cf. *Prosecutor v Nchamihigo*, No. ICTR-2001-63-A, Appeals Chamber Judgment, para. 61 (18 March 2010); *Prosecutor v Ruggiu*, No. ICTR-97-32-I, Trial Chamber Judgment and Sentence, para. 14 (1 June 2000); *Prosecutor v Nahimana*, No. ICTR-99-52-T, Trial Chamber Judgment, para. 1012 (3 December 2003).

[240] *Prosecutor v Akayesu*, No. ICTR-96-4-A, Appeals Chamber Judgment, paras. 474 ff. (1 June 2001) where the Judges held that on the basis of the French version of the Statute ('*incitation*') this is to be understood synonymously to 'incitement'.

[241] *Prosecutor v Kalimanzira*, No. ICTR-05-88-T, Trial Chamber Judgment, paras. 511–16 (22 June 2009).

[242] See Volume I of this treatise, pp. 132, 170.

crime of conspiracy to commit genocide is, *ipso facto*, the intent required for the crime of genocide, that is the *dolus specialis* of genocide'.[243]

As to *Joint Criminal Enterprise* (JCE) it is uncontroversial that all participants in a JCE I must 'share' the (specific) intent of the respective offence,[244] but the standard for a JCE III is controversial. The *Stakić* TC took a strict view, applying the special intent requirement also to JCE III since otherwise it would be 'so watered down that it is extinguished' and since the 'notions of "escalation" to genocide, or genocide as a "natural and foreseeable consequence" of an enterprise not aimed specifically at genocide are not compatible with the definition of genocide under Article 4(3)(a)'.[245] Yet, this position did not find the approval of the Appeals Chamber. In *Brđanin* it held that JCE III is, 'as a mode of liability', not 'different from other forms of criminal liability which do not require proof of intent'.[246] Consequently, a member of a JCE III may be convicted for genocide if it was reasonably foreseeable for him that one of the objective acts of the genocide offence would be committed and that it would be committed with genocidal intent.[247] This was confirmed by the Appeals Chamber decision in the *Karadžić* case, which stipulated that awareness of a 'probability' in this respect is not required.[248]

Still more confusing is the situation in the case of *superior responsibility*. While for the *Stakić* TC the superior needed to possess the requisite specific intent,[249] the *Brđanin* AC saw no 'inherent reason' for this view. Rather, it applied the mental standard of command responsibility, that is, 'the superior must have known or had reason to know of his or her subordinate's specific intent'.[250] As a consequence, while (only) subordinates need to possess the specific intent, the superior does not[251] and the case law turns, in fact, a specific intent crime into a crime of negligence.

(b) The correct view: a twofold distinction between top-/mid- and low-level perpetrators on the one hand, and principal and secondary forms of participation on the other

The point of departure of the view proposed here is twofold. First, it follows from the combined structure- and knowledge-based approach taking into account the status and

[243] *Musema*, No. ICTR-96-13-T, para. 192.

[244] See *Prosecutor v Milutinović et al.*, No. IT-05-87-T, Trial Chamber Judgment, para. 109 (26 February 2009).

[245] *Stakić*, No. IT-97-24-T, paras. 530 and 558. See also *Prosecutor v Stakić*, No. IT-97-24-T, Decision on Rule 98*bis* Motion for Judgment of Acquittal, para. 93 (31 October 2002); *Brđanin*, No. IT-99-36-T, Decision on Motion for Acquittal Pursuant to Rule 98*bis*, para. 57.

[246] *Brđanin*, No. IT-99-36-A, Decision on Interlocutory Appeal, para. 7; see also *Prosecutor v Stakić*, No. IT-97-24-A, Appeals Chamber Judgment, para. 38 (22 March 2006).

[247] *Brđanin*, No. IT-99-36-T, para. 709; *Prosecutor v Slobodan Milošević*, No. IT-02-54, Decision on Motion for Judgment of Acquittal, paras. 291, 292, 300 (16 June 2004); concurring, Cayley, *JICJ*, 6 (2008), 839.

[248] *Prosecutor v Karadžić*, No. IT-95-5/18-AR72.4, Decision on Prosecution's Motion Appealing Trial Chamber's Decision on JCE III Foreseeability, para. 18 (25 June 2009).

[249] *Stakić*, No. IT-97-24-T, Decision on Rule 98*bis* Motion, para. 92.

[250] *Brđanin*, No. IT-99-36-A, Decision on Interlocutory Appeal, para. 7; see also *Brđanin*, No. IT-99-36-T, para. 720.

[251] *Blagojević and Jokić*, No. IT-02-60-T, para. 686; Kayishema and Ruzindana, No. ICTR-95-1-T, para. 92; *Prosecutor v Ntagerura et al.*, No. ICTR-99-46-T, Trial Chamber Judgment, paras. 653–4 (25 February 2004).

role of the perpetrators. If the purposed-based reading of the 'intent to destroy' requirement is only maintained for *top- and mid-level perpetrators*, then only for these does the question arise as to whether their mere secondary participation in genocide must be treated differently. In contrast, as to the *low-level perpetrators*, the knowledge-based approach defended in the previous section must also apply to forms of secondary participation. Secondly, one must distinguish between the different forms of 'commission' and participation. More precisely, they should be distinguished between principal-like forms of participation and secondary forms of participation. Consequently, all *forms of perpetration*, including co-perpetration, JCE I[252] and perpetration by means, as well as similar forms of *intellectual and/or mental control* of the genocidal conduct (soliciting, inducing, incitement, conspiracy) are to be treated like direct perpetration.[253] This means that in the case of top- and mid-level participants a purpose-based intent is required, while in the case of low-level participants knowledge as to the genocidal context is sufficient. In contrast, secondary participation in its weakest form (i.e. complicity by *assisting* a principal), requires only knowledge as to the existence of the special intent of the principal.[254] This lower standard also follows from the rationale of any form of secondary participation, in particular assistance in a crime. If such a secondary participation is, as correctly recognized by the *Akayesu* TC,[255] a form of derived or accessorial responsibility ('borrowed criminality') with regard to the main act or principal conduct, it suffices that the accomplice acts with knowledge of the genocidal purpose of the principal perpetrators.

The application of these principles to the forms of participation discussed in the case law results in the following: as to *complicity*, the distinction in *Akayesu* cannot be followed.[256] It simply makes no sense to treat complicity based on the Genocide Convention differently from general complicity. With the adoption of the Rome Statute, we can proceed from the assumption that there is a general law of complicity that is equally applicable for all international crimes. It is therefore correct and in perfect harmony with these considerations if the *Akayesu* TC and the subsequent case

[252] On the structural identity between co-perpetration and JCE I, see Volume I of this treatise, pp. 121 ff.

[253] Also for JCE III, see Mugwanya, *Genocide* (2007), pp. 131–2; for conspiracy, see Cryer, 'Liability', in Cryer et al., *Introduction ICL* (2010), p. 384; different view on incitement, see Werle, *Principles* (2009), mn. 485 (knowledge is sufficient); Werle, Völkerstrafrecht (2012), mn. 527.

[254] In the same vein, see *Krstić*, No. IT-98-33, paras. 140 ff., with further references from the jurisprudence (n. 235) and national law (n. 236 ff.); for knowledge see also *Ndindabahizi*, No. ICTR-2001-71-I, para. 457 with further references; *Blagojević and Jokić*, No. IT-02-60-A, para. 127 with further references; *Seromba*, No. ICTR-2001-66-A, para. 146; *Prosecutor v Frans Van Anraat*, AX6406, Rechtbank's-Gravenhage, 09/751 003-04, Judgment, paras. 6.5.1. and 8 (23 December 2005) (in which the defendant was only convicted for crimes against humanity and—due to lack of knowledge—not for genocide). See also van der Borght, *CLF*, 18 (2007), 125–6; van der Wilt, *JICJ*, 4 (2006), 246–7; Gropengießer, 'Die völkerstrafrechtlichen Verbrechen', in Eser and Kreicker, *Nationale Strafverfolgung*, i (2003), pp. 107–8; Eboe-Osuji, *JICJ*, 3 (2005), 63 ff.; van Sliedregt, *JICJ*, 5 (2007), 194; Akhavan, *JICJ*, 3 (2005), 994; Folgueiro, 'Genocidio', in Parenti et al., *Crímenes* (2007), p. 176; Mugwanya, *Genocide* (2007), pp. 132–3 (different on p. 201!); Werle, *Völkerstrafrecht* (2012), mn. 599, 821–4; Werle, *Principles* (2009), mn. 761–4, 518. In favour of a purpose-based intent, however, see Mettraux, *Crimes* (2005), pp. 259–60, 287; Obote-Odora, *ICLR*, 2 (2002), 377, 382 ff., 387, 397 ff.; also, apparently, Clark, *CLF*, 19 (2008), 547 ff. referring to Article 25(3)(c) and (d) ICC Statute.

[255] See note 232 and main text.

[256] For a critical view, see also Greenawalt, *ColLR*, 99 (1999), 2282 ff.; van der Wilt, *JICJ*, 4 (2006), 244 ff.; Dawson and Boynton, *HarvHRJ*, 21 (2008), 256 ff.; Greenfield, *JCL&Crim*, 98 (2008), 945 ff.

law take the view that the accomplice (assistant in a crime) only needs to *know* of the main perpetrators' special intent without possessing it himself. To give an example: if A organizes a genocidal campaign against Jews with the requisite intent to destroy this religious group and B assists in the killing of some Jews being aware of A's genocidal purpose, B acts with the sufficient knowledge as to the genocidal context. This view also finds support in national case law[257] and in academic writing.[258] It applies to all assistants, independent of their status in the genocidal apparatus. The decisive factor in this case is not the assistant's hierarchical level, but the fact that he acts only as an assistant and, therefore, need not possess a purpose-based intent himself.

The knowledge standard in cases of mere assistance is also sound for policy reasons. To require a purpose-based intent on the part of the assistant himself would entail impunity in the many cases where the destruction of a particular group is not the assistant's aim or goal, but only accepted by him as a foreseeable side-effect.[259] Think, for example, of a company that utilizes forced labourers who belong to a particular group and imposes conditions of life upon them calculated to lead to the partial or complete bodily destruction of the group in question (Article 6(c) ICC Statute), but where the primary goal of the company is not the destruction of the group but, rather, profit maximization through the use of cheap labour. Indeed, the often-existing complicity of big business in protracted armed conflicts and, thus, in genocide committed in the context of such conflicts is a strong argument for accepting a knowledge standard.[260] One can even accept a lower standard, for example *dolus eventualis*—as was done by the Court of Appeal of the Netherlands in the *Van Anraat* case[261]—or culpable ignorance—as was done by the *Akayesu* and *Musema* TCs[262]—as long as this lower standard is included in the applicable concept of intent. It is, however, misleading to equate the 'had reason to know' standard with *dolus eventualis*,[263] at least if one understands this standard as a form of intent as opposed to a negligence standard.

As to *incitement* and *conspiracy*, the particular character of these modes of participation as criminalizing forms of 'anticipated' criminal conduct ('*Vorverlagerung*') with a view to the (abstract) endangerment or risk that they pose to legally protected

[257] BayObLG (*Bayerisches Oberstes Landesgericht*), *NJW*, 51 (1998), 392 ff., with case note by Ambos, *NStZ*, 18 (1998), 139.

[258] cf. Arnold, *CLF*, 14 (2003), 145, 151; van der Wilt, *JICJ*, 4 (2006), 246; van der Wilt, *JICJ*, 6 (2008), 560; Werle, *Principles* (2009), mn. 761–4; Werle, *Völkerstrafrecht* (2012), mn. 821–4; van Sliedregt, *Individual Criminal Responsibility* (2012), pp. 121 ff.; dissenting Schabas, *Genocide* (2009), pp. 264, 352 ff., who criticizes the different *mens rea* requirements for the various forms of complicity, arguing in favour of a knowledge-based approach for all forms of participation.

[259] According to Heine and Vest, 'Murder', in McDonald and Swaak-Goldman, *Aspects* (2000), p. 186, the result, side-effects and preconditions cannot be distinguished due to the collective nature of genocide; the knowledge requirement must, therefore, be retained.

[260] See the excellent observations by van der Wilt, *JICJ*, 4 (2006), 256–7.

[261] This did not, however, make a difference *in casu* since the Court considered that the businessman Van Anraat did not even dispose of sufficient information from which he could have inferred genocidal intent of his business partner (the Iraqi government of Saddam Hussein), see for a discussion and references van der Wilt, *JICJ*, 6 (2008), 557 ff. supporting the Court's position, 561 (leaving it open in van der Wilt, *JICJ*, 4 (2006), 247–8); see also Zahar and Sluiter, *ICL* (2008), pp. 494–6.

[262] But see in this vein, *Akayesu*, No. ICTR-96-4-T, para. 541; concurring, *Musema*, No. ICTR-96-13-T, para. 182 and main text.

[263] See van der Wilt, *JICJ*, 4 (2006), 247 with n. 34.

interests, *in casu* the attack against the existence of the group, calls for a restriction that can only be achieved on the subjective level by requiring a *purpose-based intent* to destroy.[264] Such a restriction will not generate a liability gap, because both the inciter and the conspirator generally act with the required intent to destroy; in the case of incitement, this intent is often provoked in the addressees of the inciting conduct. As to our distinction between different levels of perpetrators, it seems obvious that inciters and conspirators normally belong to the top- or mid-level of the criminal apparatus.

With regard to *JCE (III)* and *superior responsibility*, the case law's approach in downgrading the specific intent to either foreseeability (JCE III) or negligence (superior responsibility)[265] demonstrates the common function of both JCE III and superior responsibility to overcome evidentiary problems.[266] Yet, such an approach, in the final result, means that a superior (who is by definition a top- or at least mid-level participant) is, on the basis of JCE or superior responsibility, no longer punished as a (co-) perpetrator (by omission in the latter case) but only as a mere assistant, since only in this case can knowledge with regard to the genocidal context—instead of a purposed-based intent to destroy on the part of the (top- or at least mid-level) perpetrator himself—be considered sufficient.[267] Unlike the assistant, the perpetrator, to be characterized as such, must himself possess the (specific) subjective element of the wrongful act.[268] If, on the other hand, one holds the superior liable for having negligently failed to adequately supervise his subordinates (low-level perpetrators) that committed genocide with (a purpose- or knowledge-based) intent to destroy, he cannot be held responsible for the commission of genocide by omission, but only for his negligent failure to supervise, that is, for a conduct which amounts to a form of secondary participation.[269] For this very reason, the German *Völkerstrafgesetzbuch* (VStGB)[270] distinguishes between a principal-like commission by omission for the failure to prevent the subordinates' crimes (§ 4) and accomplice liability for the (intentional

[264] cf. also Schabas, Genocide (2009), p. 319 on incitement.

[265] cf. Cryer, 'Liability', in Cryer et al., *Introduction ICL* (2010), p. 384.

[266] In a similar vein, Danner and Martinez, *CalLR*, 93 (2005), 152. See also Volume I of this treatise, pp. 174–6, 230.

[267] For the same view, see Cassese et al., *ICL* (2013), pp. 193–4; see also Schabas, Genocide (2000), p. 312, where, in this case, he considers 'complicity, not command responsibility' as 'the proper basis for guilt'. In his subsequent edition (Genocide [2009], pp. 365–6) Schabas also criticizes the conviction of Nahimana by the ICTR (*Nahimana*, No. ICTR-99-52-A) on the basis of superior responsibility and states that he 'could have been charged as part of a joint criminal enterprise to incite genocide, one for which he would then readily have been convicted as the directing mind of a notorious radio station whose broadcasts dramatically contributed to the carnage. Such an approach would also more accurately describe his culpability.' On the relevant case law which seems to follow the same line, see van Sliedregt, *JICJ*, 5 (2007), 193 ff.

[268] For the same result, see van Sliedregt, *JICJ*, 5 (2007), 203–4 considering JCE as a form of participation and treating it, in fact, as complicity; also Schabas, Genocide (2009), p. 132 when stating that 'the commander who simply "should have known" cannot possibly [!] have the specific intent…' (yet not explicitly distinguishing between perpetration and complicity). Seemingly, Schabas (p. 270) changed his position on this point, since he assumes that 'the plain words of the statutes of the ad hoc tribunals and of the International Criminal Court, recognizing the application of command responsibility to genocide, make it at least theoretically possible for a superior or commander to be found guilty of genocide where the mental element was only one of negligence'.

[269] In this sense, see Arnold, *CLF*, 14 (2003), 151.

[270] *Bundesgesetzblatt* 2002 I 2254; for an English translation see <http://www.department-ambos.uni-goettingen.de/index.php/Forschung/uebersetzungen.html> accessed 7 January 2013.

or negligent) failure to properly supervise the subordinates (§ 13) and to report the crimes (§ 14).[271]

(6) The specific elements of the specific intent

(a) 'to destroy'

The specific intent must be directed at the destruction of the relevant group. The destruction is the object of the specific intent. Given the peculiar structure of genocide as a specific intent crime, the destruction need not—objectively—occur, but only—subjectively—be intended by the perpetrator. While this clearly follows from the wording of Article II of the Genocide Convention and subsequent provisions, it is less clear whether 'destruction' requires the *physical* or *biological* destruction of the group. This restrictive interpretation is defended by the International Law Commission (ILC),[272] the jurisprudence,[273] and some writers.[274] They rely on the *travaux* of the Convention and argue that cultural genocide in the form of destroying a group's national, linguistic, religious, cultural, or other existence was ultimately (despite a proposal by the Ad Hoc Committee) not included in the Convention.[275] Consequently, the drafters of the ICC Statute excluded acts of cultural genocide as a specific form of genocide from Article 6 ICC Statute with the exception of 'forcibly transferring children of the group to another group'.[276] The *Krstić* TC, invoking the *nullum crimen* principle, took the same view, limiting genocide to 'acts seeking the physical or biological destruction of all or part of the group'.[277] The Appeals Chamber confirmed this view.[278] In a similar vein, the *Stakić* Judgment required a clear distinction between physical destruction and mere dissolution of a group.[279] In contrast, the *Blagojević and Jokić* TC explicitly distinguished between destruction and death, stating that 'the physical or biological destruction of a group is not necessarily the death of the group

[271] Concurring, Cassese et al., *ICL* (2013), p. 187; Meloni, *JICJ*, 5 (2007), 637 with n. 108.

[272] See 1996 ILC Report, pp. 90–1: 'As clearly shown by the preparatory work for the Convention, the destruction in question is the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group'; see also the earlier statement in Report of the ILC to the General Assembly on the Work of its Forty-First Session, UN Doc. A/CN.4/SER.A/1989/Add.1 (part 2), p. 102, para. (4).

[273] *Muhimana*, No. ICTR-95-1B-T, para. 497 with further references in n. 456; see also ICJ, *Bosnia and Herzegovina v Yugoslavia*, Judgment (26 February 2007), paras. 190, 328; thereto Kreß, *EJIL*, 18 (2007), 619 ff.; Paul, *Kritische Analyse* (2008), pp. 289 ff.

[274] cf. for example, Schabas, *Genocide* (2009), pp. 271–2; Barboza, 'International Criminal Law', in *Recueil des Cours* 278 (1999), p. 59; Ratner, 'The Genocide Convention After Fifty Years', 92 *ASIL Proceedings* (1998), 1, 2. Wilmshurst, 'Genocide', in Cryer et al., *Introduction ICL* (2010), p. 220; Azari, *RSC*, 4 (2007), 753 ff.; Paul, *Kritische Analyse* (2008), pp. 296 ff., 320; Kreß, '§ 6', in Joecks and Miebach, *Münchener Kommentar*, vi/ii (2009), mn. 72.

[275] Boot, *Nullum Crimen* (2002), paras. 413–4; see for further references Ambos and Wirth, 'Genocide and War Crimes', in Fischer et al., *Prosecution* (2001), pp. 791–2; Schabas, *Genocide* (2009), p. 271; Wilmshurst, 'Genocide', in Cryer et al., *Introduction ICL* (2010), p. 220.

[276] See Section B. (2)(e) and Schabas, *Genocide* (2009), pp. 207–21 (arguing, at 212, that it 'was clear that the issue [of including acts of cultural genocide within Article 6 of the Rome Statute] had hit a nerve with several countries who were conscious of problems with their own policies towards minority groups, specifically indigenous peoples and immigrants' and thus saw their sovereignty endangered).

[277] *Krstić*, No. IT-98-33-T, para. 580.

[278] *Krstić*, No. IT-98-33-A, para. 25.

[279] *Stakić*, No. IT-97-24-T, para. 519.

members'.[280] A forcible transfer may lead to a destruction 'when this transfer is conducted in such a way that the group can no longer reconstitute itself—particularly when it involves the separation of its members . . . '.[281]

In any case, it is doubtful whether such a restrictive interpretation requiring only physical or biological destruction is compatible with the wording of the Convention and the subsequent genocide provisions since they clearly refer to the 'group, as such'.[282] From this it follows that the crime of genocide is intended to protect not only the physical existence of the individual members of the group, but the group as a *social entity*.[283] The underlying supra-individual concept of genocide, developed and defended above all by the German Federal Supreme Court (*Bundesgerichtshof*) and Federal Constitutional Court (*Bundesverfassungsgericht*),[284] implies that the *intent* to destroy 'extends beyond physical and biological interpretation'.[285] This does not mean, however, as the *Krstić* TC apparently misreads,[286] that the German courts deny that Article II(c) of the Convention requires—objectively—a physical destruction. Rather, the argument is predicated on the necessary distinction between the *actus reus* and the *mens rea* of the crime of genocide, focusing on the latter which does not limit the offence to the physical destruction of the group. The fact that the States Parties to the Genocide Convention were not willing to include cultural genocide as one of the specific forms of the *actus reus* in the Convention, and may thus arguably have wanted to limit the essence of genocide to physical destruction,[287] does not impede a broader interpretation of the specific intent requirement. Therefore,

[280] *Blagojević and Jokić*, No. IT-02-60-T, para. 666. On the inconsistency of the case law of the ICTY, see also Bummel and Selbmann, *HuV-I* 19 (2006), 64, 66; Werle, Völkerstrafrecht (2012), mn. 820; Werle, *Principles* (2009), mn. 760.

[281] *Blagojević and Jokić*, No. IT-02-60-T, para. 666.

[282] cf. previously Ambos and Wirth, 'Genocide and War Crimes', in Fischer et al., *Prosecution* (2001), pp. 791 ff.; critical of this view, Behrens, 'The Need for a Genocide Law', in Behrens and Henham, *Elements of Genocide* (2013), p. 243 ('high threshold').

[283] See Section B. (1). For an innovative approach, see Behrens, 'The Mens Rea of Genocide', in Behrens and Henham, *Elements of Genocide* (2013), pp. 84–6 (advancing a wider interpetration of 'destruction', defining it 'in relation to the nature of each group').

[284] For further references see Ambos and Wirth, 'Genocide and War Crimes', in Fischer et al., *Prosecution* (2001), p. 791 in n. 122; Judgment of the German Federal Constitutional Court (BVerfG), *NJW*, 54 (2001), 1848; detailed on the German jurisprudence Werle, 'Rechtsprechung zur Zerstörungsbsicht', in Hettinger et al., FS Küper (2007), pp. 675 ff.; concurring, Safferling, 'Special Intent Requirement', in Safferling and Conze, *Genocide Convention* (2010), pp. 175-6; dissenting Paul, *Kritische Analyse* (2008), pp. 293 ff.; Kreß, '§ 6', in Joecks and Miebach, *Münchener Kommentar*, vi/ii (2009), mn. 72, 89–90.

[285] German Federal Constitutional Court (BVerfG), *NJW*, 54 (2001), 1850 ('Die Zerstörungsabsicht wird ebenfalls weiter verstanden als physisch-biologische Vernichtung'; English translation quoted according to *Krstić*, No. IT-98-33-T, para. 579); similar, *Blagojević and Jokić*, No. IT-02-60-T, para. 666; *Krajišnik*, No. IT-00-39-T, para. 854; Werle, 'Rechtsprechung zur Zerstörungsbsicht', in Hettinger et al., FS Küper (2007), pp. 688–9; against this view, however, see *Prosecutor v Blagojević and Jokić*, No. IT-02-60-A, para. 123 with n. 337 ('displacement is not equivalent to destruction'); critical of an extensive interpretation, Schabas, *LJIL*, 18 (2005), 874; Gallagher, *LJIL*, 18 (2005), 538–9.

[286] *Krstić*, No. IT-98-33-T, para. 579 quoting the German Federal Constitutional Court (BVerfG) only selectively.

[287] cf. Ntanda Nsereko, 'Genocide', in McDonald and Swaak-Goldman, *Substantive and Procedural Aspects* (2000), p. 128, states that 'these acts [that constitute genocide] underscore the fact that the essence of genocide is the *physical destruction* or decimation of the group'.

it is correct that the German Federal Constitutional Court affirms that the 'text of the law does not . . . compel the interpretations that the culprit's intent must be to exterminate physically . . . members of the group'.[288] Such a broader interpretation also conforms to the fact that the actual destruction of peoples often begins with vicious assaults on culture, particular languages, and religious and cultural monuments and institutions. Thus, such acts will often indicate the perpetrators' intent to destroy.

Historically, the notion 'as such' was—at least as intended by Venezuela, which suggested the amendment—meant to express the motive of the agent(s).[289] William Schabas therefore distinguishes 'between what might be called the collective motive and the individual or personal motive' and requires 'a racist or discriminatory motive, that is, a genocidal motive'.[290] However, the original, more explicit formulation expressing certain motives ('on grounds of the national or racial origin, religious belief, or political opinion') was finally not adopted,[291] and this speaks strongly against the inclusion of motives in the (subjective side) of the crime.[292] Apart from that, motive and (genocidal) intent are two different things.[293] This is also acknowledged by the case law.[294] While the motive inquires about the reasons behind a certain conduct ('why'), the intent merely goes to the psychological state of mind during the act. Thus, the fact that the perpetrators may act with motives other than destruction does not exclude the existence of genocidal intent.[295]

[288] German Federal Constitutional Court (BVerfG), *NJW*, 54 (2001), 1850–1 ('Im völkerrechtlichen Schrifttum wird der Völkermordtatbestand zum Teil als auf die physisch-biologische Vernichtung einer geschützten Gruppe bzw. einer substantiellen Zahl ihrer Mitglieder beschränkt gesehen. Dies ist nach dem Wortlaut der Vorschrift jedoch nicht zwingend'). Against such a restriction, see also Kreß, *ICLR*, 6 (2006), 487; thereto also Demko, *SZIER* (2009), 243 ff.

[289] cf. Schabas, *Genocide* (2009), pp. 294 ff.; Boot, *Nullum Crimen* (2002), para. 388. Hübner, *Völkermord* (2004), p. 164; Lüders, *Völkermord* (2004), pp. 143 ff.

[290] Schabas, *Genocide* (2009), p. 306.

[291] It was proposed by the UN Ad Hoc Committee but finally rejected by the Sixth Committee, cf. Drost, *Genocide* (1959), pp. 33, 39, 83; Planzer, *Genocide* (1956), 94.

[292] cf. Ambos, *Der Allgemeine Teil* (2002/2004), p. 412; essentially in the same vein, Wilmshurst, 'Genocide', in Cryer et al., *Introduction ICL* (2010), pp. 222–3; Paul, *Kritische Analyse* (2008), pp. 279 ff.

[293] See Volume I of this treatise, pp. 268–9.

[294] *Kayishema and Ruzindana*, No. ICTR-95-1-A, para. 161; *Jelisić*, No. IT-95-10-A, para. 49; *Niyitegeka*, No. ICTR-96-14-A, para. 52 (thereto Kim, *ICLR*, 5 (2005), 438–9); *Prosecutor v Kvočka et al.*, No. IT-98-30/1-A, Appeals Chamber Judgment, para. 106 (28 November 2005); *Muvunyi*, No. ICTR-2000-55A-T, para. 479; *Prosecutor v Limaj et al.*, No. IT-03-66-A, Appeals Chamber Judgment, para. 109 (27 September 2007); thereto also Mettraux, *Crimes* (2005), p. 211; Zahar and Sluiter, *ICL* (2008), p. 180; concurring, Mugwanya, *Genocide* (2007), pp. 155–6; dissenting Behrens, *JICJ*, 10 (2012), 514 ff, who considers that 'specific motives can occupy so strong a place in the mind of the perpetrator that they may even replace genocidal intent'. For Behrens the specific genocidal intent is actually a motive, distinct from other motives in that it is codified by the Genocide Convention (p. 510: 'the destruction of the group, in whole or in part, is the aim of the perpetrator and therefore a motive which has become part of the crime of genocide'), that is, a 'motive whose existence must be proven by the prosecution beyond reasonable doubt' (p. 522). In my view, this is confusing intent and motive.

[295] *Niyitegeka*, No. ICTR-96-14-A, para. 53; concurring, *Prosecutor v Simba*, No. ICTR-01-76-T, Trial Chamber Judgment and Sentence, para. 412 (13 December 2005); essentially in a similar vein Hübner, *Völkermord* (2004), pp. 165 ff.; Lüders, *Völkermord* (2004), p. 145; Mettraux, *Crimes* (2005), pp. 210–1; Mugwanya, *Genocide* (2007), p. 232.

(b) 'in whole or in part'

While there was disagreement as to the requirement of the intent to destroy the *whole* group during the negotiation of the Convention,[296] it is now clear from the wording of Article II and the subsequent provisions that it is sufficient that the intent be directed at the destruction of the group 'in part'. It is still unclear, though, what exactly a 'destruction in part' means, in other words, how many members of the group must potentially be targeted. The following sub-issues may be formulated:

(1) Is it necessary to intend the destruction of a *significant number* of members of the group (*quantitative* element)?

(2) Would it be sufficient to intend to destroy *a significant section* of the group, for example, the leaders (*qualitative* element)?

(3) Would it be sufficient to intend to destroy a reasonably significant number or section of a *part* of a group?

As to the *first question* the answer must clearly be in the affirmative. As early as 1960 Nehemia Robinson had defined genocide as aimed at destroying 'a multitude of persons of the same group,' as long as the number is 'substantial'.[297] The Whitaker 1985 Expert Report referred to 'a reasonably significant number, relative to the total of the group as a whole'.[298] These definitions were in fact adopted by the international instruments.[299] The ILC refers to a 'substantial part of the group'.[300] The ICTR spoke, *inter alia*, of a 'considerable number of individuals'.[301] During the ICC Preparatory Commission negotiations it was noted that 'the reference to "intent to destroy, in whole or in part . . ." was understood to refer to the specific intention to destroy more than a small number of individuals . . . ',[302] that is, no *specific* number of victims is required.[303] Critics of this quantitative threshold often do not sufficiently distinguish between the

[296] Schabas, *Genocide* (2009), pp. 273 ff.

[297] Robinson, *Genocide Convention* (1960), p. 63; see also Kreß, '§ 6', in Joecks and Miebach, *Münchener Kommentar*, vi/ii (2009), mn. 74; Gaeta, 'Genocide', in Schabas and Bernaz, *Routledge Handbook* (2011), p. 113; Cassese et al., *ICL* (2013), p. 121; for this numerical approach cf. also Behrens, 'The Mens Rea of Genocide', in Behrens and Henham, *Elements of Genocide* (2013), pp 86–9; *Prosecutor v Bagosora et al.*, No. ICTR-98-41-T, Trial Chamber Judgment, para. 2115 (18 December 2008).

[298] Benjamin Whitaker, Revised and Updated Report on the question of the Prevention and Punishment of the Crime of Genocide, UN Doc. E/CN.4/Sub.2/1985/6, p.16, para. 29.

[299] Draft Code 1996, UN-YB ILC 1996 II, 2, 44 ('substantial part of the group'); *Kayishema and Ruzindana*, No. ICTR-95-1-T, para. 97 ('The Trial Chamber opines, therefore, that "in part" requires the intention to destroy a considerable number of individuals who are part of the group'); *Bagilishema*, No. ICTR-95-1A-T, para. 64 ('at least a substantial part'); in the same vein *Muvunyi*, No. ICTR-2000-55A-T, para. 479; also Zahar and Sluiter, *ICL* (2008), p. 175.

[300] Draft Code 1996, UN-YB ILC 1996 II, 2, 44.

[301] *Kayishema and Ruzindana*, No. ICTR-95-1-T, para. 97; see also *Bagilishema*, No. ICTR-95-1A-T, para. 64 ('at least a substantial part').

[302] Draft Statute for the ICC. Part 2. Jurisdiction, Admissibility and Applicable Law, UN Doc. A/AC.249/1998/CRP.8, p. 2, n.1; cf. Schabas, 'Article 6', in Triffterer, *Commentary* (2008), mn. 9 with references.

[303] *Muhimana*, No. ICTR-95-1B-T, paras. 498, 514 ('no numeric threshold'); *Ndindabahizi*, No. ICTR-2001-71-I, para. 471 ('only a single person was killed'); *Prosecutor v Setako*, No. ICTR-04-81-T, Trial Chamber Judgment and Sentence para. 466 (25 February 2010).

objective and subjective level, thereby ignoring that the said threshold only refers to the perpetrator's intent.[304]

In this context it was also argued that it is not necessary 'to intend to achieve the complete annihilation of a group from every corner of the globe';[305] rather it suffices to intend to destroy a geographically limited part of a group.[306] The *Krstić* TC considered the decisive factor to be that the perpetrators seek 'to destroy a *distinct part* of the group as opposed to an accumulation of isolated individuals within it' and that they 'view the part of the group they wish to destroy as a *distinct entity* which must be eliminated as such'.[307] Under these circumstances, 'the killing of all members of the part of a group located within a small geographical area, although resulting in a lesser number of victims, would qualify as genocide'.[308] In turn, if the members of the group were only killed selectively over a broad geographical area, the specific intent requirement would be missing.[309] The ICTY AC confirmed the quantitative concept as a 'necessary and important starting point',[310] given that the perpetrator's genocidal intent will 'always be limited by the opportunity presented to him'.[311] In general terms, the number of the individuals targeted must be evaluated in relation to the size of the entire group[312] and on a case-by-case basis.[313]

The *second question*, regarding the qualitative element, has also been answered in the affirmative. The Whitaker Report previously referred explicitly to 'a significant section of a group, such as its leadership'.[314] This statement has been adopted by the ICTY Prosecutor[315] and the Chambers.[316] It is doubtful, however, whether the intention to destroy the leadership of a particular group constitutes genocidal intent if it remains an isolated act, that is, if it does not entail the complete disappearance or termination of the group. In other words, the consequences for the 'group as such' must be taken into account. One may, in accordance with the 1994 Report of the Commission of Experts, argue that 'the attack on the leadership must be viewed

[304] See by way of example the discussion of the problem by Cassese, 'Genocide', in Cassese et al., *Rome Statute*, i (2002), pp. 347–8 referring to Sadat Wexler, *Model Draft Statute* (1998), p. 5; cf. also Cassese et al., *ICL* (2013), p. 129.

[305] Draft Code 1996, UN-YB ILC 1996 II, 2, 45; thereto also Mettraux, *Crimes* (2005), p. 217.

[306] *Krstić*, No. IT-98-33-T, paras. 560, 589; *Jelisić*, No. IT-95-10-T, para. 83; ICJ, *Bosnia and Herzegovina v Yugoslavia*, Judgment 26.2.2007, para. 199; BGHSt 45, 64 (81); BVerfG, *NJW*, 54 (2001), 1850–1; Mettraux, *Crimes* (2005), pp. 218–9; Safferling, 'Special Intent Requirement', in Safferling and Conze, *Genocide Convention* (2010), p. 177; Paul, *Kritische Analyse* (2008), pp. 315 ff.; Kreß, '§ 6', in Joecks and Miebach, *Münchener Kommentar*, vi/ii (2009) mn. 77.

[307] *Krstić*, No. IT-98-33-T, para. 590 (emphasis added). Critical of this additional requirement, Zahar and Sluiter, *ICL* (2008), p. 178; Kolb, 'Droit international pénal', in Kolb, *Droit international pénal* (2008), p. 87.

[308] *Krstić*, No. IT-98-33-T, para. 590.

[309] *Krstić*, No. IT-98-33-T, para. 590.

[310] *Krstić*, No. IT-98-33-A, para. 12.

[311] *Krstić*, No. IT-98-33-A, para. 13.

[312] *Krstić*, No. IT-98-33-A, para. 12.

[313] *Krstić*, No. IT-98-33-A, para. 14.

[314] Whitaker, Crime of Genocide, UN Doc. E/CN.4/Sub.2/1985/6, para. 29; critical of this 'functional approach', Behrens, 'The Mens Rea of Genocide', in Behrens and Henham, *Elements of Genocide* (2013), pp. 89–93 (arguing, *inter alia*, that this approach discriminates among members of a group, p. 92).

[315] *Prosecutor v Karadžić and Mladić*, No. IT-95-18-R61 and No. IT-95-5-R61, Transcript of Hearing, p. 24 (27 June 1996).

[316] *Sikirica*, No. IT-95-8-T, paras. 65, 76; *Jelisić*, No. IT-95-10-T, para. 79-82; *Krstić*, No. IT-98-33-T, para. 587; also *Krstić*, No. IT-98-33-A, para. 12; thereto also Mettraux, *Crimes* (2005), pp. 221 ff.; Kreß, *ICLR*, 6 (2006), 490–1.

in the context of the fate of what happened to the rest of the group'.[317] In this sense, the attack concerns a *significant* section of the group only if it entails serious consequences for its existence.

The *third question* came up in *Krstić*. The Trial Chamber, taking Bosnian Muslims as the protected group,[318] had to decide whether the Bosnian Muslim men of military age of the town of *Srebrenica* 'represented a sufficient part of the Bosnian Muslim group so that the intent to destroy them qualifies as an 'intent to destroy the group in whole or in part'.[319] In light of the criterion mentioned earlier, it answered this question in the affirmative since the 'Bosnian Serb could not have failed to know . . . that this selective destruction of the group would have a lasting impact on the entire group,' they 'had to be aware of the catastrophic impact that the disappearance of two or three generations of men would have on the survival of a traditionally patriarchal society. . . . '. It was sufficient that '[t]he Bosnian Serb forces knew . . . that the combination of those killings with the forcible transfer of the women, children and elderly would inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica'.[320] In fact, the Chamber referred to the Bosnian Muslims of the *Srebrenica* community as being a 'part' of the group of Bosnian Muslims.

Against this background, the question arises as to how small a 'part' of a protected group can possibly be to still constitute the object of protection of the crime. It is clear that by narrowing down the concept of group to very small parts or units of a broader group, the scope of the crime may become in fact unlimited. By considering the Bosnian Muslim men of *Srebrenica* as part of the group of Bosnian Muslims, the Chamber, in fact, performed a double reduction of the *actus reus*: it reduced the Bosnian Muslims to the ones living in *Srebrenica* and further to the Bosnian Muslim men of *Srebrenica*.[321] Thus, in fact, the Chamber analysed whether the Serbs intended to destroy a part—the Bosnian Muslim men of *Srebrenica*—of a part—the Bosnian Muslims of *Srebrenica*—of the group of Bosnian Muslims. One could even argue that it constitutes a further reduction of the group concept if the Chamber refers to *Bosnian* Muslims, instead of Muslims as a religious group as such.

Be that as it may, the discussion shows that it is necessary to delimitate more clearly what is meant by 'in whole or in part'. This is even more true if, once again, one keeps in mind the structure of the offence as a crime of intention (*Absichtsdelikt*), that is, an offence where the specific *mens rea* of the perpetrator prevails over and exceeds the *actus reus*. Again, it needs to be emphasized that the perpetrator need not objectively destroy a group 'in whole or in part' but only intend to do so.

[317] Final Report of the Commission of Experts Established pursuant to Security Council Resolution 780 (1992), UN Doc. S/1994/674, para. 94. See also *Krstić*, No. IT-98-33-A, para. 12 ('emblematic', 'essential to its survival'), para. 28 ('long-term impact').

[318] *Krstić*, No. IT-98-33-T, para. 591; critically, Schabas, *CardozoLR*, 27 (2006), 1716; Behrens, 'The Mens Rea of Genocide', in Behrens and Henham, *Elements of Genocide* (2013), pp. 93–5 (critical of the lowering of the threshold for genocidal commission entailed by the 'geographical approach').

[319] *Krstić*, No. IT-98-33-T, para. 581; concurring, ICJ, *Bosnia and Herzegovina v Yugoslavia*, Judgment (26 February 2007), para. 296.

[320] *Krstić*, No. IT-98-33-T, para. 595.

[321] Critical, Kreß, '§ 6', in Joecks and Miebach, *Münchener Kommentar*, vi/ii (2009), mn. 77.

The Appeals Chamber dismissed the appeal based on these considerations, claiming that the Defence misunderstood the Trial Chamber's analysis.[322] In the Appeals Chamber's view, the Trial Chamber did not view the Bosnian Muslim men of military age of *Srebrenica*, as understood by the Defence and also by this author, as part of the Bosnian Muslim population of *Srebrenica*; it rather treated the killing of the men of military age, correctly in the Appeals Chambers view, as evidence from which to infer the requisite genocidal intent with regard to *all* the Bosnian Muslims of *Srebrenica*.[323] At least, the Appeals Chamber concedes that the Trial Chamber used 'imprecise language'.[324] In any case, with these considerations of the Appeals Chamber, it should be clear that there are limits to the expansion of the genocide offence by reducing the size of the protected groups more and more that is, a certain (quantitative) threshold must always exist.[325]

With regard to our third question, this means that the intent to destroy a relatively significant number, or section of a *part* of a group is not sufficient to constitute the requisite genocidal intent. Generally, in such borderline cases an overall, case-by-case approach should be employed, taking into consideration the quantitative and qualitative criteria discussed.[326]

(c) 'a group'

The perpetrator's intent must be directed towards the destruction of a 'group'. Groups consist of individuals and therefore, destructive action must ultimately be taken and directed against individuals. However, these individuals are not important per se; they are important only as members of the group to which they belong.[327] They must be

[322] *Krstić*, No. IT-98-33-A, paras. 19 ff. (19).

[323] *Krstić*, No. IT-98-33-A, paras. 19 ff. (19); in a same vein seemingly Safferling, 'Special Intent Requirement', in Safferling and Conze, *Genocide Convention* (2010), p. 177.

[324] *Krstić*, No. IT-98-33-A, para. 22.

[325] In a similar vein, Lüders, *Völkermord* (2004), pp. 137 ff. From this it may follow that the attacks in Darfur do not amount to genocide for lack of the respective intent, cf. *Darfur Report*, para. 513 ('The fact that in a number of villages attacked and burned by both militias and Government forces the attackers refrained from exterminating the whole population that had not fled, but instead selectively killed groups of young men, is an important element.'). Notwithstanding, the arrest warrant against Sudanese president *Al Bashir* goes to genocide (*Prosecutor v Al Bashir*, No. ICC-02/05-01/09, Second Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 12 July 2010, para. 5 ff.: 'Al Bashir acted with dolus specialis/specific intent to destroy in part the Fur, Masalit and Zaghawa ethnic groups'); cf. also *Darfur Report*, para. 520, where it is considered possible 'that in some instances single individuals, including Government officials, may entertain a genocidal intent, or in other words, attack the victims with the specific intent of annihilating, in part, a group perceived as a hostile ethnic group'. The mainstream literature also considers that the Darfur attacks constitute genocide (Udombana, *IntLawyer*, 40 (2006), 42; Mathew, *FloridaJIL*, 8 (2006), 547; Jack, *PennStateILR*, 24 (2006), 707; Luban, *CJIL*, 7 (2006), 315; Ice, *DenverJILP*, 38 (2009), 193 ff.); leaving the decision to the judges Schabas, *CardozoLR*, 27 (2006), 1720; on the groups affected by the Darfur attacks see Hong, *VirgJIL*, 49 (2010), 257 ff., who considers that the current definition of genocide makes it impossible to find 'specific intent within the mixed-up reality of a postcolonial civil conflict'.

[326] Essentially in the same vein, see Paul, *Kritische Analyse* (2008), pp. 308 ff. (315); for a combined approach, see also Mugwanya, *Genocide* (2007), pp. 153 ff., 157; also *Popović et al.*, No. IT-05-88-T, paras. 831–3.

[327] Robinson, *Genocide Convention* (1960), p. 58; Demko, *SZIER* (2009), 226–7, 229.

targeted because of their membership in the group.[328] In other words, the ulterior victim of genocide is the group, although its destruction necessarily requires the commission of crimes against its members, that is, against the individuals belonging to that group.[329] Thus, as said before[330] and closing the circle, the crime of genocide aims to protect the group as a social, supra-individual entity, 'as such' and thus protect its members as part of this entity.[331]

[328] *Akayesu*, No. ICTR-96-4-T, para. 521 ('Thus, the victim is chosen not because of his individual identity, but rather on account of his membership of a national, ethnical, racial or religious group. The victim of the act is therefore a member of a group, chosen as such, which, hence, means that the victim of the crime of genocide is the group itself and not only the individual.'). See also *Kayishema and Ruzindana*, No. ICTR-95-1-T, para. 97; *Stakić*, No. IT-97-24-T, para. 520 (intent 'to destroy the targeted group in whole or in part as a separate and distinct entity'); Cassese et al., *ICL* (2013), p. 123. Proposing that genocide should be considered as a crime 'against the family as a component of the group rather than against the group itself' (p. 117), Fournet, *Genocide and Crimes Against Humanity* (2013), p. 112–9; Behrens, 'The Mens Rea of Genocide', in Behrens and Henham, *Elements of Genocide* (2013), pp. 80–2.

[329] *Sikirica*, No. IT-95-8-T, para. 89.

[330] See Section A. (2).

[331] *Sikirica*, No. IT-95-8-T, para. 89; *Krajišnik*, No. IT-00-39-T, para. 856; Lüders, *Völkermord* (2004), pp. 140 ff.; Mettraux, *Crimes* (2005), pp. 231–2; Werle, Völkerstrafrecht (2012), mn. 816; Werle, *Principles* (2009), mn. 756; Azari, *RSC*, 4 (2007), 759; Paul, *Kritische Analyse* (2008), pp. 274 ff.

Chapter II
Crimes against Humanity

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A. Introduction

(1) Legal history and concept[1]

The concept of crimes against humanity goes back to the Declaration of 28 May 1915 by the governments of France, Great Britain, and Russia, relating to the massacres of the Armenian population in Turkey. The declaration described the atrocities as 'crimes against humanity for which all members of the Turkish Government will be held responsible together with its agents implicated in the massacres'.[2] Of course, the novelty was that the crimes were committed by citizens of a state against their own fellow citizens, not against those of another state. Similarly, in the Nuremberg trials 'crimes against humanity' were dealt with as crimes committed by Germans against fellow Germans.[3] While, however, such a crime did not exist formally in international law at the time of commission of the Nazi atrocities (i.e. mainly between 1939 and 1945), the concept of a 'crime against humanity' certainly has historical roots in at least three instruments: the '*Martens Clause*' of the 1899 and 1907 Hague Conventions,[4] referring to the 'laws of humanity'; the previously mentioned Joint Declaration of 28 May 1915, condemning 'crimes against humanity and civilization'[5] as well as the 1919 Report of the Commission on the Responsibility of the Authors of War, supporting individual criminal responsibility for violations of the laws of humanity'.[6] These principles have traditionally been understood broadly, perhaps even going so far as

[1] This section draws on Ambos, 'Crimes Against Humanity', in Sadat, *Convention* (2011), pp. 279–82.

[2] cf. Schwelb, *BritYBIntL*, 23 (1946), 181. See also Cerone, *NewEngJIntCompL*, 14 (2008), 191–2.

[3] cf. Article 6(c) IMT Statute and Clark, 'Crimes against Humanity at Nuremberg', in Ginsburgs and Kudriavtsev, *The Nuremberg Trial* (1990), pp. 195–8.

[4] The Preamble to the Convention with Respect to the Laws and Customs of War on Land, 29 July 1899, 32 *Stat* 1803 and the Preamble to the Convention Respecting the Laws and Customs of War on Land, with annexed Regulations, 18 October 1907, 36 *Stat* 2277 specify that in cases not included in the Hague Regulations, 'the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience'. The *Martens Clause* is named after the Russian diplomat who drafted it: Bassiouni, *Crimes against Humanity* (1999), p. 62, n. 81.

[5] cf. Schwelb, *BYbIL*, 23 (1946), 181; see also UNWCC, *History* (1948), p. 35.

[6] The 1919 Report Presented to the Preliminary Peace Conference by the Commission on the Responsibility of the Authors of War and on Enforcement of Penalties for Violations of the Laws and Customs of War, recommended the establishment of a high tribunal to try persons belonging to enemy countries who were guilty of 'offences against the laws and customs of war or the laws of humanity', excerpted in Bassiouni, *Crimes against Humanity* (1999), pp. 553–65.

to treat crimes against humanity in an equivalent manner to human rights and encompassing a wide range of conduct, performed by either state or non-state actors, and in times of war or peace.[7] In any case, it is fair to argue in light of the three instruments just mentioned that crimes against humanity had already been embedded in customary international law before the Nuremberg trials.[8]

However, the definition of crimes against humanity in modern ICL instruments has thus far been vague and, in many respects, inconsistent. Thus, for example, while Article 5 ICTY Statute maintains the traditional link to armed conflict ('committed in armed conflict, whether international or internal in character'), drawing on Article 6(c) IMT Statute ('before or during the war'), Article 3 ICTR Statute codifies crimes against humanity as a mere peace crime committed 'as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds'. We will return to this in more detail later.[9] Both provisions cover the same underlying acts, without, however, defining them more precisely. A more refined definition of crimes against humanity, taking into account historical development and case law, was only achieved with Article 7 of the ICC Statute. This provision will therefore form the basis of our analysis. Of course, to understand the *rationale* of crimes against humanity, more in-depth scrutiny is required, going beyond the mere analysis of the positive law. History teaches us that the state has always had an important role in the organization and actual commission of crimes against humanity. Indeed, historical facts lend a strong argument to a conceptualization of crimes against humanity as a state crime in the sense of Richard Vernon's classical definition: 'a moral inversion, or travesty, of the state';[10] 'an abuse of state power involving a systematic inversion of the jurisdictional resources of the state';[11] 'a systematic inversion: powers that justify the state are, perversely, instrumentalized by it, territoriality is transformed from a refuge to a trap, and the modalities of punishment are brought to bear upon the guiltless'.[12]

The problem with this definition is that it is limited to the classical relation between a state and its citizens residing in its own territory, leaving out other extraterritorial state-citizen relations and relations between a state and foreign citizens.[13] In addition, the definition does not account for non-state actors, at least not explicitly. One may replace 'state' by 'non-state actor' to accommodate the concept to the now recognized standing of the latter as a potential perpetrator of crimes against humanity. This simple substitution seems inadequate, however, since there is clearly a difference between a state's obligation under international law to guarantee the rule of law and protect its citizens and a similar (emerging) duty of a non-state actor over the territory under its control. All in all, it is therefore more convincing to develop a concept of crimes against humanity while downplaying the focus on the entity behind these crimes. This does not deny the eminent political connotation of crimes against humanity; indeed it stresses the 'distinctive perversion of politics'[14] underlying crimes against humanity. It takes up

[7] cf. Paust et al., *ICL* (2007), p. 703. [8] cf. Robinson, *AJIL*, 93 (1999), 44.
[9] See Section B. (1)(a). [10] Vernon, *JPP*, 10 (2002), 233.
[11] Vernon, *JPP*, 10 (2002), 242. [12] Vernon, *JPP*, 10 (2002), 245.
[13] See the convincing criticism of Luban, *YaleJIL*, 29 (2004), 94 with fn. 28.
[14] Luban, *YaleJIL*, 29 (2004), 94 with fn. 28.

David Luban's idea of crimes against humanity as 'politics gone horribly wrong',[15] as 'politics gone cancerous',[16] launching a double assault on individuality (the individual and political 'quality of being human', 'humanness') and groups ('the set of individuals', 'sociability', 'humankind'):[17]

> First the phrase 'crimes against humanity' suggest offenses that aggrieve not only the victims and their own communities, but all human beings, regardless of their community. Second, the phrase suggests that these offences cut deep, violating the core humanity that we all share and that distinguishes us from other natural beings.[18]
>
> [T]he humanness that crimes against humanity violates lies in our status as political animals . . . crimes against humanity offend against that status in two ways: by perverting politics, and by assaulting the individuality and sociability of the victims in tandem.[19]
>
> [C]rimes against humanity . . . represent an affront to our nature as political animals, our double character as unsociably social individuals who combine self-awareness and self-interest with a natural need for society of others . . . crimes against humanity assault our individuality by attacking us solely because of the groups to which we belong, and they assault our sociability by transforming political communities into death traps.[20]

(2) Protected legal interests

As argued in Volume I of this treatise[21] the use of criminal law as an instrument of social control presupposes that the conduct criminalized actually causes *harm* to legal interests ('*Rechtsgüter*') which a given society considers important enough to be protected by means of criminalization. While crimes against humanity, being international crimes, constitute a threat to the *collective* legal interests of international peace and security,[22] they also affect more concrete individual legal interests such as life, bodily integrity, liberty, and personal autonomy and thus ultimately protect *human dignity*.[23]

'Crimes against humanity', understood in this way, intend to provide penal protection against the transgression of the most basic laws protecting our individuality as political beings and our social entity as members of political communities. The transgressor, that is, the criminal against humanity, becomes an enemy and legitimate target of all humankind,[24] a *hostis humani generis*, who, in principle, anyone ('the people') may bring to justice. While this conclusion gives rise to certain concerns with

[15] Luban, *YaleJIL*, 29 (2004), 108. [16] Luban, *YaleJIL*, 29 (2004), 116.

[17] Luban, *YaleJIL*, 29 (2004), 86 ff. Vernon, *JPP*, 10 (2002) while critical of the element of humanness (see 237), shares the idea of an attack on humankind in the sense of entity and diversity (cf. 238 ff.).

[18] Luban, *YaleJIL*, 29 (2004), 86 (footnote omitted). [19] Luban, *YaleJIL*, 29 (2004), 120.

[20] Luban, *YaleJIL*, 29 (2004), 159–60.

[21] Volume I of this treatise, pp. 60 ff. (on the protection of '*Rechtsgüter*' and the prevention of harm as the overall function of criminal law).

[22] See the Preamble of the ICC Statute, para. 3. [23] See Volume I of this treatise, p. 66.

[24] Luban, *YaleJIL*, 29 (2004), 160; for the same consequence Vernon, *JPP*, 10 (2002), 234.

regard to the possible exclusion of 'public enemies'[25] from the rule of law,[26] the underlying concept of crimes against humanity is convincing, in that it explains the essence of these crimes without invoking a merely positivist analysis, and in that it avoids overinclusiveness by criminalizing only violations of the most fundamental human rights. Such an approach is also convincing from a methodological perspective, since it makes clear that the quest for a correct and rational construction of the law ('right law') must take precedence over pure policy considerations. Thus, there seems to be at least some common ground as to what amounts to crimes against humanity and what the prosecutor has to prove.

(3) Structure of the crime (Article 7 ICC Statute)

Article 7 represents both a 'codification' and a 'progressive development' of international law within the meaning of Article 13 UN Charter.[27] It unites the distinct legal features which may be thought of as the 'common law' of crimes against humanity.[28] Concretely speaking, Article 7(1) provides for the context element ('committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'), and the underlying acts[29] listed in para. 2 provide for their definition. All these elements will be analysed in more detail in the following sections.

[25] Readers with a 'civil law' background will recall the polemical and controversial debate over the creation of a criminal law for enemies ('*Feindstrafrecht*', '*derecho penal del enemigo*', '*diritto penal del nemico*') taking place in particular in continental Europe and Latin America and directed in particular at terrorist offenders. Such a special criminal law is to be rejected (see for a fairly full account the two volumes of Cancio and Gómez-Jara, *Derecho penal del enemigo* (2006); see also Donini and Papa, *Diritto penal del nemico* (2007)). For this author's view see: 'Feindstrafrecht', *SchwZStR*, 124 (2006), 1–30; in Spanish in Cancio and Gómez-Jara, *Derecho penal del enemigo* (2006), i, pp. 119–62; updated version in Ambos, *El derecho pénal* (2007), pp. 81–145; in Italian in Donini and Papa, *Diritto penal del nemico* (2007), pp. 29–64.

[26] Luban himself admits that his crimes against humanity concept may give rise to a dangerous people's (vigilante) justice and jurisdiction (Luban, *YaleJIL*, 29 (2004), 140, 160); he proposes to counter such potential abuses by delegating the *ius puniendi* to national and international tribunals which satisfy the minimum standards of 'natural justice', that is, guarantee a fair trial (Luban, *YaleJIL*, 29 (2004), 142–3, 145, 160).

[27] See also Clark, 'Crimes Against Humanity', in Clark, Feldbrugge, and Pomorski, *International and National Law* (2001), 139–56.

[28] Luban, *YaleJIL*, 29 (2004), 93 ff., summarizing these legal features as follows (at 108): 'crimes against humanity are international crimes committed by politically organized groups acting under color of policy, consisting of the most severe and abominable acts of violence and persecution, and inflicted on victims because of their membership in a population or group rather than their individual characteristics'.

[29] '[M]urder; extermination; enslavement; deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender . . . , or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; enforced disappearance of persons; the crime of apartheid; other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.'

B. The Context Element

(1) General remarks

There was a permanent struggle on the part of the respective drafters and judges to meet what, in their view, was the correct understanding of crimes against humanity and, at the same time, to balance this understanding with state sovereignty. For this reason, awareness of the origins and history of the distinct (sub-)elements of the context element is necessary to properly assess their respective legal significance and correctly understand the rationale of the context element. The so-called war or armed conflict nexus has played a particular role in this development.[30]

(a) From the war nexus to a policy element

(i) The Nuremberg Charter and Control Council Law No. 10

When crimes against humanity were defined for criminal law purposes for the first time in the *Nuremberg Charter*, the context element was different from the one contained in Article 7 ICC Statute. Article 6(c) of the Nuremberg Charter requires that the individual act—for example, a murder—be committed 'in execution or connection with any crime within the jurisdiction of the tribunal (i.e., crimes against peace or war crimes)'.[31] Moreover, it requires that the victims be civilians. Both the so-called war nexus and the qualification of possible victims as civilians can be explained by the origin of crimes against humanity within the law of armed conflict.[32] The *Martens Clause*, which is commonly cited as the first appearance of the concept of crimes against humanity,[33] is found in a treaty on the law of war, namely the 1907 Hague Convention (IV).[34] Another reason for the requirement of the war nexus was one of state sovereignty and non-intervention: without such a nexus, so it was argued, crimes against humanity would infringe on the principle of non-intervention.[35] The war nexus so understood amounted to the *international element* of crimes against humanity. Yet, against this view, it was always held that the Nuremberg Charter's war nexus never constituted a material element of crimes against humanity but merely a precondition for the IMT's jurisdiction,[36] a view which gained increasing support in subsequent codifications and case law.[37] In any case, the nexus requirement was not even strictly

[30] In this section I draw on Ambos and Wirth, *CLF*, 13 (2002), especially 3–15.

[31] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (1945), including the Charter of the International Military Tribunal, (1951) 82 *UNTS* 280.

[32] cf. *Prosecutor v Tadić*, No. IT-94-1-T, Trial Chamber Opinion and Judgment, para. 620 (7 May 1997): 'The inclusion of crimes against humanity in the Nurnberg Charter was justified by their relation to war crimes'. See also Bassiouni, *Crimes against Humanity* (1999), pp. 60–9.

[33] Lippman, *BCThirdWorldLJ*, 17 (1997), 173. For references to several 19th-century and early 20th-century cases of international concern or intervention in cases of massive atrocities, see *US v Altstoetter and Others* (*Justice* case) (case 3), in US-GPO, *TWC*, iii (1997), pp. 981–2 (4 December 1947).

[34] See note 4.

[35] Lippman, *BCThirdWorldLJ*, 17 (1997), 183, quoting Justice Jackson.

[36] McAuliffe de Guzman, *HRQ*, 22 (2000), 356.

[37] See in particular the 1968 Convention of the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, n. 50.

observed by the IMT itself[38] and—perhaps for that reason—had already disappeared in Article II(c) of Control Council Law No. 10 (CCL 10).[39] This change in the law was not uncontested, though. Some of the US military tribunals continued to require the nexus because of the reference to the Nuremberg Charter in Article 1 of CCL 10.[40] It was also argued that 'the only purpose of the Charter was to bring to trial "major war criminals"', that is, that the prosecution strategy itself required a war nexus.[41] In contrast, the Tribunal of the *Justice* case accepted the absence of the nexus[42] and introduced instead another element to 'exclude isolated cases of atrocity or persecution', namely 'proof of conscious participation in systematic government organised or approved procedures'.[43] Thus, the *Justice* case indicated for the first time that a specific context element that excludes isolated crimes is required. The German post-war jurisprudence on CCL 10[44] confirmed the approach of the *Justice* case qualifying criminal conduct as a crime against humanity if committed in 'context (*Zusammenhang*) with the system of power and tyranny as it existed in the National-Socialist Period'.[45] The war nexus was not even mentioned. Taken together, this jurisprudence represents the beginning of a tendency in national and international practice to attempt to distinguish crimes against humanity from ordinary crimes by requiring—instead of the war nexus—a link to *some kind of authority*.

[38] cf. *Prosecutor v Kupreškić et al.*, No. IT-95-16-T, Trial Chamber Judgment, para. 576 (24 January 2000): '[T]here was only a tenuous link to war crimes or crimes against the peace. This is demonstrated by the judgment rendered by the IMT in the case of defendant von Schirach. Von Schirach, as Gauleiter of Vienna, was charged with and convicted of crimes against humanity for the deportation of Jews from Austria. The IMT concluded that von Schirach was probably not involved in the "development of Hitler's plan for territorial expansion by means of aggressive war", nor had he been charged with war crimes. However, the link to another crime under the Charter (that of aggression) was found in the fact that "Austria was occupied pursuant to a common plan of aggression". Its occupation was, therefore, a "crime within the jurisdiction of the Tribunal". Another example is found in the case of Streicher, publisher of *Der Stürmer*, an anti-Semitic weekly newspaper. Streicher was convicted for "incitement of the German people to active persecution". There was no evidence that he had ever committed war crimes or "that he was ever within Hitler's inner circle of advisers; nor during his career was he closely connected with the wording of the policies which led to war". Nevertheless he was convicted of persecution as a crime against humanity (in connection with war crimes).'

[39] Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity of 20 December 1945, *Official Gazette Control Council For Germany*, 3 (1946), pp. 50–5. cf. Swaak-Goldman, 'Crimes against Humanity', in McDonald and Swaak-Goldman, *Substantive and Procedural Aspects* (2000), pp. 159–60.

[40] *US v Flick and Others* (*Flick* case) (case 5), in US-GPO, *TWC*, vi (1997), pp. 1200–22 (22 December 1947). See Robinson, 'Crimes against Humanity', in Lattanzi and Schabas, *Essays* (1999), p. 145. For reference to further cases, see van Schaack, *ColJTransnat'lL*, 37 (1999), 814–19.

[41] *Flick and Others* (*Flick* case), in US-GPO, *TWC*, vi (1997), p. 1213.

[42] *Altstoetter and Others* (*Justice* case), in US-GPO, *TWC*, iii (1997), p. 974.

[43] *Altstoetter and Others* (*Justice* case), in US-GPO, *TWC*, iii (1997), p. 982.

[44] Pursuant to Article III(1)(d) CCL 10 German courts were competent to apply this law 'in the case of crimes committed by persons of German citizenship or nationality against other persons of German citizenship or nationality, or stateless persons' if the occupying authority of the respective zone had authorized them to do so.

[45] German Supreme Court for the British Zone (*Oberster Gerichtshof für die Britische Zone* (OGHBrZ)), No. StS 3/48, Judgment, in *OGHSt*, xi, p. 14 (20 May 1948)—author's translation ('Zusammenhang mit der Gewalt und Willkürherrschaft, wie sie in nazistischer Zeit bestanden hat'); see also OGHBrZ, StS 139/48, Judgment, in *OGHSt*, i, p. 206 (21 December 1948) (*Weller* case). The OGHBrZ alone decided an estimated 100 published cases concerning crimes against humanity (cf. the official collection *OGHSt*, three volumes, Berlin: De Gruyter, 1948–50).

(ii) Post-Nuremberg developments

In its 1950 Nuremberg Principles,[46] the ILC adopted the war nexus in the wording of the Nuremberg Charter. The nexus requirement introduced by the 1951 Draft Code of Offenses against the Peace and Security of Mankind[47] one year later was, however, broadened, going beyond mere war crimes to any crime of the Draft Code, including, for example, 'encouragement . . . of terrorist activities in another State'.[48] In any case, the nexus fulfilled the same purpose as always, that is, to give the respective crime a transnational character and rendering it an international matter unaffected by sovereignty concerns. Surprisingly, the 1954 Draft Code of Offenses against the Peace and Security of Mankind replaced the nexus by the more '*Justice* case'-like policy requirement that the perpetrator act 'at the instigation or with toleration of [state] authorities'.[49] The implicit return to the alternative link to authority mentioned in the previous section puts the focus, again, on the relationship between the state and its representatives, vis-à-vis the citizens, that is, a situation that is governed by international human rights law (HRL). With this it becomes clear that the classical laws of war had been increasingly displaced by the then-new HRL, which constitutes the alternative international element of crimes against humanity. The only reminder of the Draft Code's humanitarian law origin of crimes against humanity is its definition of possible victims as the 'civilian population'. But this term also disappeared in subsequent ILC Drafts.

The next landmark in the development of crimes against humanity was the 1968 Convention of the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.[50] According to its Article 1(b), the Convention applies 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, Nurnberg'.[51] On its plain reading this means that, on the one hand, crimes against humanity can be committed in either situation—peace or armed conflict—and, on the other, that this reading also applies to the Nuremberg Charter ('as . . . defined in the Charter'). This interpretation is, in turn, only compatible with the wording of Article 6(c) of the Nuremberg Charter if the war nexus mentioned therein is considered as merely a jurisdictional restriction of the IMT's competence.

The move from the war nexus to a link with some form of state authority was subsequently confirmed by national case law. In the *Menten* case, the Dutch Supreme Court held in 1981 that the concept of crimes against humanity requires that the crimes 'form part of a system based on terror or constitute a link in a consciously pursued policy directed against particular groups of people'.[52] In 1985, the French *Cour de Cassation* ruled in the *Barbie* case that crimes against humanity must be 'committed in a systematic manner in the name of a State practicing a policy of ideological

[46] Principle VI(c) of the Principles of International Law recognised in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, *YbILC*, ii (1950), 374.

[47] Draft Code of Crimes against the Peace and Security of Mankind, *YbILC*, ii (1951), 134, Article 2(10).

[48] Draft Code of Crimes against the Peace and Security of Mankind, *YbILC*, ii (1951), 134, Article 2(6).

[49] Chapeau of Article 2(11), Draft Code, *YbILC*, ii (1954), 151.

[50] Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, 754 *UNTS* 73.

[51] Emphasis added.

[52] The Netherlands Hoge Raad (*Menten* case), *ILR*, 75 (1987), 362–3.

supremacy'.[53] This ruling was repeated in 1992 in the *Touvier* case.[54] A few years later, in 1994, the Supreme Court of Canada held in the *Finta* case: 'What distinguishes a crime against humanity from any other criminal offence under the Canadian Criminal Code is that the cruel and terrible actions which are essential elements of the offence were undertaken in pursuance of a policy of discrimination or persecution of an identifiable group or race'.[55]

The ILC's Draft Codes of Crimes against the Peace and Security of Mankind, on the one hand, confirmed the move to a policy-oriented requirement and, on the other, pursued a human rights approach. Article 21 of the 1991 Draft Code converted crimes against humanity into 'systematic or mass violations of human rights' and declared punishable any 'individual who commits or orders the commission of any of the following violations of human rights: murder, torture . . . in a systematic manner or on a mass scale . . . '.[56] The latter element combines qualitative ('systematic') and quantitative ('mass scale') criteria and, in a way, converts crimes against humanity into a leadership crime since only leaders are in a position to act systematically or on a large scale. Against this background it is not surprising that the ILC lists as possible perpetrators persons with '*de facto* power or organised in criminal gangs or groups'.[57] Thus, the Draft, in fact, retains the need for some kind of authority, or at least power, behind the crimes, simply clarifying that a non-state actor can also meet this element. Finally, the 1991 Draft Code does not require that the victims of crimes against humanity be civilians. The 1996 Draft Code,[58] while reintroducing civilians as victims (Article 18), confirms the context-related structure, according to which the systematic or large-scale commission of crimes is only required as background for the individual criminal conduct,[59] that is, the individual himself need not act systematically or on a large scale. On the other hand, it is similar to the 1991 Draft Code in that the authority behind the crimes may also be a non-state actor since it suffices that the crimes be 'instigated or directed by a Government or any organisation or group'.[60] In any case, a war nexus has been deliberately excluded by the ILC.[61] Interestingly, the jurisprudence of the ICTY and ICTR, to be analysed in the next section, has been greatly influenced by the 1996 Draft Code's reference to acting 'in a systematic manner or on a large scale'. On the other hand, the 1996 Draft Code has also been influenced by the language of the ICTR Statute which expressly requires a 'widespread or systematic attack'.

[53] Cour de Cassation (*Barbie* case), *ILR*, 78 (1984), 137. On the *Barbie* case and its impact on the law of crimes against humanity, see Fournet, *Genocide and Crimes Against Humanity* (2013), pp. 11–47.

[54] Cour de Cassation (*Touvier* case), *ILR*, 100 (1992), 352. The very language of the context element in these cases may be aimed at excluding acts of the Vichy regime or of French officials in Algeria from the scope of crimes against humanity, see pp. 353–5 where the Court explains that the Vichy regime collaborated with Germany only for pragmatic reasons and not for reasons of ideological supremacy. See also Binder, *YaleLJ*, 98 (1989), 1336–8.

[55] Supreme Court of Canada (*Finta* case), *SCR*, 1 (1994), 812.

[56] Article 21 Draft Code of Crimes against the Peace and Security of Mankind, *YbILC*, ii/2, 94 (1991).

[57] Article 21 Draft Code of Crimes against the Peace and Security of Mankind, *YbILC*, ii/2, 94 (1991), Commentary on Article 21, para. 5.

[58] Article 18 Draft Code of Crimes against the Peace and Security of Mankind, YbILC, ii/2, 15 (1996).

[59] At least this seems to be the interpretation given in *Tadić*, No. IT-94-1-T, para. 649.

[60] Chapeau of Article 18 Draft Code, *YbILC*, ii/2, 15 (1996).

[61] Draft Code, *YbILC*, ii/2, 15 (1996), commentary on Article 18(6).

(iii) The ad hoc international criminal tribunals

Article 5 of the 1993 ICTY Statute[62] returned to the international humanitarian law (IHL) origins of the definition of crimes against humanity and reintroduced, albeit in a different version, the war nexus ('armed conflict') and the focus on civilian victims.[63] In explaining this approach, the Secretary General's Report[64] refers exclusively to Common Article 3 of the four Geneva Conventions,[65] apparently (and incorrectly) considering the prohibition of war crimes in a non-international armed conflict as being identical to the prohibition of crimes against humanity.[66] In fact, the ICTY Statute's war nexus differs significantly from that of the Nuremberg Charter in two respects. On the one hand, the Nuremberg Charter was narrower than the Statute in that it required not only a commission of the crimes 'in armed conflict', but also a more specific nexus to one of the other war crimes enumerated in the Charter. On the other hand, the Charter had a wider scope than the ICTY Statute in that it extended the nexus to the mere preparation of an aggressive war. Against this background it is difficult to argue that the Statute's armed conflict nexus is required by customary international law as expressed in the Nuremberg Charter; this is all the more true if one follows the view that the Nuremberg war nexus was a merely jurisdictional element.[67] Indeed, in one of its first rulings—the *Tadić* Jurisdictional Appeal—the ICTY AC held that 'there is no logical or legal basis for [a war nexus] and it has been abandoned in subsequent State practice with respect to crimes against humanity'.[68] Moreover, it stated:

> It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed . . . customary international law may not require a connection between crimes against humanity and any conflict at all. Thus . . . the Security Council may have defined the crime in Article 5 more narrowly than necessary under customary international law.[69]

[62] Statute of the International Tribunal for the Former Yugoslavia, UN Doc. S/RES/827 (1993) (ICTY Statute).

[63] cf. Article 5 ICTY Statute: jurisdiction over '[t]he following crimes when committed in *armed conflict*, whether international or internal in character, and directed against any *civilian population* . . .' (emphasis added).

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

[65] First Geneva Convention of 1949, 75 *UNTS* 31; Second Geneva Convention of 1949, 75 *UNTS* 85; Third Geneva Convention of 1949, 75 *UNTS* 135; Fourth Geneva Convention of 1949, 75 *UNTS* 287.

[66] cf. Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, para. 47 (footnote omitted): '[C]rimes against humanity were first recognised in the Charter and Judgment of the Nuremberg Tribunal, as well as in Law No. 10 of the Control Council for Germany. Crimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character.' Fn. 9 reads: 'In this context, it is to be noted that the International Court of Justice has recognised that the *prohibitions contained in Common Article 3 of the 1949 Geneva Conventions* are based on "elementary considerations of humanity" and cannot be breached in an armed conflict, regardless of whether it is international or internal in character' (reference omitted; emphasis added).

[67] Note 36 with main text.

[68] *Prosecutor v Tadić*, No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 140 (2 October 1995).

[69] *Prosecutor v Tadić*, No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 141. The decision was quoted by the ILC in explaining its reasons for the exclusion of the war nexus in its Draft Code, Commentary on Article 18(6), *YbILC*, ii/2, 15 (1996).

In a later decision, the Appeals Chamber went a step further by stating that 'the armed conflict requirement is a *jurisdictional* element'[70] which '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'.[71] This view has also been expressed in subsequent case law.[72]

For all these reasons the only correct approach is the one taken by Article 3 of the ICTR Statute, that is, not to require any link to an armed conflict and instead introducing the context element of a 'widespread or systematic attack against any civilian population' (although the 'civilian population' requirement constitutes a—final—relic of the war crimes origin of the definition of crimes against humanity).[73]

In sum, the judges of both tribunals replaced the war nexus with a context element, which became the blueprint for Article 7(1) of the ICC Statute. For this reason, the jurisprudence of the ad hoc tribunals is of particular relevance for the interpretation of the chapeau of Article 7 ICC Statute and, in addition, the underlying acts. We will, therefore, draw heavily on this jurisprudence in the following section.

(b) The rationale of the context element as a guideline for interpretation

The function of the context element is to distinguish ordinary (national) crimes from extraordinary (international) crimes against humanity. The context element is the 'international element'[74] in crimes against humanity which renders a certain criminal conduct a matter of international concern.[75] The exact nature of this international concern—the rationale for why these crimes are considered important enough to deal with on an international level—assists greatly in the interpretation of these crimes and must, therefore, be briefly analysed here.

There are two possible reasons why the international community may treat a crime as a matter of international law. First, a crime can obtain an international character since it cannot be prosecuted effectively on a national level and states have a *common interest* to prosecute it. This practical reason applies to crimes such as piracy, probably

[70] *Prosecutor v Tadić*, No. IT-94-1-A, Appeals Chamber Judgment, para. 249 (15 July 1999).

[71] *Prosecutor v Tadić*, No. IT-94-1-A, Appeals Chamber Judgment, para. 251.

[72] *Prosecutor v Kunarac et al.*, No. IT-96-23 & IT-96-23/1-A, Appeals Chamber Judgment, para. 83 (12 June 2002); *Prosecutor v Tolimir*, No. IT-05-88/2-T, Trial Chamber Judgment, para. 691 (12 December 2012); *Prosecutor v Perišić*, No. IT-04-81-T, Trial Chamber Judgment, para. 80 (6 September 2011); *Prosecutor v Kordić and Čerkez*, No. IT-95-14/2-T, Trial Chamber Judgment, para. 33 (26 February 2001).

[73] Statute of the International Criminal Tribunal for Rwanda, UN Doc. S/RES/955 (1994) (ICTR Statute), Annex, Article 3: 'The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population . . . '

[74] cf. *Prosecutor v Tadić*, No. IT-94-1-A and IT-94-1-A*bis*, Judgment in Sentencing Appeals, Separate Opinion of Judge Shahabuddeen (26 January 2000); Bassiouni, *Crimes against Humanity* (1999), p. 243 (cf. the title of Chapter 6: 'The International or Jurisdictional Element').

[75] Kreß, 'Der Jugoslawien-Strafgerichtshof', in Fischer and Lüder, *Völkerrechtliche Verbrechen* (1999), p. 53; van Schaack, *ColJTransnat'lL*, 37 (1999), 819; Matthew Lippman, *BCThirdWorldLJ*, 17 (1997), 183 quoting Robert H. Jackson, head of the US delegation at the London Conference in 1945 where the Nuremberg Charter was negotiated; Cerone, *NewEngJIntCompL*, 14 (2008), 195 ('nexus requirement'); in the same vein, see Kirsch, 'Zweierlei Unrecht', in Michalke und Köberer, *FS Hamm* (2008), pp. 285 ff. considering, however, the context element as a mere jurisdictional element; see also Kirsch, *LJIL*, 22 (2009), 539–41.

the most ancient international crime,[76] or damaging submarine telegraph cables.[77] The second reason is the extreme *gravity* of certain crimes,[78] which is usually accompanied by the unwillingness or inability of national criminal systems to prosecute them. This is the rationale for the criminalization of crimes against humanity under international law. Particularly grave violations of individual rights by action or deliberate inaction of official authorities have been the concern of international law since the concept of human rights began to develop at the end of the nineteenth century.[79] This concept gained the status of 'hard law', at the latest, with the adoption of the Charter of the United Nations.[80] Thus, it was a logical consequence to criminalize the worst human rights violations, which coincide with the gravest crimes known to mankind.

The *specific seriousness* of crimes against humanity in relation to ordinary crimes (e.g. fraud) and 'normal' human rights violations (e.g. denial of the right to associate in trade unions[81]) is constituted of two characteristics. Crimes against humanity comprise only the most severe violations of human rights (e.g. violations of dignity, life, or freedom) and, in addition, must be committed either *systematically* or on a *widespread scale*. Accordingly, it has been emphasized repeatedly, *inter alia* by the ILC and by case law,[82] that the context element serves to single out random acts of violence from the scope of crimes against humanity. The widespread or systematic commission of crimes increases the gravity of the single crime in that it multiplies the *danger* of the individual perpetrator's conduct,[83] as a victim who is the object of a widespread or systematic attack is much more vulnerable than a victim of ordinary criminal conduct. In the latter case police or neighbours may be called for help, or victims can even defend themselves without having to fear retaliation by other co-perpetrators. Perpetrators of crimes against humanity also pose a greater threat because they are normally beyond the reach of the ordinary response of the criminal justice system. In this sense, Antonio Cassese noted that, in contrast to the perpetrator of an ordinary crime, a criminal against humanity may not fear punishment.[84] On the contrary, collective action tolerated or supported by official policy or authorities helps to overcome natural inhibitions. What is more, not only is the danger presented by the single perpetrator increased, but each individual participant in the attack also helps to constitute the attack itself, and, thus, helps to constitute the atmosphere and the environment for the crimes of others.

[76] Jennings and Watts, *Oppenheim's* (1992), p. 746; Bassiouni, 'The Sources', in Bassiouni, *International Criminal Law* (1999), p. 83; Stern, 'A propos', in Yakpo and Boumedra, *Liber Amicorum* (1999), pp. 736, 744 ff. For a more detailed treatment see Chapter V, D.

[77] Jennings and Watts, *Oppenheim's* (1992), p. 761.

[78] McAuliffe de Guzman, *HRQ*, 22 (2000), 376.

[79] Jennings and Watts, *Oppenheim's* (1992), pp. 849–50; also pp. 995–8, where the authors consider crimes against humanity in the context of human rights.

[80] Verdross and Simma, *Universelles Völkerrecht* (1984), p. 162; German Constitutional Court (BVerfG), No. 2 BvM 1/76, in *BVerfGE*, 46, p. 362 (13 December 1977).

[81] Article 22 International Covenant on Civil and Political Rights, 999 *UNTS* 171.

[82] Commentary on Article 18(5) Draft Code, *YbILC*, ii/2, 15 (1996); Altstoetter and Others (*Justice* case), in US-GPO, *TWC*, iii (1997), p. 982; *Tadić*, No. IT-94-1-T, paras. 646, 648, 653; *Prosecutor v Akayesu*, No. ICTR-96-4-T, Trial Chamber Judgment, para. 579 (2 September 1998).

[83] Heine and Vest, 'Murder/Willful Killing', in McDonald and Swaak-Goldman, *Substantive and Procedural Aspects* (2000), pp. 175, 194.

[84] *Tadić*, No. IT-94-1-A and IT-94-1-A*bis*, Separate Opinion of Judge Cassese, para. 14.

(c) Conclusion

The most striking conclusion that can be drawn from this analysis of the evolution of the context element is that it has continued to change throughout history. In a way, the only common denominator is the fact that some kind of context has been required by every drafter or judge dealing with crimes against humanity. In addition, after the abandonment of the war nexus, a link to an authority or power, be it a state, organization, or group, was required by most provisions on crimes against humanity as well as by the case law of the ad hoc tribunals. While the reference to 'organizational policy' in Article 7(2) ICC Statute makes clear that the provision also applies to non-state actors,[85] it is far from clear how far this 'privatization' of crimes against humanity can reasonably go. We will return to this issue in due course.

In any case, the context element has been converted into the '*international element*' of crimes against humanity, which makes certain criminal conduct an object of international concern. The *rationale* of this 'internationalization' of certain crimes is their special gravity, often accompanied by the unwillingness or inability of national criminal justice systems to prosecute them. Indeed, as has been discussed, crimes against humanity may be understood as a state crime in the sense of a 'systematic inversion' of the powers justifying the state's existence.[86] Thus, the rationale of the context element can be summarized as the protection of fundamental human rights and underlying human dignity[87] against serious systematic and widespread human rights violations caused, supported, or tolerated by state or certain non-state organizations (to be qualified more precisely in the following section).

(2) Elements of the context

As previously mentioned, the requirement of a widespread or systematic attack was codified for the first time in Article 3 ICTR Statute and subsequently in Article 7 ICC Statute ('committed as part of a widespread or systematic attack directed against any civilian population').[88] Although Article 5 ICTY Statute does not explicitly mention this context element, the Tribunal argued in *Tadić* and *Blaškić* that it was implicit in the requirement that the object of such crimes must be a 'population' ('directed against any

[85] Dissenting: Bassiouni, *The Legislative History* (2005), pp. 151–2; Bassiouni, *Crimes Against Humanity* (2011), p. 47. Convincingly against Bassiouni's view, Schabas, 'Crimes against Humanity', in Sadat and Scharf, *The Theory and Practice* (2008), pp. 358 ff. In any case, Bassiouni recognizes an 'extension to non-state actors by analogy' if they act pursuant to a policy: Bassiouni, *Crimes against Humanity* (1999), p. 245.

[86] Note 12 and main text.

[87] cf. *Kupreškić et al.*, No. IT-95-16-T, para. 547 ('[crimes against humanity] are intended to safeguard basic human values by banning atrocities directed against human dignity').

[88] On the respective negotiations at the Rome Diplomatic Conference, see Robinson, *AJIL*, 93 (1999), 47–51.

[89] *Tadić*, No. IT-94-1-T, para. 648 ('[E]ither a finding of widespreadness, which refers to the number of victims, or systematicity, indicating that a pattern or methodical plan is evident, fulfils this requirement [that the acts must be directed against a civilian population])'; *Prosecutor v Blaškić*, No. IT-95-14-T, Trial Chamber Judgment, para. 202 (3 March 2000) ('It is appropriate, however, to note that the words "directed against any civilian population" and some of the sub-characterisations set out in the text of the Statute imply, both by their very nature and by law, an element of being widespread or organised, whether as

civilian population').[89] In addition, both judgments refer to the 1996 ILC Draft Code which requires the commission of crimes 'in a systematic manner or on a large scale'. Finally, *Blaškić* takes into account the Statutes of the ICTR and the ICC as well as other case law of the tribunals.[90]

(a) Attack

Article 7(2)(a) ICC Statute defines 'attack' as 'a course of conduct involving the multiple commission of acts referred to in paragraph 1 . . . , pursuant to or in furtherance of a State or organisational policy . . . '.[91] The *Kenya* Pre-Trial Chamber (PTC) of the ICC considered an 'attack' as 'a campaign or operation carried out against the civilian population' which is, however, not limited to a 'military operation'.[92] Previously, the *Akayesu* ICTR TC defined the concept as follows:

> The concept of attack may be defined as an unlawful act of the kind enumerated in Article 3(a) to (i) of the Statute, like murder, extermination, enslavement etc. An attack may also be non-violent in nature, like imposing a system of apartheid, which is declared a crime against humanity in Article 1 of the Apartheid Convention of 1973, or exerting pressure on the population to act in a particular manner, may come under the purview of an attack, if orchestrated on a massive scale or in a systematic manner.[93]

Substantially the same definition has been adopted in subsequent case law.[94] All these definitions have in common—despite *Akayesu*'s puzzling equation of attack with an 'unlawful act' in the first part of the passage quoted[95]—that an attack consists of a *multiplicity of criminal acts* as defined in the respective provisions, that is, murder, extermination, torture, rape etc. Yet, the attack need not necessarily be 'violent in nature' (e.g., the system of apartheid). Also, the acts that form part of an attack need

regards the acts or the victims. "Extermination", "enslavement" and "persecutions" do not refer to single events').

[90] *Blaškić*, No. IT-95-14-T, para. 202.

[91] On the negotiations see, for example, Hwang, *FordhamILJ*, 22 (1998), 497–501.

[92] Pre-Trial Chamber II, *Situation in the Republic of Kenya*, No. ICC-01/09-19, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, para. 80 (31 March 2010) (referring to para. 3 of the Introduction to Article 7 in the Elements of Crimes, UN Doc. PCNICC/2000/1/Add.2).

[93] *Akayesu*, No. ICTR-96-4-T, para. 581.

[94] *Prosecutor v Nahimana et al.*, No. ICTR-99-52-A, Appeals Chamber Judgment, para. 918 (28 November 2007); *Prosecutor v Rutaganda*, No. ICTR-96-3-T, Trial Chamber Judgment, para. 70 (6 December 1999); *Prosecutor v Karemera et al.*, No. ICTR-98-44-T, Trial Chamber Judgment and Sentence, para. 1674 (2 February 2012); *Prosecutor v Nzabonimana*, No. ICTR-98-44D-T, Trial Chamber Judgment and Sentence, para. 1777 (31 May 2012); *Prosecutor v Kunarac et al.*, No. IT-96-23-T & IT-96-23/1-T, Trial Chamber Judgment, para. 415 (22 February 2001); *Prosecutor v Blagojević and Jokić*, No. IT-02-60-T, Trial Chamber Judgment, para. 543 (17 January 2005); *Prosecutor v Milutinović et al.*, No. IT-05-87-T, Trial Chamber Judgment, para. 144 (26 February 2009); *Prosecutor v Lukić and Lukić*, No. IT-98-32/1-T, Trial Chamber Judgment, para. 873 (20 July 2009).

[95] What the Trial Chamber probably means is that each individual act is committed *as part* of a widespread or systematic attack (cf. *Akayesu*, No. ICTR-96-4-T, para. 578).

not all be of the same type, but may be different. This point has been made by the *Kayishema and Ruzindana* TC, clarifying that an attack may consist of an accumulation of *different* crimes.[96] The ICTY *Kupreškić* TC refers to 'acts' that 'were part of a widespread or systematic occurrence of crimes'.[97] Such a broad understanding of the 'act' part of the attack also encompasses the '*other inhumane acts*' contained in Article 5(i) ICTY Statute, Article 3(i) ICTR Statute, and 7(1)(k) ICC Statute.[98] Given the lack of precision of this fallback category, the concept of the attack becomes, however, too imprecise and potentially limitless. Of course, the degree of precision ultimately depends on a reasonable definition of 'inhumane acts', which will be proposed later.[99] In any case, it is clear that the attack concept, requiring a multiplicity of acts, excludes isolated and random (inhumane) acts,[100] although this consequence is sometimes also attributed to the qualifiers 'systematic' or 'widespread' as we will see later. On the other hand, a military attack is clearly not required.[101]

While the attack requires a multiplicity of (criminal) acts, it does not necessarily need a multiplicity of actors, nor does a single perpetrator have to act at different times.[102] For example, if a single perpetrator poisons the water of a large population, he would thereby commit a multiplicity of killings (and thus multiple criminal acts) with a single (natural) act. The same holds true for the attacks of 11 September 2001 against the USA. Flying one plane into a skyscraper constitutes an attack by a single conduct producing multiple criminal acts (killings, injuries etc.) which in their combination suffice for the required 'attack'.[103] Indeed, a 'particular conduct may constitute one or more crimes'.[104]

(b) Widespread or systematic

(i) Systematic attack

The attack is systematic if it is based on a policy or plan which directs or guides the individual perpetrators as to the object of the attack, that is, the 'civilian population'. According to the *Tadić* Trial Judgment, a systematic attack requires the existence of a 'pattern or methodical plan'.[105] *Akayesu* defined a systematic attack 'as thoroughly

[96] *Prosecutor v Kayishema and Ruzindana*, No. ICTR-95-1-T, Trial Chamber Judgment, para. 122 (21 May 1999): 'The attack is the event in which the enumerated crimes must form part. Indeed, within a single attack, there may exist a combination of the enumerated crimes, for example murder, rape and deportation.'

[97] *Kupreškić et al*., No. IT-95-16-T, para. 544.

[98] See Ambos and Wirth, *CLF*, 13 (2002), 16; Mettraux, *HarvILJ*, 43 (2002), 259–61.

[99] See Section C. (11).

[100] See Clark, 'Crimes against Humanity', in Clark, Feldbrugge, and Pomorski, *Essays* (2001), p. 152; Dixon revised by Hall, 'Article 7', in Triffterer, *Commentary* (2008), mn. 4; Gomez-Benitez, *CDJ*, 7 (2001), 21.

[101] Dixon revised by Hall, 'Article 7', in Triffterer, *Commentary* (2008), mn. 8; Robinson, 'Crimes Against Humanity', in Cryer et al., *Introduction ICL* (2010), p. 237.

[102] Chesterman, *DukeJComp&IL*, 10 (2000), 316.

[103] *Kupreškić et al*., No. IT-95-16-T, para. 712; Ambos and Wirth, 'Commentary', in Klip and Sluiter, *Annotated Leading Cases*, ii (2001), p. 701; Gil Gil, *RDPC*, 4 (1999), 788 ff.

[104] Elements of Crimes, General Introduction, para. 9.

[105] *Tadić*, No. IT-94-1-T, para. 648.

organised and following a regular pattern on the basis of a common policy involving substantial public or private resources'.[106] Thus, it added to the *Tadić* definition *inter alia* the requirements that the organization of the attack be 'thorough' and that 'substantial resources' be used. The *Kayishema and Ruzindana* TC stressed the relation between the systematic nature of the attack and the relevant policy: 'A systematic attack means an attack carried out pursuant to a preconceived policy or plan'.[107] Similarly, the *Kunarac et al.* TC also read the requirement of some policy or plan, at least implicitly, into the element of systematicity when it stated: 'The adjective "systematic" signifies the organised nature of the acts of violence and the improbability of their random occurrence'.[108] The ICC PTC II, taking recourse *inter alia* to the ICTY jurisprudence, defined 'systematic attack' as referring to the 'organised nature of the acts of violence and the improbability of their random occurrence'.[109] The systematicity of the attack may 'be expressed through patterns of crimes, in the sense of nonaccidental repetition of similar criminal conduct on a regular basis'.[110]

What all these decisions and the subsequent case law[111] have in common is that they rely on the 1996 ILC Draft Code, which defined a systematic attack as one committed 'pursuant to a preconceived plan or policy'.[112] This may be considered to be the core meaning of the systematic qualifier. On this basis, the two additional requirements of the *Akayesu* TC ('thoroughly organised and following a regular pattern' and using 'substantial resources') should not be regarded so much as requirements *stricto sensu*, but rather as an illustration of typical 'systematic' attacks. Otherwise, this view would, for example, exclude an attack with machetes from the systematic alternative, since machetes indicate a lack of resources (in terms of the availability of more effective weapons) or that it was sloppily organized. In the same vein, the four criteria introduced by the *Blaškić* TC[113]—(1) existence of a political objective or plan pursuant to which the attack is perpetrated or an ideology, in the broad sense of the word, that is, to

[106] *Akayesu*, No. ICTR-96-4-T, para. 580. The same Chamber confirms its holding in *Rutaganda*, No. ICTR-96-3-T, para. 69 and *Prosecutor v Musema*, No. ICTR-96-13-T, Trial Chamber Judgment and Sentence, para. 204 (27 January 2000). See also *Prosecutor v Seromba*, No. ICTR-2001-66-I, Trial Chamber Judgment, para. 356 (13 December 2006).

[107] *Kayishema and Ruzindana*, No. ICTR-95-1-T, para. 123.

[108] *Kunarac et al.*, No. IT-96-23-T & IT-96-23/1-T, para. 429.

[109] *Situation in the Republic of Kenya*, No. ICC-01/09-19, para. 96.

[110] *Situation in the Republic of Kenya*, No. ICC-01/09-19, citing *Prosecutor v Katanga and Chui*, No. ICC-01/04-01/07-717, Pre-Trial Chamber I, Decision on the Confirmation of Charges, para. 397 (30 September 2008); *Kordić and Čerkez*, No. IT-95-14/2-A, Appeals Chamber Judgment, para. 94 (17 December 2004); *Blagojević and Jokić*, No. IT-02-60-T, para. 545.

[111] *Prosecutor v Bagosora and Nsengiyumva*, No. ICTR-98-41-A, Appeals Chamber Judgment, para. 389 (14 December 2011); *Nahimana et al.*, No. ICTR-99-52-A, para. 920; *Prosecutor v Ntakirutimana and Ntakirutimana*, Nos. ICTR-96-10-A and ICTR-96-17-A, Appeals Chamber Judgment, para. 516 (13 December 2004); *Prosecutor v Gacumbitsi*, No. ICTR-001-64-A, Appeals Chamber Judgment, para. 101 (7 July 2006); *Karemera et al.*, No. ICTR-98-44-T, para. 1674; *Nzabonimana*, No. ICTR-98-44D-T, para. 1777; *Prosecutor v Nyiramasuhuko et al.*, No. ICTR-98-42-T, Trial Chamber Judgment and Sentence, para. 6040 (24 June 2011); *Kordić and Čerkez*, No. IT-95-14/2-A, para. 94; *Prosecutor v Milošević*, No. IT-98-29-1-A, Appeals Chamber Judgment, para. 266 (12 November 2009); *Tolimir*, No. IT-05-88/2-T, para. 698.

[112] Commentary on Article 18(3) Draft Code, *YbILC*, ii/2, 15 (1996); *Musema*, No. ICTR-96-13-T, para. 204.

[113] *Blaškić*, No. IT-95-14-T, para. 203 (footnotes omitted); these requirements are repeated in *Kordić and Čerkez*, No. IT-95-14/2-T, para. 179.

destroy, persecute or weaken a community; (2) perpetration of a criminal act on a very large scale or the repeated and continuous commission; (3) preparation and use of significant public or private resources; (4) implication of high-level political and/or military authorities in the definition and establishment of the methodical plan—demand too much and create a somewhat hypertrophic definition assembling highly diverse sources (including the 1991 and 1996 ILC Drafts and the *Tadić* and *Akayesu* views mentioned earlier).[114] Such a 'pick and choose' method is questionable in itself because it results in a new definition of 'systematic', establishing cumulative criteria which cannot be attributed to any of the sources alone. In fact, only the first *Blaškić* criterion, also adopted by *Kayishema and Kunarac*, can be regarded as a proper criterion of a systematic attack. As to the second criterion, the *Blaškić* TC fails to indicate any source for its first alternative (committed on a 'very large scale') which, in any case, rather belongs to the definition of the widespread qualifier. But also the second alternative of the second criterion (repeated and continuous commission of inhumane acts) was named by the ILC only as an example, that is, as a *possible* result of the implementation of a plan or policy.[115] The third criterion, taken from *Akayesu,* has already been criticized. Finally, the fourth criterion is formulated too narrowly, as will be explained in the course of interpretation of the policy requirement.

In conclusion, the common denominator of the various definitions of a systematic attack is that such an attack 'is one carried out pursuant to a preconceived policy or plan'.[116] More explicitly, what constitutes the *systematic* character of the attack is the *guidance* provided for the individual perpetrators as to the envisaged object of the attack, namely the civilian population.

(ii) Widespread attack

With regard to the criterion of a widespread attack, the ad hoc tribunals mainly focus on the scale of the attack, or, equivalently, on the number of victims. Thus, the *Tadić* TC, following the ILC's 1996 Draft Code,[117] defined a widespread attack as referring 'to the [large] number of victims'.[118] Very similarly, *Kayishema* held that a widespread attack must be 'directed against a multiplicity of victims'.[119] *Blaškić* explained: 'A crime may be widespread or committed on a large-scale by "the cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude".'[120] And the *Kunarac* Chamber referred to 'the large-scale nature of the attack and the number of its victims'.[121] In contrast, the *Akayesu* TC provided a much longer

[114] *Blaškić*, No. IT-95-14-T, para. 203, fn. 379–81.
[115] Commentary on Article 18(3) Draft Code, *YbILC*, ii/2, 15 (1996).
[116] *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, Trial Chamber Judgment, para. 77 (7 June 2001).
[117] Commentary on Article 18(4) Draft Code, *YbILC*, ii/2, 15 (1996).
[118] *Tadić*, No. IT-94-1-T, para. 648.
[119] *Kayishema and Ruzindana*, No. ICTR-95-1-T, para. 123.
[120] *Blaškić*, No. IT-95-14-T, para. 206, quoting the ILC's Commentary on Article 18(4) Draft Code, *YbILC*, ii/2, 15 (1996). This definition was adopted by various subsequent decisions, for example, the Trial Chamber in *Kordić and Čerkez*, No. IT-95-14/2-T, para. 179.
[121] *Kunarac et al.*, No. IT-96-23-T & IT-96-23/1-T, para. 428; see also *Tadić*, No. IT-94-1-T, para. 648; *Blaškić*, No. IT-95-14-T, para. 202; *Prosecutor v Krnojelac et al.*, No. IT-97-25-T, Trial Judgment, para. 57 (15 March 2002).

and more complicated definition, holding that a 'massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims' was required.[122] This definition was referred to by the ICC PTC II, stressing at the same time that the widespread element is neither to be assessed strictly quantitatively nor geographically but 'on the basis of the individual facts'.[123]

Again, all these (and subsequent)[124] decisions draw on the ILC's Draft Codes and their respective commentaries. Thus, it may be concluded that all that a widespread attack requires is a large number of victims—arguably larger than the one required for a systematic attack—which, as stated in *Blaškić*, can also be attacked by a single conduct 'of extraordinary magnitude'. The additions to this core definition in *Akayesu* do not contribute substantially to the definition and may be regarded as merely illustrative.

(iii) Alternative or cumulative approach

Article 7(1) ICC Statute requires explicitly that the acts be committed as part of a 'widespread *or* systematic' attack, thus, suggesting an alternative approach to both requirements. It has also been repeated many times by both ad hoc tribunals that an attack need not be widespread *and* systematic, but only *either* widespread, *or* systematic.[125] Also, some codifications such as the 1996 ILC Draft Code,[126] UNTAET Regulation 15/2000,[127] and the Statute of the Special Court for Sierra Leone (SCSL) seem to adopt the alternative approach. The scholarly literature normally follows this approach,[128] albeit without discussing the relevant issues adequately. However, Article 7(2)(a) ICC Statute requires that the 'multiple commission of acts' be based on ('pursuant to or in furtherance of') a certain policy and therefore, seems to opt for the cumulative approach. Thus, the question arises as to whether it is possible to interpret Article 7(2)(a) in accordance with the alternative approach which is explicitly adopted by Article 7(1)?

The solution to this problem lies in the *function* accorded to the policy element. Whereas Article 7(2)(a) of the ICC Statute expressly requires this element, the question

[122] *Akayesu*, No. ICTR-96-4-T, para. 580; the definition is repeated in *Rutaganda*, No. ICTR-96-3-T, para. 69 and *Musema*, No. ICTR-96-13-T, para. 204.

[123] *Situation in the Republic of Kenya*, No. ICC-01/09-19, para. 95. The Chamber also adopted the *Blaškić* definition, see note 120.

[124] *Tolimir*, No. IT-05-88/2-T, para. 698 citing *Prosecutor v Blaškić*, No. IT-95-14-A, Appeals Chamber Judgment, para. 101 (29 July 2004); *Kunarac et al.*, No. IT-96-23 & IT-96-23/1-A, para. 94; *Tadić*, No. IT-94-1-T, para. 648. See also *Prosecutor v Gotovina et al.*, No. IT-06-90-T, Trial Chamber Judgment, ii, para. 1703 (15 April 2011); *Nahimana et al.*, No. ICTR-99-52-A, para. 920; *Karemera et al.*, No. ICTR-98-44-T, para. 1674; *Nyiramasuhuko et al.*, No. ICTR-98-42-T, para. 6040.

[125] *Tadić*, No. IT-94-1-T, paras. 646–8; *Akayesu*, No. ICTR-96-4-T, para. 579; *Kayishema and Ruzindana*, No. ICTR-95-1-T, para. 123; *Rutaganda*, No. ICTR-96-3-T, paras. 67–8; *Musema*, No. ICTR-96-13-T, paras. 202–3; *Blaškić*, No. IT-95-14-T, para. 207; *Kunarac et al.*, No. IT-96-23-T & IT-96-23/1-T, para. 427; *Kordić and Čerkez*, No. IT-95-14/2-T, para. 178; *Bagilishema*, No. ICTR-95-1A-T, para. 77.

[126] Article 18 Draft Code: '[i]n a systematic manner or on a large scale', YbILC, ii/2, 15 (1996).

[127] Available at <http://www.un.org/en/peacekeeping/missions/past/etimor/untaetR/Reg0015E.pdf> accessed 15 March 2013.

[128] See, for example, Swaak-Goldman, 'Crimes against Humanity', in McDonald and Swaak-Goldman, *Substantive and Procedural Aspects* (2000), p. 157; Scheinert, *ICLR*, 13 (2013), 645.

[129] Cassese et al., *ICL* (2013), p. 107; Schabas, *Introduction* (2011), pp. 111–14; Bassiouni, *Crimes against Humanity* (1999), pp. 243 ff. See also *Kunarac et al.*, No. IT-96-23 & IT-96-23/1-A, para. 98; *Situation in the Republic of Kenya*, No. ICC-01/09-19, Dissenting Opinion of Judge Kaul, paras. 28–33 (analysing the jurisprudence of the ad hoc tribunals and the SCSL and concluding that pursuant to the Tribunals'

of whether it is required under customary international law is controversial.[129] This issue will be discussed in connection with our analysis of the policy element. In any case, the wording of Article 7(2)(a) makes clear that a mere quantitative understanding of the context element is insufficient. The 'attack' within the meaning of Article 7(1) must always be based on ('pursuant to or in furtherance of') a certain policy.

(c) Directed against any civilian population

(i) Population

The widespread or systematic attack has to be directed against 'any civilian population'. 'Population' refers to a multiplicity of persons sharing common attributes.[130] However, it is not necessary that the perpetrator attacks the '*entire* population of the geographical entity in which the attack is taking place (a state, a municipality or another circumscribed area)'.[131] The population requirement also serves—as does the 'widespread or systematic attack' element—to exclude single or random acts of violence from the scope of crimes against humanity.[132] The *Tadić* TC held that this element implies the collective nature of the crimes.[133] However, the victims of the attack need not be victimized *because* of their membership in a certain group,[134] therefore a discriminatory intent is insofar not required.[135] It suffices that a multiplicity of victims exists. In fact, the ICTY inferred the very requirement of a widespread or systematic attack from the term 'population'.[136] Consequently, the population requirement does not add anything to the attack requirement, that is, it is redundant if the respective provision (such as Article 7 ICC Statute) explicitly requires a (widespread or systematic) attack. It may only qualify the population as Article 7 does with the adjective 'civilian'.[137]

On the other hand, the term 'any' clarifies that the victims need not be nationals of a foreign state.[138] Such clarification was necessary as long as crimes against humanity

renunciation of the policy requirement this was not demanded by customary law, notwithstanding its explicit inclusion in Article 7(2)(a) ICC Statute). For an in-depth analysis, see Mettraux, 'Definition', in Sadat, *Convention* (2011), pp. 142–76 (also concluding that there was no requirement for a policy element in customary law, pp. 175–6).

[130] Mettraux, *HarvILJ*, 43 (2002), 255 ('A "population" is a sizeable group of people who possess some distinctive features that mark them as targets of the attack. The "population" must form a self-contained group of individuals, either geographically or as a result of other common features'); Werle, *Principles* (2009), p. 293 ('any group of people linked by shared characteristics that in turn make it the target of an attack').

[131] *Kunarac et al.*, No. IT-96-23-T & IT-96-23/1-T, para. 424 (emphasis in the original) referring to *Tadić*, No. IT-94-1-T, para. 644. On the geographical scope of the attack, see Kuschnik, *Gesamttatbestand* (2009), p. 276.

[132] See also *Kunarac et al.*, No. IT-96-23-T & IT-96-23/1-T, para. 422.

[133] *Tadić*, No. IT-94-1-T, para. 644; concurring, *Bagilishema*, No. ICTR-95-1A-T, para. 80.

[134] See also McAuliffe de Guzman, *HRQ*, 22 (2000), 362; Chesterman, *DukeJComp&IL*, 10 (2000), 325; Pégorier, *Ethnic Cleansing* (2013), p. 118.

[135] cf. *Tadić*, No. IT-94-1-A, para. 305 ('discriminatory intent . . . indispensable . . . only with regard to those crimes for which this is expressly required, that is, for Article 5(h), concerning various types of persecution').

[136] *Tadić*, No. IT-94-1-T, para. 644.

[137] See also McAuliffe de Guzman, *HRQ*, 22 (2000), 362–4.

[138] Robinson, *AJIL*, 93 (1999), 51; Pégorier, *Ethnic Cleansing* (2013), p. 115; also *Tadić*, No. IT-94-1-T, para. 635; *Kunarac et al.*, No. IT-96-23-T & IT-96-23/1-T, para. 423.

had not been fully emancipated from the laws of war (as has been demonstrated by the analysis of the 'war nexus'). In a more general sense, the qualifier confirms that no part of the civilian population is excluded from the offence.[139] Moreover, it supports the broad interpretation of the term 'civilian' advanced in the next section.

(ii) Civilian

While it is settled jurisprudence that the character of a predominantly civilian population is not altered by 'the presence of certain non-civilians in their midst',[140] that is, the presence of hostile military forces among a predominantly civilian population does not change its character as 'civilian', it is controversial which individuals fall within the definition of 'civilian'. In this regard, one should first recall that the civilian requirement is a relic of the origins of crimes against humanity in the laws of war. Moreover, its inclusion in modern ICL codifications is most probably based on a confusion of Common Article 3 of the Geneva Conventions with the law of crimes against humanity. If the scope of crimes against humanity was ever limited to the protection of (civilian) war victims this is no longer the case. At present, it serves the protection of human rights of civilians in general. However, not only the human rights of civilians, but also those of soldiers can be violated. The ICTY described this dilemma as follows: 'One fails to see why only civilians and not also combatants should be protected by these rules (in particular by the rule prohibiting persecution), given that these rules may be held to possess a broader humanitarian scope and purpose than those prohibiting war crimes'.[141] Yet, whereas the Tribunal felt that it could not ignore the wording of its Statute—which explicitly requires the element 'civilian'—one should recall its persuasive conclusion that a broad interpretation of the term is required.[142] The ad hoc tribunals[143] have frequently referred to the *Barbie* case in which the French *Cour de Cassation* decided that members of the 'Resistance' could be victims of crimes against humanity.[144] The UN Commission of Experts for the situation in the Former Yugoslavia considered that the term 'civilian', meaning non-combatant, included a head of family who 'tries to protect his family gun-in-hand'.[145] The ad hoc tribunals have followed this approach and adopted a wide definition of civilian. The *Vukovar* decision

[139] Commission of Experts, *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, UN Doc. S/1994/674, para. 77.

[140] *Mrkšić and Šljivančanin*, No. IT-95-13-1-A, Appeals Chamber Judgment, para. 31 (5 May 2009); see also *Tadić*, No. IT-94-1-T, para. 638; *Blaškić*, No. IT-95-14-A, para. 113; *Akayesu*, No. ICTR-96-4-T, para. 582; *Kayishema and Ruzindana*, No. ICTR-95-1-T, para. 128; *Rutaganda*, No. ICTR-96-3-T, para. 72; *Musema*, No. ICTR-96-13-T, para. 207; *Kupreškić et al.*, No. IT-95-16-T, para. 549; *Kunarac et al.*, No. IT-96-23-T & IT-96-23/1-T, para. 325; *Kordić and Čerkez*, No. IT-95-14/2-T, para. 180; *Bagilishema*, No. ICTR-95-1A-T, para. 79; *Prosecutor v Krnojelac*, No. IT-97-25-T, Trial Chamber Judgment, para. 56 (15 March 2002); *Tolimir*, No. IT-05-88/2-T, para. 696.

[141] *Kupreškić et al.*, No. IT-95-16-T, para. 547.

[142] *Kupreškić et al.*, No. IT-95-16-T.

[143] *Prosecutor v Martić*, No. IT-95-11-A, Appeals Chamber Judgment, para. 309 (8 October 2008); *Prosecutor v Mrkšić et al.*, No. IT-95-13/1-T, Trial Chamber Judgment, para. 450 (27 September 2007); previously *Tadić*, No. IT-94-1-T, para. 614; *Blaškić*, No. IT-95-14-T, para. 212; *Kupreškić et al.*, No. IT-95-16-T, para. 548; *Akayesu*, No. ICTR-96-4-T, para. 582.

[144] Cour de Cassation, *ILR*, 78 (1984), 140. The court also held, at 137, that crimes against humanity could be committed 'against the opponents of [a policy of ideological supremacy], whatever the form of their opposition'.

[145] Commission of Experts, UN Doc. S/1994/674, para. 78.

held that: 'Although according to the terms of Article 5 of the Statute of this Tribunal combatants in the traditional sense of the term cannot be victims of a crime against humanity, this does not apply to individuals who, at one particular point in time, carried out acts of resistance'.[146] Consequently, the Tribunal ruled that former resistance fighters who had laid down their arms and were now hospital patients could be victims of crimes against humanity.[147] In *Tadić*, the Trial Chamber opined that 'those actively involved in a resistance movement can qualify as victims of crimes against humanity'.[148] A more comprehensive definition is given by *Akayesu*: 'Members of the civilian population are people who are not taking any active part in the hostilities, including members of the armed forces who laid down their arms and those persons placed *hors de combat* by sickness, wounds, detention or any other cause'.[149] This definition has been reformulated and clarified in *Blaškić*:

> Crimes against humanity therefore do not mean only acts committed against civilians in the strict sense of the term but include also crimes against two categories of people: those who were members of a resistance movement and former combatants—regardless of whether they wore a uniform or not—but who were no longer taking part in hostilities when the crimes were perpetrated because they had either left the army or were no longer bearing arms or, ultimately, had been placed *hors de combat*, in particular, due to their wounds or their being detained. It also follows that the 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.[150]

This approach equates the wide concept of non-combatants in Common Article 3 of the Geneva Conventions (GCs)[151] with the term 'civilian' as an element of crimes against humanity. It clarifies that the (formal) status of an individual is not decisive, but rather attention must be paid to the individual's 'specific situation'. It thus complies with the humanitarian purpose of crimes against humanity, since everyone except an active combatant of a hostile armed force is in a 'specific situation' requiring the protection of his human rights. The subsequent jurisprudence, however, did not follow this approach at full length. Rather than assigning civilian status to persons placed *hors*

[146] *Prosecutor v Mrkšić et al.*, No. IT-95-13-R61, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, para. 29 (3 April 1996).

[147] *Prosecutor v Mrkšić et al.*, No. IT-95-13-R61, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, para. 32.

[148] *Tadić*, No. IT-94-1-T, para. 643; the same definition is used in *Kupreškić et al.*, No. IT-95-16-T, para. 549.

[149] *Akayesu*, No. ICTR-96-4-T, para. 582; *Rutaganda*, No. ICTR-96-3-T, para. 72; *Musema*, No. ICTR-96-13-T, para. 207; *Krnojelac*, No. IT-97-25-T, para. 56.

[150] *Blaškić*, No. IT-95-14-T, para. 214. Similarly *Prosecutor v Galić*, No. IT-98-29-T, Trial Chamber Judgment, para. 143 (5 December 2003); *Bagilishema*, No. ICTR-95-1A-T, para. 79; *Prosecutor v Limaj et al.*, No. IT-03-66-T, Trial Chamber Judgment, para. 186 (30 November 2005).

[151] The language of Common Article 3 is used almost verbatim in *Blaškić*, No. IT-95-14-T, para. 214.

[152] *Blaškić*, No. IT-95-14-A, para. 114; *Martić*, No. IT-95-11-A, para. 313; *Mrkšić & Šljivančanin*, No. IT-95-13-1-A, para. 32; *Prosecutor v Popović et al*, No. IT-05-88-T, i, Trial Chamber Judgment, para. 755 (10 June 2010); *Tolimir*, No. IT-05-88/2-T, para. 697; *Prosecutor v Stanišić and Župljanin*, Trial Chamber Judgment, i, No. IT-08-91-T, para. 27 (27 March 2013).

de combat, they remain—in accordance with Article 50(1) AP I—non-civilians, but nevertheless qualify as victims of crimes against humanity.[152]

This view is in full accordance with post-World War II decisions of the German Supreme Court in the British Occupied Zone under CCL 10. In one case, the defendants were convicted for having sentenced to death and ordered the execution of two (German) soldiers who had deserted in the last days of the war. The Court noted that the crime against the soldiers was not committed against the civilian population but ruled this was not necessary since crimes against humanity can be committed against (former) soldiers as well.[153] In another case, the same Court convicted a defendant for sentencing to death two (German) soldiers who had committed the 'crime' of demoralization of the armed forces ('*Wehrkraftzersetzung*').[154] Both decisions support the view that crimes against humanity can be committed against soldiers of the same nationality as the perpetrators.

A broad interpretation extending the protection to at least all non- or 'no-longer' combatants is further supported by two considerations. First, the civilian element has origins in humanitarian law. Consequently, it must be understood to be at least as comprehensive as the definition of 'civilian' under humanitarian law. Indeed, the *Tadić* TC, albeit emphasizing that the humanitarian law definition is not directly applicable to crimes against humanity, stated that it may provide useful guidance.[155] Secondly, going beyond the armed conflict related definition, crimes against humanity are no longer linked to the laws of war but rather to HRL. Against this background, an effective protection of *any* individual against inhumane acts is required. It is, therefore, necessary to find an interpretation of the term 'civilian' which covers all persons not protected by humanitarian law. In times of peace, the prohibition of crimes against humanity is—apart from the very narrow offence of genocide—the only applicable (criminal) law to protect human rights. Thus, in this situation the term 'civilian' must be interpreted even more broadly than in times of war, when humanitarian law provides some protection. In conclusion, the term 'civilian' must be understood in a twofold sense: on the one hand, it corresponds to the meaning of the term 'civilian' in humanitarian law and thus affords protection to all non or no-longer combatants; on the other hand, it must be broader because it must also cover all persons who are not protected by humanitarian law, especially in times of peace.

Against this background, the opinion of the ICTR TC in *Kayishema*, excluding, *inter alia*, members of the police as possible victims of crimes against humanity, must be considered erroneous.[156] Members of the police are non-combatants as they are responsible for the maintenance of the *civil* order. Unless a member of the police takes up arms and joins a hostile military force, he or she may not be considered a non-civilian for the purpose of the application of crimes against humanity. Thus, in sum, every individual,

[153] OGHBrZ, No. StS 111/48, Judgment, in *OGHSt*, i, p. 228 (7 December 1948).
[154] OGHBrZ, No. StS 309/49, Judgment, in *OGHSt*, ii, p. 231 (18 October 1949).
[155] *Tadić*, No. IT-94-1-T, paras. 639, 643; see also *Akayesu*, No. ICTR-96-4-T, para. 582, fn. 146 and 147 and more recently *Prosecutor v Jean-Pierre Bemba Gombo*, No. ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, para. 78 (15 June 2009) (it is unclear however whether the Chamber wants to directly apply the humanitarian law definition or use it as a guideline).
[156] *Kayishema and Ruzindana*, No. ICTR-95-1-T, para. 127.

regardless of that person's formal status as a member of an armed force, must be regarded as a civilian unless the forces are hostile towards the perpetrator and the individual has not laid down his or her arms or, ultimately, been placed *hors de combat*.

(d) Policy element

The policy element is now explicitly recognized in Article 7(2)(a) ICC Statute.[157] The codification reflects the international element's move from the war nexus requirement, to state or organizational authority, as has been described. A similar policy element was provided for by the ILC Draft Codes of 1954[158] and 1996.[159] Similar language can be found in several judicial decisions in the period between World War II and the establishment of the ad hoc tribunals. The term 'policy element' was formally introduced by the jurisprudence of the ad hoc tribunals.

There are various questions of different relevance to be discussed with regard to the policy element. First of all, the question arises as to whether the element is required at all under international law, and how it relates to the 'widespread' and 'systematic' qualifiers. Secondly, the content of the 'policy' must be determined. Thirdly, it must be clarified what entity, apart from a state, must or may stand behind the respective policy. Finally, the relationship between the element and the underlying acts of crimes against humanity must be explained.

(i) The need for the policy element and the conduct required

The first statement of the ad hoc tribunals on the policy element was the 1995 Rule 61 decision in *Nikolić* which pointed out that '[a]lthough [the crimes] need not be related to a policy established at state level, in the conventional sense of the term, they cannot be the work of isolated individuals alone'.[160] The *Tadić* TC took a more restrictive view and opined:

> [T]he reason that crimes against humanity so shock the conscience of mankind and warrant intervention by the international community is because they are not isolated, random acts of individuals but rather result from a deliberate attempt to target a civilian population. Traditionally this requirement was understood to mean that there must be *some form of policy* to commit these acts.[161]

Thus, the judges in *Tadić* required a policy, even if the attack is only widespread and not, at the same time, systematic. In contrast, the *Akayesu* TC mentioned the policy element only with regard to the systematic alternative. It first defined the concept of 'widespread' as requiring a multiplicity of victims—without mentioning a policy—and then went on to explain: 'The concept of systematic may be defined as thoroughly

[157] On the negotiations of the Rome Statute, see Robinson, *AJIL*, 93 (1999), 47–51.
[158] Article 2(11) Draft Code *YbILC*, ii, (1954).
[159] Chapeau of Article 18 Draft Code *YbILC*, ii/2, 15 (1996).
[160] *Prosecutor v Nikolić*, No. IT-94-2-R61, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, para. 26 (20 October 1995).
[161] *Tadić*, No. IT-94-1-T, para. 653 (emphasis added); in support, the Chamber cited the *Menten* case (The Netherlands Hoge Raad, *ILR*, 75 (1987), 362–3).

organised and following a regular pattern on the basis of a common policy involving substantial public or private resources'.[162] However, the *Kayishema and Ruzindana* Judgment apparently returned to *Tadić*, understanding the policy element as an implication of the 'attack against any civilian population': '[T]he requirement that the attack must be committed against a "civilian population" inevitably demands some kind of plan and, the discriminatory element of the attack is, by its very nature, only possible as a consequence of a policy.'[163] As the requirement 'attack against any civilian population' is valid for both widespread *and* systematic attacks, this ruling seems to imply that a policy would also be required for a widespread attack, that is, that it is an inherent element of the attack in general.[164] The problem with the *Kayishema and Ruzindana* reasoning is that it suffers from an erroneous interpretation of the 'population' element. As has been explained, neither an attack on a particular group of victims nor—despite the wording of Article 3 ICTR Statute ('on national, political, ethnic, racial or religious grounds')—a discriminatory intent is required by customary international law. Thus, from a purely legal-positivist perspective, a plan or policy with a view to the selection of the victims is not necessary. The contrary view would then be, in line with the *Kupreškić* TC, that the policy element is not 'strictly a requirement' of crimes against humanity,[165] but only serves as an indicator for the existence of a (systematic) attack. This view is supported by some other sources. For example, section 5.2 of Regulation 15/2000 of the East Timor Special Panels,[166] which in principle is modelled after Article 7(2)(a) of the ICC Statute, renounces the policy element. The same view was expressed by the SCSL.[167]

[162] *Akayesu*, No. ICTR-96-4-T, para. 580; confirmed in *Rutaganda*, No. ICTR-96-3-T, para. 69 and *Musema*, No. ICTR-96-13-T, para. 204.

[163] *Kayishema and Ruzindana*, No. ICTR-95-1-T, para. 124; concurring, *Bagilishema*, No. ICTR-95-1A-T, para. 78.

[164] See in this sense also *Bagilishema*, No. ICTR-95-1A-T, para. 78 ('policy element can be seen to be an inherent feature of the attack, whether the attack be characterized as widespread or systematic'); in the respective footnote to para. 78 the Chamber, referring to *Kupreškić et al.*, No. IT-95-16-T, para. 551, however, expresses 'some doubt as to whether it [a policy] is strictly a requirement, as such, for crimes against humanity'.

[165] *Kupreškić et al.*, No. IT-95-16-T, para. 551 (referring to *Tadić*, No. IT-94-1-T para. 653, where it was held that a policy was no longer necessary). However, if a policy is no longer necessary, it is inconsistent of the Chamber to require, relying on *Kayishema and Ruzindana*, No. ICTR-95-1-T, para. 134, that the 'accused must know that his act(s) is . . . pursuant to some kind of policy or plan'. In the same vein as *Kupreškić et al.* see *Kordić and Čerkez*, No. IT-95-14/2-T, para. 182, but also relying on *Kayishema and Ruzindana* as to the mental element (*Kordić and Čerkez*, para. 185). See also *Kunarac et al.*, No. IT-96-23 & IT-96-23/1-A, para. 98; *Tolimir*, No. IT-05-88/2-T, para. 698.

[166] Section 5.2 of the Regulation is identical with Article 7 ICC Statute, except that a subsection equivalent to Article 7(2)(a) is missing.

[167] *Prosecutor v Fofana and Kondewa*, No. SCSL-04-14-T, Trial Chamber Judgment, para. 113 (2 August 2007) ('The existence of a policy or plan, or that the crimes were supported by a policy or plan to carry them out, may be evidentially relevant to establish the widespread or systematic nature of the attack and that it was directed against a civilian population, but it is not a separate legal requirement of crimes against humanity', footnote omitted); *Prosecutor v Sesay et al.*, No. SCSL-04-15-T, Trial Chamber Judgment, para. 79 (2 March 2009) (quoting *Fofana and Kondewa*, para. 113 without so indicating); *Prosecutor v Brima et al.*, No. SCSL-04-16-T, Trial Chamber Judgment, para. 215 (20 June 2007) ('That the crimes were supported by a policy or plan to carry them out is not a legal ingredient of crimes against humanity. However, it may eventually be relevant to establish the widespread or systematic nature of the attack and that it was directed against a civilian population', footnote omitted). See also in the same line Judge Kaul's dissent in the *Kenya* case (see note 129).

In any case, the omission of the policy element in the law of an international or mixed criminal tribunal does not mean that this element cannot be derived from the requirement of the attack, at least in its systematic form. For any kind of systematic conduct requires, however small, a degree of organization which, in turn, requires a policy and an entity powerful enough to implement it. Thus, the 'systematic attack' element indeed inevitably implies a policy element. This is not the case, however, with regard to the *widespread* qualifier; an issue that has drawn little attention so far because, up to now, there are only a few decisions which have had to rely exclusively on a widespread (and not, at the same time, systematic) attack.[168] As previously explained, the widespread element is fulfilled if there exists a large number of victims. If this were to suffice, a serial killer—for example a lunatic like the Norwegian mass murderer Anders Behring Breivik—could qualify as a criminal against humanity. In other words, it would mean that even ordinary crimes, if only 'widespread' enough, were to be included in the scope of crimes against humanity.[169] This obviously would go beyond the rationale of the crime.[170] If such rationale consists, as has been argued, of the protection of fundamental human rights, a relationship arises between the individual victim(s) and the state[171] (or state-like organizations exercising *de facto* power[172]) and the rights-violating entity will act pursuant to a policy. In contrast, as regards the inter-personal relationship of citizens, human rights come only into play in the sense that the state fails to comply with its duty to protect its citizens.[173] In conclusion, both a systematic and a widespread attack require some kind of link with a state, or a *de facto* power pursuing a certain policy. But what would be the content of such a policy?

[168] See *Prosecutor v Ndindabahizi*, No. ICTR-2001-71-I, Trial Chamber Judgment, para. 484 (15 July 2004) and *Prosecutor v Gatete*, No. ICTR-2000-61-T, Trial Chamber Judgment, para. 633 (31 March 2011); both not mentioning a policy element. In *Bemba Gombo*, No. ICC-01/05-01/08-424, paras. 82–3, 117, the PTC chose not to further inquire about the existence of a systematic attack after having established the widespread nature of the attack, but it confirmed, in line with Article 7(2)(a) ICC Statute, the existence of an organizational policy (para. 110).

[169] Similar concerns are expressed by Bassiouni, *Crimes against Humanity* (1999), p. 245. But see in this regard Halling, *LJIL*, 23 (2010), 845, who favours a removal of the policy requirement from the ICC Statute in order to close identified loopholes, for example, the commission by single perpetrators.

[170] For the same result, Commission of Experts, UN Doc. S/1994/674, para. 84 ('the ensuing upsurge in crimes that follows a general breakdown of law and order does not qualify as crimes against humanity'). The Commission, however, added the following caveat: 'However, a general breakdown in law and order may be a premeditated instrument, a situation carefully orchestrated to hide the true nature of the intended harm.'

[171] *Kunarac et al.*, IT-96-23-T & IT-96-23/1-T, para. 470 ('Human rights law is essentially born out of the abuses of the state over its citizens and out of the need to protect the latter from state-organised or state-sponsored violence').

[172] This may be called a semi-classical position arguing that non-state actors are also bound by HRL if they exercise the functions of a state (*de facto* power) in a territory where no state effectively exercises its jurisdiction, see, for example, Kälin and Künzli, *Human Rights Protection* (2009/2011), pp. 77–82; Clapham, *IRRC*, 88 (2006), 498–9.

[173] cf. *Kunarac et al.*, No. IT-96-23-T & IT-96-23/1-T, para. 470 ('In the human rights context, the state is the ultimate guarantor of the rights protected and has both duties and a responsibility for the observance of those rights. In the event that the state violates those rights *or fails in its responsibility to protect* the rights, it can be called to account and asked to take appropriate measures to put an end to the infringements'; emphasis added).

(ii) Form and content of the policy

As to the *form* of the policy, there is no great controversy. It has been repeatedly stated by the ad hoc tribunals that '[t]here is no requirement that this policy must be adopted formally as the policy of a state',[174] nor must the policy or plan 'necessarily be declared expressly or even stated clearly and precisely'.[175] Thus, in sum, an implicit or *de facto* policy is sufficient. This has also been confirmed by the ICC.[176]

The question of the *content* of the policy is much more complex. Of course, the policy must be to commit crimes against humanity,[177] that is, to commit the enumerated individual criminal acts of (for example) Article 7(1) ICC Statute in a systematic or widespread manner against a civilian population. But this does not say more than the words of the Statute itself. In particular, it does not answer the question of what the precise expression of this policy need entail, that is, whether it must manifest itself by active conduct or whether omission (acquiescence, tolerance) suffices. While an active policy seems to be implicit in the systematic qualifier—how can something be planned or organized without the respective active policy of the entity behind it?—it is less clear how a policy can exist with regard to a multiplicity of criminal acts (i.e. a widespread attack) which are not organized or planned (i.e. systematic). This seems only possible if a policy can also consist of an omission, for example in the deliberate denial of protection for the victims of widespread but unsystematic crimes, thereby tolerating these crimes. Take the case of the large-scale killing of inhabitants in a certain area by private groups in order to get hold of its natural resources, accompanied by an official failure to stop these crimes from occurring. The government's motive for inaction could be that the victims of the attack are opponents of the government and thus the private groups would be doing the government's 'dirty work'. Another example would be small groups of unorganized militia carrying out small uncoordinated missions which, however, viewed in their totality, involve sufficient victims to qualify as widespread. If this conduct were in line with the intentions of the government or the *de facto* power in the territory and would, therefore, not encounter any opposition from this power (i.e., it was tolerated), it could be considered a policy by omission.[178] This broad interpretation also finds support in the case law. The *Kupreškić* TC explicitly included toleration, approval, endorsement etc. as possible methods for implementation of a policy.[179]

[174] *Akayesu*, No. ICTR-96-4-T, para. 580; also *Tadić*, No. IT-94-1-T, para. 653; *Rutaganda*, No. ICTR-96-3-T, para. 69; *Musema*, No. ICTR-96-13-T, para. 204; *Kupreškić et al.*, No. IT-95-16-T, para. 551; *Blaškić*, No. IT-95-14-T, para. 204.

[175] *Blaškić*, No. IT-95-14-T, para. 204.

[176] See recently *Katanga and Ngudjolo Chui*, No. ICC-01/04-01/07-717, para. 396; *Bemba Gombo*, No. ICC-01/05-01/08-424, para. 81.

[177] cf., for example, *Tadić*, No. IT-94-1-T, para. 653.

[178] Bassiouni, *Crimes against Humanity* (1999), p. 264 ('whenever [public] officials with the intent that certain crimes be committed, knowingly or intentionally fail to carry out their duties to enforce criminal laws equally and fairly . . . then such public officials are criminally accountable for the conduct of others'). However, it must be noted that the issue here is not the criminal responsibility of the individuals who tolerate the attack, but the question of whether a policy can consist in the mere toleration of crimes; in a similar vein, see Pégorier, *Ethnic Cleansing* (2013), p. 114 ('constitute . . . crimes against humanity, . . . the failure to protect a population against an attack, or the failure to suppress any such attack').

[179] *Kupreškić et al.*, No. IT-95-16-T, para. 552 ('[t]he need for crimes against humanity to have been at least *tolerated* by a State, Government or entity is also stressed in national and international case-law';

There are, however, limits to this broad interpretation. First, on an objective level, the respective entity or authority must be under a legal obligation, based for example on international HRL, to provide protection against the attack. This presupposes some form of (effective) control[180] which enables this entity to prevent the crimes from occurring, since nobody can be obliged by the impossible (*ultra posse nemo obligatur*). Secondly, the authority must be aware of the crimes—mere negligence does not suffice. Apart from that, an interpretation allowing for an omission seems to be contradicted by the third paragraph of the Introduction to the Elements of Crimes concerning Article 7 which reads: 'It is understood that "policy to commit such attack" requires that the State or organization *actively* promote or encourage such an attack against a civilian population.'[181] In a similar line, the ICC *Katanga and Ngudjolo* PTC required a 'thoroughly organised' attack following 'a regular pattern'.[182] The footnote to the quoted part of the Elements provides, however: 'A policy which has a civilian population as the object of the attack would be implemented by State or organizational action. Such a policy may, in exceptional circumstances, be implemented *by a deliberate failure to take action*, which is consciously aimed at encouraging such attack. The existence of such a policy cannot be inferred solely from the absence of governmental or organisational action'.[183] This contradictory text is the result of a compromise achieved during the Fourth Session (13 to 31 March 2000) of the Preparatory Commission ('PrepCom'). Reading the main text and the footnote together, it becomes clear that inactivity may suffice in 'exceptional circumstances'. This is in line with the broad interpretation put forward here since, arguably, in most cases a policy of crimes against humanity will manifest itself by active support, that is, the recourse to the omission alternative only applies exceptionally. Apart from that, to require an active policy for crimes against humanity would, in line with this argumentation, amount to deleting the 'widespread' alternative from Article 7 ICC Statute, that is, it would go against the wording of this provision. The Elements must not, however, amend the text or meaning of the Statute.[184]

emphasis added); see also para. 555 ('some sort of explicit or *implicit approval or endorsement* by State or governmental authorities is required'; emphasis added).

[180] Here recourse can be taken to the human rights case law in case of the extraterritorial application of human rights, cf. *Bankovicí and Others v Belgium and Others*, Application No. 52207/99, Judgment (12 December 2001) para. 71 (linking the notion of 'effective control' to 'the relevant territory' for the exceptional 'recognition of the exercise of extraterritorial jurisdiction by a Contracting State'); also *Issa and Others v Turkey*, Application No. 31821/96, Judgment (16 November 2004) para. 71; *Al Skeini and Others v United Kingdom*, Application No. 55721/07, Judgment (7 July 2011) para. 74. See also Human Rights Committee, *Sergio Euben Lopez Burgos v Uruguay*, UN Doc. Supp. No. 40 (A/36/40) 176, 29 July 1981, Human Rights Committee, Communication No. R12/52, para. 12.3; and Human Rights Committee, *Lilian Celiberti de Casariego v Uruguay*, Communication No. 56/1979, UN Doc. CCPR/C/OP/1 at 92, 29 July 1981, para. 10.3, with almost identical wording.

[181] Elements of Crimes, Introduction to the Elements of Article 7, para. 3 (emphasis added).

[182] *Katanga and Ngudjolo Chui*, No. ICC-01/04-01/07-717, para. 396 ('in the context of a widespread attack, the requirement of an organisational policy pursuant to article 7(2)(a) of the Statute ensures that the attack, even if carried out over a large geographical area or directed against a large number of victims, *must still be thoroughly organised and follow a regular pattern*. It must also be conducted in furtherance of a common policy involving public or private resources'; emphasis added).

[183] Emphasis added.

[184] According to Article 9 ICC Statute, the Elements 'shall assist the Court in the interpretation and application of articles 6, 7 and 8' (para. 1) and 'be consistent with this Statute' (para. 3). See Volume I of this treatise, pp. 32–3, 74.

In conclusion, the contents of the policy depend on the nature of the attack as systematic or widespread. In the former case, the policy would provide at least certain guidance regarding the prospective victims in order to coordinate the activities of the single perpetrators. A systematic attack, thus, requires active conduct from the side of the entity behind the policy without necessarily amounting to extensive or repeated activity. Rather, what counts is whether the conduct suffices to trigger and direct the attack. Thus, for example, the identification of possible victims by the authorities and an (implicit or explicit) announcement of impunity from prosecution for crimes against this group would be sufficient. A widespread attack which is not at the same time systematic is one that lacks any guidance or organization. The policy behind such an attack may be one of mere deliberate inaction, tolerance, or acquiescence. Such a policy, however, presupposes that the respective entity is legally obliged and able to intervene.[185]

(iii) The entity behind the policy

While Article 7 makes clear with its reference to a 'State *or* organizational policy'[186] that the entity behind the policy does not have to be a state in the classical sense of public international law, it is controversial what kind of non-state entities are included in the concept and what criteria they are to fulfil. In its 1996 Draft Code, the ILC took the position that the entity committing a crime against humanity must be 'a Government or . . . any organization or group'.[187] In a similar vein, the ICTY concluded that the policy 'need not be the policy of a State',[188] need not be conceived on the highest level in the state or organization,[189] and the entity behind the policy must also be 'holding *de facto* authority over a territory'.[190] Thus, arguably, every level in the respective state or other organization which, as such, exercises *de facto* power in a given territory can also develop an explicit or implicit policy with regard to the commission of crimes against humanity in this territory. In any case, the relevant authority is the entity which exercises the *highest de facto* authority in the given territory and can—within limits—control all other holders of power and all individuals. This entity must at least tolerate the respective crimes. As to the quality of the (non-state) entity or organization, it also seems to be clear that it must be in a position akin,

[185] Members of governments that implement a policy by tolerance may themselves be responsible under the doctrine of command responsibility, see Volume I of this treatise, pp. 197 ff.

[186] Emphasis added.

[187] Chapeau of Article 18 of the Draft Code, *YbILC*, ii/2, 15 (1996). The Commentary to the chapeau reads: '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.' Similarly, the Commentary to Article 21 (Systematic or mass violations of human rights) of the 1991 Draft Code explains: 'yet the article 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', *YbILC*, ii/2, 94 (1991).

[188] *Tadić*, No. IT-94-1-T, para. 655; confirmed in *Kayishema and Ruzindana*, No. ICTR-95-1-T, para. 126; *Kupreškić et al.*, No. IT-95-16-T, para. 551; *Bagilishema*, No. ICTR-95-1A-T, para. 78. See, previously, *Nikolić*, No. IT-94-2-R61, para. 26 ('. . . not be related to a policy established at State level, in the conventional sense of the term').

[189] *Blaškić*, No. IT-95-14-T, para. 205.

[190] *Kupreškić et al.*, No. IT-95-16-T, para. 552; see also *Tadić*, No. IT-94-1-T, para. 654.

or at least similar to, a state; that is, it must possess similar capacities of organization and force.[191]

The issue came to the forefront in the ICC *Situation in the Republic of Kenya*, which is concerned with the post-election violence of 2007/2008. With regard to the term 'organization' the majority of the Chamber concluded that not 'the formal nature of a group and the level of its organization' were decisive, but that instead 'a distinction should be drawn on whether a group has the capability to perform acts which infringe on basic human values'.[192] Therefore, it is to be determined on a case-by-case basis whether a respective group meets the requirements of Article 7(2)(a).[193] *In casu* the majority found that the 'organizational policy' element was met by 'various groups including local leaders, businessmen and politicians'.[194] In his dissenting opinion Judge Kaul, conducting a lengthy analysis of the historic origins of crimes against humanity and the proper interpretation of the term 'organization',[195] concludes that in order for a crime against humanity to fall under the jurisdiction of the ICC, it would have to have been committed by an entity that 'partake[s] of some characteristics of a State'.[196] The controversy in PTC II is still persisting,[197] but PTC III concurs with PTC II as to its case-by-case approach and the criteria proposed to

[191] See Bassiouni, *The Legislative History* (2005), p. 245 (non-state actors 'partake of the characteristics of state actors in that they exercise some dominion or control over territory and people, and carry out "policy" which has similar characteristics of those of "state action or policy" '); Schabas, 'Crimes against Humanity', in Sadat and Scharf, *The Theory and Practice* (2008), p. 359 ('state-like bodies').

[192] *Situation in the Republic of Kenya*, No. ICC-01/09-19, para. 90. In paras. 84 and 85 respectively the PTC refers to *Katanga and Ngudjolo Chui*, No. ICC-01/04-01/07-717, para. 396 and *Bemba Gombo*, No. ICC-01/05-01/08-424, para. 81, both stating that the policy could be made by 'any organisation with the capability to commit a widespread or systematic attack against a civilian population'.

[193] *Situation in the Republic of Kenya*, No. ICC-01/09-19, para. 93. The Chamber also lists some considerations that could be helpful in making this determination, namely: '(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 aforementioned criteria' (*Situation in the Republic of Kenya*, No. ICC-01/09-19, footnotes omitted).

[194] *Situation in the Republic of Kenya*, No. ICC-01/09-19, para. 117.

[195] *Situation in the Republic of Kenya*, No. ICC-01/09-19, Dissenting Opinion of Judge Kaul, paras. 21–70 (esp. 43–70).

[196] *Situation in the Republic of Kenya*, No. ICC-01/09-19, para. 51: 'These characteristics could involve the following: (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' (*Situation in the Republic of Kenya*, No. ICC-01/09-19, footnotes omitted). However, control over a territory was not required, but could be an additional factor in determining the existence of an organization (para. 51, n. 56).

[197] See, for example, *Prosecutor v Ruto et al.*, No. ICC-01/09-01/11-373, Decision on the Confirmation of Charges, paras. 33–4, 184–5 (23 January 2012) and Dissenting Opinion of Judge Kaul, paras. 8–9; *Prosecutor v Francis Kirimi Muthaura et al.*, No. ICC-01/09-02/11-382-Red, Decision on the Confirmation of Charges, paras. 112, 221 (23 January 2012) and Dissenting Opinion of Judge Kaul, paras. 7–8. Note in this respect also Jalloh, *AmUInt LRev*, 28 (2013), 435–441, who is of the view that the issue will only be resolved by an amendment to the Rome Statute.

determine the status of the organization,[198] noting the disagreement in the Court's jurisprudence and leaving the question open in its concrete case since even the stricter requirements have been met.[199] In the academic literature, the discussion has just begun, but there is a certain tendency for a broader interpretation in line with the PTC II's majority.[200] Werle and Burghardt conclude, on the basis of a detailed analysis of the ordinary meaning of the term 'organization' in Article 7(2)(a), that it encompasses 'any association of persons with an established structure' and there is no convincing reason to restrict this 'ordinary meaning'.[201] Ultimately, the authors favour a broad reading mainly for teleological, purpose-based reasons[202] and in this sense take a similar approach to Sadat who comes to the same result with a more victim-oriented approach and by invoking the jurisprudence of the tribunals. In her view, a broad understanding is also in line with customary law and Judge Kaul's dissent, therefore, 'undermines the broader purpose of the Statute's crimes against humanity provision mandating the protection of "civilian populations."' and is 'inconsistent with the text and legislative history of Article 7'.[203] In contrast, Kreß finds a basis for a more restrictive approach, demanding a state-like organization, in customary law[204] and in the principle of strict construction.[205] He also sees, like Kaul, the danger of violating state sovereignty by too broad a reading, and emphasizes that an international prosecution is (only) warranted in the absence of a national prosecution, a situation most likely to occur when the acts are committed by states or state-like entities.[206]

To take a side in this controversy, it is perhaps worthwhile looking first more closely at the criteria or characteristics which the majority of PTC II and Judge Kaul list as possible distinguishing features for the determination of an 'organization' in Article 7(2)(a).[207] These criteria are in large part identical (responsible command and hierarchical structure, available means to carry out such an attack, territorial control, and the purpose of the organization and its acts) and only differ substantially insofar as

[198] *Situation in the Republic of Côte d'Ivoire*, No. ICC-02/11-14, PTC III, 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, para. 46 (3 October 2011). However, Judges Odio Benito and Fulford have in the meantime left the Court.

[199] *Situation in the Republic of Côte d'Ivoire*, No. ICC-02/11-14, PTC III, Decision, para. 99.

[200] For a broad reading cf. Werle and Burghardt, *JICJ*, 10 (2012), 1166, 1168–70 (analysing the meaning of the concept of 'organization' and concluding that for systematic and teleological reasons a broad understanding is required); Sadat, *AJIL,* 107 (2013), 376–7 (arguing that the definition of crimes against humanity has evolved since Nuremberg and therefore, does not require the organization behind the acts to be state-like); previously Kuschnik, *Gesamttatbestand* (2009), pp. 242–3; Hall, 'Article 7', in Triffterer, *Commentary* (2008), mn. 92 (demanding '*de facto* power'). For a narrower approach, see Kreß, *LJIL*, 23 (2010), 857–61 (arguing in favour of strict construction, 863, on the basis of customary law, 867–71); previously Kreß, 'Der Jugoslawien-Strafgerichtshof', in Fischer and Lüder, *Völkerrechtliche Verbrechen* (1999), pp. 54–5; see also Schabas, *ICC Commentary* (2010), p. 152 ('should probably be construed broadly enough to encompass entities that act like States').

[201] Werle and Burghardt, *JICJ*, 10 (2012), 1151.

[202] Werle and Burghardt, *JICJ*, 10 (2012), 1166.

[203] Sadat, *AJIL,* 107 (2013), 371, 375.

[204] Kreß, *LJIL*, 23 (2010), 867–71.

[205] Kreß, *LJIL*, 23 (2010), 863.

[206] Kreß, *LJIL*, 23 (2010), 861, 866; *Situation in the Republic of Kenya*, No. ICC-01/09-19, Dissenting Opinion of Judge Kaul, paras. 10, 63–5.

[207] See notes 193 and 196.

Kaul regards them as indications of state-likeness[208] without which an organization is 'not able to carry out a policy of this nature'.[209] Secondly, the different conclusions reached by academic writers depend, on the one hand, on a different assessment of the state of customary law—indeed, more a question of belief than hard law—and, on the other, on the importance of human rights protection as the object and purpose of crimes against humanity.[210] Thus, the gist of the issue is how to reconcile the call for the broadest possible protection of human rights by way of ICL (here crimes against humanity) with legitimate concerns as to the principle of strict construction and a possible loss of significance or 'downgrading' of crimes against humanity. Ultimately, then, the decision comes down to the personal preference or background of the respective author with regard to the weight to be attached to the protection of human rights by way of ICL. While an (exclusively) human rights approach almost automatically entails a broad interpretation of the *actus reus* of international crimes, an understanding of ICL in the sense of a classical liberal criminal law with its core principles of legality, culpability, and fairness, as defended by this author,[211] leads to more narrow interpretations.[212] In any case, the mere risk of a *lacuna* with respect to the criminalization of a particular conduct is an inherent feature of criminal law and does, as such, not allow for too broad an interpretation against the letter of the law.

(iv) The policy element and the underlying acts

The wording of the chapeau of Article 3 of the ICTR Statute and Article 7(1) of the ICC Statute provide that the enumerated criminal acts must be 'committed *as part of* a widespread or systematic attack'.[213] Article 5 ICTY Statute provides that a person is responsible for the crimes 'when committed in armed conflict . . . *and directed* against any civilian population'.[214] This wording (specifically the 'and')—if taken literally—could be read to require that the perpetrator must personally direct the crime against a civilian population (i.e., not only against one or a few single victims) and, thus, commit a multiplicity of acts. However, as early as in 1996, an ICTY TC decided that 'as long as there is a link with the widespread or systematic attack against any civilian population,

[208] *Situation in the Republic of Kenya*, No. ICC-01/09-19, Dissenting Opinion of Judge Kaul, para. 51 ('entity which may act like a State or has quasi-State abilities').

[209] *Situation in the Republic of Kenya*, No. ICC-01/09-19, Dissenting Opinion of Judge Kaul, para. 52 (accordingly, he excludes 'groups of organized crime, a mob, groups of (armed) civilians or criminal gangs').

[210] See, on the one hand, Kreß, *LJIL*, 23 (2010), 860–1 ('the consequence of a broad, human-value-driven teleological construction of the term "organization" in Article 7(2)(a) of the Statute would be the creation of new international human rights law directly incumbent on "organs" or "agents" of organizations which are not even state-like', 861) and, on the other, Sadat, *AJIL*, 107 (2013), 376–7 (requiring a state-like organization 'excludes situations of mass atrocities committed by other organizations, and ignores the evolution of crimes against humanity over the decades since the Nuremberg judgment') and Werle and Burghardt, *JICJ*, 10 (2012), 1160–4 ('An interpretation of the term "organization" that limits the ordinary meaning by adding a further element can only be convincing if it can be argued that the additional element increases the wrongfulness of these violations of fundamental rights', 1160, on the following pages this is negated by these authors); see also Werle, *Völkerstrafrecht* (2012), mn. 887.

[211] cf. Volume I of this treatise, pp. 87 ff.

[212] On the importance of the legal and cultural background (humanitarian vs. military) in approaching issues of IHL, especially military necessity, see Luban, *LJIL*, 26 (2013), 315 ff.

[213] Emphasis added. [214] Emphasis added.

a single act could qualify as a crime against humanity'.[215] This has become the invariable practice of both tribunals.[216] It was reformulated in the clearest possible way in *Kunarac*: 'The underlying offence does not need to constitute the attack but only to form a part of the attack'.[217] And: 'It is sufficient to show that the act took place in the context of an accumulation of acts of violence which, individually, may vary greatly in nature and gravity'.[218] This corresponds to the wording of both Article 3 ICTR Statute and Article 7(1) ICC Statute ('committed *as part of* a widespread or systematic attack').

A more precise definition of the required link between the act and the attack may be derived from the rationale of crimes against humanity developed here, that is, the protection against the particular dangers of multiple crimes supported or tolerated by the authorities. If the dangerousness of an individual criminal act is increased *because* the conduct occurs in the context of an attack, the act must be regarded objectively as a part of this attack. For example, the specific risk for the victim of an aggression may be increased because he may not be able to ask the police for help precisely because the criminal act is part of a larger (state-directed) attack. If the victim is killed in the course of the aggression, the killing is part of the attack. On the other hand, a person who is killed in the course of an ordinary burglary is not a victim of crimes against humanity if the police would have been willing to protect the person (but arrived too late), that is, the nature of the criminal act did not entail a greater risk. In other words, the victim of an ordinary crime suffers only the general risk of any crime victim, but not the special risk created by the attack in the context of crimes against humanity. Thus, an adequate test to determine whether a certain act was part of the attack is to analyse whether the act would have been *less dangerous* for the victim if the attack and the underlying policy had not existed.[219]

There is, of course, no 'group element' in crimes against humanity as in the case of genocide.[220] Thus, the victim of the individual act of a crime against humanity need not necessarily be a member of a specifically targeted group, victims need only to be targeted in the course of an attack against a civilian population and the perpetrator may even be a member of the targeted group itself.[221] Equally, it is not necessary 'to demonstrate that the victims are linked to any particular side of the conflict'.[222]

[215] *Mrkšić et al.*, No. IT-95-13-R61, para. 30.

[216] *Tadić*, No. IT-94-1-T, para. 649; *Kayishema and Ruzindana*, No. ICTR-95-1-T, para. 135 ('crimes … must form part of … an attack'); *Kupreškić et al.*, No. IT-95-16-T, para. 550; *Kunarac et al.*, No. IT-96-23-T & IT-96-23/1-T, para. 417; *Kordić and Čerkez*, No. IT-95-14/2-T, para. 178; *Blaškić*, No. IT-95-14-A, para. 101; *Prosecutor v Deronjić*, No. IT-02-61-A, Judgment on Sentencing Appeal, para. 109 (20 July 2005); *Tolimir*, No. IT-05-88/2-T para. 698; *Bagilishema*, No. ICTR-95-1A-T, para. 82; *Seromba*, No. ICTR-2001-66-I, para. 357; *Nahimana et al.*, No. ICTR-99-52-A, para. 924; *Stanišić and Župljanin*, No. IT-08-91-T, para. 28.

[217] *Kunarac et al.*, No. IT-96-23-T & IT-96-23/1-T, para. 417.

[218] *Kunarac et al.*, No. IT-96-23-T & IT-96-23/1-T, para. 419.

[219] Ambos and Wirth, *CLF*, 13 (2002), 36. See for examples where this is not the case: Mettraux, *Crimes* (2005), pp. 251–2.

[220] cf. Chapter I, B. (1).

[221] Mettraux, *HarvILJ*, 43 (2002), 256, giving the example of a German who is detained or tortured for hiding a Jewish friend during World War II even though he is not part of the targeted Jewish population.

[222] *Kunarac et al.*, No. IT-96-23-T & IT-96-23/1-T, para. 423; *Prosecutor v Akayesu*, No. ICTR-96-4-A, Appeals Chamber Judgment, para. 437 (1 June 2001); *Limaj et al.*, No. IT-03-66-T, para. 186; *Blagojević and Jokić*, No. IT-02-60-T, para. 544.

(e) Subjective element

The chapeau of Article 7 ICC Statue explicitly requires that the accused be *aware of the attack* of which his individual act forms part.[223] This implies a twofold test: firstly, the perpetrator must know of the existence of the larger attack; secondly, he must know that his individual act forms part of this attack.[224] The knowledge requirement constitutes an *additional mental element* to be distinguished from the general *mens rea* requirement of Article 30 ICC Statute.[225] This follows both from the fact that 'knowledge' is explicitly mentioned in Article 7 ICC Statue and from the Elements of Crime where knowledge is also required separately for each of the enumerated individual acts of crimes against humanity. In structural terms, the knowledge requirement provides the necessary connection between the perpetrator's individual acts and the overall attack by means of the perpetrator's mindset. By this, the knowledge requirement ensures that single, isolated acts, which only happen to have been carried out contemporaneously with an overall attack—so-called 'opportunistic' acts—do not qualify as crimes against humanity and, therefore, cannot be prosecuted under Article 7 ICC Statute.

The case law holds, in line with the wording of Article 7 ICC Statute, that the accused must be aware that his act forms part of the collective attack.[226] However, the specific *contents* of this knowledge and its *object of reference* remain in dispute.[227] As to the former, the risk-oriented or risk-based approach proposed by the *Blaškić* TC is persuasive. Accordingly, knowledge also includes the conduct 'of a person taking a deliberate risk in the hope that the risk does not cause injury'.[228] This was confirmed by the *Kunarac* AC, upholding the Trial Chamber's view that the perpetrator must, at least, have known 'the risk that his acts were part of the attack'.[229] This approach extends knowledge from 'full' or 'positive' knowledge well into the field of recklessness and, thus, clarifies the obscure concept of 'constructive knowledge' introduced by other

[223] This part draws on my earlier work 'Crimes Against Humanity', in Sadat, *Convention* (2011), pp. 288–90.

[224] Ambos, *Nouvelles Études Pénales (AIDP)*, 19 (2004), 249. Against a mental requirement, see Kirsch, 'Zweierlei Unrecht', in Michalke and Köberer, *FS Hamm* (2008), p. 286.

[225] Ambos and Wirth, *CLF*, 13 (2002), 39–40; Ambos and Wirth, 'Commentary', in Klip and Sluiter, *Annotated Leading Cases*, ii (2001), pp. 39–40.

[226] *Kordić and Čerkez*, No. IT-95-14/2-T, para. 187; *Tadić*, No. IT-94-1-A, paras. 248, 255; *Kupreškić et al.*, No. IT-95-16-T, para. 556; *Prosecutor v Vasiljević*, No. IT-98-32-A, Appeals Chamber Judgment, para. 30 (25 February 2004); *Limaj et al.*, No. IT-03-66-T, para. 190; *Prosecutor v Krajišnik*, No. IT-00-39-T, Trial Chamber Judgment, para. 706 (27 September 2006); *Prosecutor v Bisengimana*, No. ICTR-00-60-T, Trial Chamber Judgment, para. 57 (13 April 2006); *Gotovina et al.*, No. IT-06-90-T, para. 1707; *Tolimir*, No. IT-05-88/2-T, para. 700.

[227] See Ambos and Wirth, *CLF*, 13 (2002), 37 ff.

[228] *Blaškić*, No. IT-95-14-T, para. 254 referring to Desportes and Le Gunehec, *Droit pénal général* (2009), p. 445 ('de la personne qui prend un risque de façon délibérée, tout en espérant que ce risque ne provoque aucun dommage').

[229] *Kunarac et al.*, No. IT-96–23 & IT-96–23/1-A, para. 102 quoting from *Kunarac et al.*, No. IT-96-23-T & IT-96-23/1-T, para. 434; concurring, *Vasiljević*, No. IT-98-32-A, para. 37; *Prosecutor v Martić*, No. IT-95-11-T, Trial Chamber Judgment, para. 49 (12 June 2007); *Mrkšić et al.*, No. IT-95-13/1-T, para. 439; *Milutinović et al.*, No. IT-05-87-T, para. 162. But see *Blaškić*, No. IT-95-14-A, para. 126.

[230] *Tadić*, No. IT-94-1-T, paras. 656–9; *Tadić*, No. IT-94-1-A, para. 248 (does not mention constructive knowledge); *Kayishema and Ruzindana*, No. ICTR-95-1-T, paras. 133–4; *Rutaganda*, No. ICTR-96-3-T,

Chambers.[230] By this, a perpetrator is seen to have knowledge of the attack if he is aware of the risk that his conduct can be objectively construed as part of the broader attack. As to the knowledge of the attack itself, it is sufficient that the perpetrator is aware of its existence in general without possessing detailed knowledge of its particularities and circumstances,[231] or, as expressed by the Elements, 'without knowledge of all characteristics of the attack'.[232] In other words, the perpetrator must (only) be aware of the facts related to the attack which increase the dangerousness of his conduct for the victims or which turn this conduct into a contribution to the crimes of others.[233] This standard corresponds to the risk-based approach.

The risk-based approach also shows its superiority in cases where the perpetrator carries out one of the underlying acts at a moment when the *attack* is only *imminent* or has just begun. In such a situation, positive knowledge of an overall attack cannot exist, since the attack does not yet exist itself. The Elements provide that in such a situation, it is sufficient that the perpetrator intends 'to further such an attack'[234] or intends 'the conduct to be part of a[n] attack'. Thus, the drafters seem to have intended to replace the cognitive knowledge requirement by the volitional requirement of the perpetrator's *desire* to bring about the relevant facts. Yet, while it is true that future events (*in casu* the development of an incipient attack into a fully fledged one) cannot be known but only hoped for or desired, one can be aware of the risk that a certain conduct will lead to a certain result.[235] In other words, a participant in an incipient attack cannot know for certain that the attack will develop into a fully fledged attack, but he can certainly be aware of a risk that something of that kind will happen.[236]

Apart from the knowledge requirement, Article 7(1) does not contain any other specific mental elements; notably, the need for a *discriminatory intent* is no longer required. While the 'old' jurisprudence since *Tadić*, based partly on the Report of the Secretary General on the establishment of the ICTY[237] and partly on the wording of

para. 71; *Kupreškić et al.*, No. IT-95-16-T, paras. 556–7; *Musema*, No. ICTR-96-13-T, para. 206; *Prosecutor v Ruggiu*, No. ICTR-97-32-T, Trial Chamber Judgment, para. 20 (1 June 2000); *Kordić and Čerkez*, No. IT-95-14/2-T, para. 185. For a critical discussion of this concept: Ambos and Wirth, *CLF*, 13 (2002), 38–9; Ambos *(AIDP)*, 19 (2004), 250.

[231] See, for example, *Kunarac et al.*, No. IT-96-23 & IT-96-23/1-A, para. 102; *Limaj et al.*, No. IT-03-66-T, para. 190; *Milutinović et al.*, No. IT-05-87-T, para. 160; *Prosecutor v Simba*, No. ICTR-1-76-T, Trial Chamber Judgment, para. 421 (13 December 2005); *Katanga and Ngudjolo Chui*, No. ICC-01/04-01/07-717, para. 401; *Prosecutor v Omar Hassan Ahmad Al Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, No. ICC-02/05-01/09, para. 87 (4 March 2009).

[232] Elements of Crimes, Introduction to the Elements of Article 7, para. 2; on the negotiations: Robinson, 'Elements', in Lee, *The ICC* (2001), p. 72.

[233] Ambos and Wirth, *CLF*, 13 (2002), 41.

[234] Elements of Crimes, Introduction to the Elements of Article 7, para. 2. See also Robinson, 'Elements', in Lee, *The ICC* (2001), p. 73.

[235] Frisch, *Vorsatz und Risiko* (1983), pp. 341 ff. (p. 341: 'Notwendig ist das Wissen um das der Handlung eignende und (normative) ihre Tatbestandsmäßigkeit begründende Risiko . . . ').

[236] For the same result, see Ambos and Wirth, *CLF*, 13 (2002), 40.

[237] Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, para. 48 ('Crimes against humanity refer to inhumane acts of a very serious nature, such as wilful killing, torture or rape, committed as part of a widespread or systematic attack against any civilian population *on national, political, ethnic, racial or religious grounds*'; emphasis added).

[238] '. . . on national, political, ethnic, racial or religious grounds . . . '.

[239] *Tadić*, No. IT-94-1-T, para. 652; *Rutaganda*, No. ICTR-96-3-T, paras. 75–6.

Article 3 ICTR Statute,[238] required such a special intent,[239] that position was always criticized by scholars[240] and reversed by the *Tadić* appeal decision, which restricted the discriminatory intent to the crime of persecution.[241] This holding has consequently been followed invariably by the ICTY.[242]

C. Underlying Acts

(1) Murder (Article 7(1)(a) ICC Statute)

Article 7(1)(a) ICC Statute lists murder as the first underlying act without providing for more concrete elements in para. 2 of Article 7. According to the Elements, murder requires, apart from the context element, that the perpetrator kills[243] one or more persons. The absence of a specific definition of the elements of murder makes it necessary to invoke other sources in the sense of Article 21 of the Statute, following the hierarchy provided by this norm.[244] While the crime of murder has existed in ICL instruments as a crime against humanity since the Nuremberg Charter[245] and as an ordinary crime in the world's major criminal law systems well before 1945[246] (thereby amounting to a 'general principle of law'[247]), to find a definition of this crime one has to take recourse to comparative law in the sense of Article 21(1)(c) ICC Statute.

In the case law of the ad hoc tribunals, murder has been classified following the *actus reus/mens rea* common law dichotomy—considered in *Čelebići* as 'universal and

[240] See, for example, McAuliffe de Guzman, *HRQ*, 22 (2000), 364–8.

[241] *Tadić*, No. IT-94-1-A, para. 305; for the discussion of the question see paras. 281–305.

[242] *Kupreškić et al*., No. IT-95-16-T, para. 558; *Blaškić*, No. IT-95-14-T, para. 260; *Kordić and Čerkez*, No. IT-95-14/2-T, para. 186; *Popović et al*, No. IT-05-88-T, para. 968; *Tolimir*, No. IT-05-88/2-T, para. 849; *Prosecutor v Muvunyi*, No. ICTR-2000-55A-T, Trial Chamber Judgment, para. 514 (12 September 2006); *Prosecutor v Zigiranyirazo*, No. ICTR- ICTR-01-73-T, Trial Chamber Judgment, para. 430 (18 December 2008). Also, the ICTR interpreted the reference to certain grounds in Article 3 as belonging to the nature of the attack, not the perpetrator's *mens rea*, cf. *Akayesu*, No. ICTR-96-4-A, para. 469, cited after *Bagilishema*, No. ICTR-95-1A-T, para. 81, fn. 79–80.

[243] The respective footnote 7 provides: 'For the purposes of this definition the term "killed" is interchangeable with the term "caused death". This footnote applies to all elements which use either of these concepts'.

[244] cf. Volume I of this treatise, pp. 73 ff.

[245] Article 6(c) IMT, Article 5(c) of the Tokyo Charter, Article II(1)(c) of CCL 10, Principle VI(c) of the ILC's Nuremberg Principles (*YbILC*, ii, (1950), 374), Article 2(11) Draft Code, *YbILC*, ii, (1954), 151 and Article 18(a) of the 1996 Draft Code (*YbILC*, ii/2, 15); Article 5(a) of the ICTY Statute, Article 3(a) of the ICTR Statute and Article 7(1)(a) of the ICC Statute.

[246] cf. Article 18(7) Draft Code, *YbILC*, ii/2, 15 (1996) ('murder is a crime that is clearly understood and well defined in the national law of every State'); referred to in *Kupreškić et al*., No. IT-95-16-T, para. 821; *Akayesu*, No. ICTR-96-4-T, para. 587. See also Bassiouni, *Crimes against Humanity* (1999), 293–300. For analysis of the main characteristics of relevant provisions of national penal codes of the world's major legal systems, see Heine and Vest, 'Murder/Willful Killing', in McDonald and Swaak-Goldman, *Substantive and Procedural Aspects* (2000), pp. 176 ff., esp. at p. 195.

[247] Bassiouni, *Crimes against Humanity* (1999), p. 300. See also Swaak-Goldman, 'Crimes against Humanity', in McDonald and Swaak-Goldman, *Substantive and Procedural Aspects* (2000), pp. 143 ff.

[248] *Prosecutor v Delalić et al.*, No. IT-96-21-T, Trial Chamber Judgment, paras. 473–4 (16 November 1998), at n. 433 noting *Morissette v United States*, 342 *US* 246 (1952).

persistent in mature systems of law'[248]—as the unlawful, intentional killing of a human being.[249] Accordingly, the necessary elements of murder as a crime against humanity are the following:[250]

- in objective terms, the death of the victim as the result of an unlawful conduct of the accused (including an omission in the context of command responsibility)[251] which must be a substantial cause of the death;[252]
- in subjective terms, the intention to kill or inflict grievous bodily harm on the deceased having known that such bodily harm is likely to cause the victim's death, and recklessness as to whether death ensues or not.[253]

This broad definition is in line with Bassiouni's findings according to which murder, in the world's major criminal justice systems, constitutes an umbrella term for all provisions criminalizing the taking of life, from intentional killing to the creation of *life-endangering conditions likely to result in death* according to reasonable human experience.[254] Thus, murder within the meaning of Article 6(c) of the Nuremberg Charter (and *a fortiori* in the subsequent instruments framed in the same terms), includes a closely related form of unintentional but foreseeable death that in common law systems is called 'manslaughter',[255] and in the Romanist-Civilist-Germanic systems constitutes homicide with *dolus* ('*Vorsatz*') and homicide with *culpa* ('*Fahrlässigkeit*').[256]

[249] *Akayesu*, No. ICTR-96-4-T, para. 589 followed in *Rutaganda*, No. ICTR-96-3-T, para. 80 and *Musema*, No. ICTR-96-13-T, para. 215.

[250] *Akayesu*, No. ICTR-96-4-T, para. 589, approved in *Kupreškić et al.*, No. IT-95-16-T, para. 560, *Blaškić*, No. IT-95-14-T, para. 217, *Rutaganda*, No. ICTR-96-3-T, para. 80; *Musema*, No. ICTR-96-13-T, para. 215; *Prosecutor v Đorđević*, No. IT-05-87/1-T, Public Judgment with Confidential Annex, para. 1708 (25 February 2011); *Gotovina et al.*, No. IT-06-90-T, para. 1725; *Perišić*, No. IT-04-81-T, paras. 102, 738; *Nzabonimana*, No. ICTR-98-44D-T, para. 1792; *Prosecutor v Nizeyimana*, No. ICTR-2000-55C-T, Judgment and Sentence, para. 1552 (19 June 2012); *Prosecutor v Haradinaj et al.*, No. IT-04-84*bis*-T, Public Judgment with Confidential Annex, para. 425 (29 November 2012); *Stanišić and Župljanin*, No. IT-08-91-T, para. 39.

[251] *Delalić et al.*, No. IT-96-21-T, para. 424; *Akayesu*, No. ICTR-96-4-T, para. 589; *Perišić*, No. IT-04-81-T, para. 103.

[252] *Delalić et al.*, No. IT-96-21-T, para. 424. Followed in *Tolimir*, No. IT-05-88/2-T, para. 715; *Haradinaj et al.*, No. IT-04-84*bis*-T, para. 427; *Blaškić*, No. IT-95-14-T, para. 153 and in *Kordić and Čerkez*, No. IT-95-14/2-T, para. 229 in relation to wilful killing (ICTY Statute, Article 2), adding that for the purposes of this Article the victim must be a 'protected person', and at para. 230 in relation to murder (ICTY Statute, Article 3) noting that the offence is against a person 'taking no active part in the hostilities'.

[253] *Akayesu*, No. ICTR-96-4-T, para. 589; *Prosecutor v Kvočka et al.*, No. IT-98-30/1-T, Trial Chamber Judgment, para. 132 (2 November 2001); *Tolimir*, No. IT-05-88/2-T, para. 716; *Stanišić and Župljanin*, No. IT-08-91-T, para. 39.

[254] Bassiouni, *Crimes against Humanity* (1999), pp. 300–2. The phrase 'according to reasonable human experience' has the same meaning as ' according to the known or foreseeable expectations of a reasonable person in the same circumstances' which Bassiouni uses in his discussion of this issue. The definition of murder noted here is 'the widespread common understanding of the meaning of murder' and arises 'notwithstanding the technical differences in the definitions of various forms of intentional and unintentional killing in the world's major criminal justice systems'.

[255] Bassiouni, *Crimes against Humanity* (1999) (in both of its common law forms, i.e., voluntary and involuntary manslaughter).

[256] Bassiouni, *Crimes against Humanity* (1999). See also Heine and Vest, 'Murder/Willful Killing', in McDonald and Swaak-Goldman, *Substantive and Procedural Aspects* (2000), p. 177 ('At a minimum, intention entails committing "an act clearly dangerous to human life that causes the death of an individual" '). In this vein, see also Werle, *Völkerstrafrecht* (2012), mn. 899–900; Hogan-Doran, *LJIL*, 11 (1998), 168–71.

However, while the objective element of the definition has not been considered controversial, the subjective element has been the subject of extensive discussion. In *Kupreškić*, purporting to follow *Akayesu*, it was held that the requisite *mens rea* is the intent to kill or the intent to inflict serious injury in reckless disregard of human life.[257] The *Blaškić* TC equated recklessness 'to serious criminal negligence'[258] and assumed that the accused 'had to understand' that his conduct 'was likely to lead to death'[259] and must have acted 'in the reasonable knowledge that the attack was likely to result in death'.[260] In a similar vein, the *Kordić* TC held that to fulfil the *mens rea* of murder it suffices to intend to inflict serious injury in the reasonable knowledge that the attack was likely to result in death.[261] The recklessness formula was also applied with regard to the war crimes of wilful killing and murder in *Celebici*,[262] with the Trial Chamber holding that *mens rea* is present where the intention of the accused exists to kill or inflict serious injury in reckless disregard of human life.[263]

The discussion about the correct mental standard for 'murder' has been complicated by the fact that the French version of the ICTY and ICTR Statutes speaks of '*assassinat*' which is—as opposed to the mere intentional '*meurtre*'—to be understood as premeditated murder,[264] that is, as a killing where the intention is formed before the actual criminal act is executed.[265] While some Chambers have sidestepped the problem by invoking customary international law which arguably does not demand premeditation and thereby considering the French as an erroneous translation,[266] the *Kayishema* TC rejected this view convincingly, clarifying that both the French and the English version of the Statute(s) are authentic (therefore, there can be no error of translation)[267] and stating:

[257] *Kupreškić et al.*, No. IT-95-16-T, para. 561. [258] *Blaškić*, No. IT-95-14-T, para. 152.
[259] *Blaškić*, No. IT-95-14-T, para. 153. [260] *Blaškić*, No. IT-95-14-T, para. 217.
[261] *Kordić and Čerkez*, No. IT-95-14/2-T, para. 236. See also *Kupreškić et al.*, No. IT-95-16-T, paras. 560–1; *Blaškić*, No. IT-95-14-T, para. 217; *Akayesu*, No. ICTR-96-4-T, para. 589; *Tolimir*, No. IT-05-88/2-T, para. 716.
[262] *Delalić et al.*, No. IT-96-21-T, para. 439.
[263] *Delalić et al.*, No. IT-96-21-T, paras. 431 and 438 stressing the importance of considering the nature and purpose of the prohibition contained in the GC and relevant principles of interpretation of the ICTY Statute and Rules, and at the same time taking into account the objects of the Statute and the social and political considerations which gave rise to its creation (see paras. 160 ff., esp. para. 170). Concurring, *Kordić and Čerkez*, No. IT-95-14/2-T, para. 229.
[264] See Article 221-3 of the French Code Pénal of 1 March 1994: 'Le meurtre commis *avec préméditation* . . . constitue un *assassinat*' (emphasis added). See also *Blaškić*, No. IT-95-14-T, para. 216 fn. 414; *Kayishema and Ruzindana*, No. ICTR-95-1-T, para. 137, n. 37 (yet generalizing too much when stating that 'in most civil law systems, premeditation is always required for *assassinat*'); Chesterman, *DukeJComp&IL*, 10 (2000), 329.
[265] See Article 132-72 of the CP: 'La préméditation est le dessein formé *avant* l'action de commettre un crime ou un délit determine' (emphasis added).
[266] *Akayesu*, No. ICTR-96-4-T, para. 588; concurring, *Rutaganda*, No. ICTR-96-3-T, para. 79 and *Musema*, No. ICTR-96-13-T, para. 214 (quite apodictically declaring that '[c]ustomary international law dictates that the offence of "murder", and not "assassinat", constitutes a crime against humanity'); *Blaškić*, No. IT-95-14-T, para. 216 (referring in addition to the 1996 ILC Draft Code); *Kordić and Čerkez*, No. IT-95-14/2-T, para. 235 ('settled that premeditation is *not* required', emphasis added). Concurring also Chesterman, *DukeJComp&IL*, 10 (2000), 329 (invoking, *inter alia*, Article 7(1)(a) ICC Statute).
[267] *Kayishema and Ruzindana*, No. ICTR-95-1-T, para. 138 with n. 77 ('Notably the text was drafted in English and French, both being original and authentic. The Statute was then translated into the four remaining official UN languages. Therefore, between English and French there was no translation. Accordingly, there can be no "error in translation" as such; there can only be a mistake in the drafting of an original text. Notably, the term used in the ICTY Statute is also *assassinat* (ICTY Statute Article 5(a)').

> When interpreting a term from one language to another, one may find that there is no equivalent term that corresponds to all the subtleties and nuances. This is particularly true with legal terms that represent jurisprudential concepts. Here, the *mens rea* for murder in common law overlaps with both *meurtre* and *assassinat* (that is, a *meurtre aggravé*) in civil systems.[268] The drafters chose to use the term *assassinat* rather than *meurtre*. As a matter of interpretation, the intention of the drafters should be followed so far as possible and a statute should be given its plain meaning.[269]

The Chamber also rejects the customary law argument of *Akayesu* and rather presumes that the drafters consciously used '*assassinat*' alongside murder in order to introduce a higher *mens rea* standard.[270] At any rate, in case of doubt, an interpretation more favourable to the accused should be adopted.[271] Thus, the Chamber concludes:

> The Chamber finds, therefore, that murder and *assassinat* should be considered together in order to ascertain the standard of *mens rea* intended by the drafters and demanded by the ICTR Statute. When murder is considered along with *assassinat* the Chamber finds that the standard of *mens rea* required is intentional and premeditated killing. The result is premeditated when the actor formulated his intent to kill after a cool moment of reflection.[272]

While the *Kayishema* ruling did not remain unnoticed,[273] it was often implicitly rejected in other decisions without further reasoning.[274] There is, however, no way to get around the clear French wording of the ICTY and ICTR Statutes without violating

The equal status of the English and French versions, also acknowledged by Chesterman, *DukeJComp&IL*, 10 (2000), 329, n 120, follows from Rule 41 of the Provisional Rules of Procedure of the Security Council, as amended on 21 December 1982, UN Doc. S/96/Rev.7 ('Arabic, Chinese, English, French, Russian and Spanish shall be both the official and the working languages of the Security Council').

[268] See *Kayishema and Ruzindana*, No. ICTR-95-1-T, at n. 76 ('For example, at the high end of murder the *mens rea* corresponds to the *mens rea* of *assassinat*, that is, unlawful killing with premeditation. Conversely, at the low end of murder where mere intention or recklessness is sufficient and premeditation is not required, the *mens rea* of murder corresponds to the *mens rea* of *meurtre*').

[269] *Kayishema and Ruzindana*, No. ICTR-95-1-T, para. 138.

[270] *Kayishema and Ruzindana*, No. ICTR-95-1-T, para. 138. In this regard the Chamber argues in fn. 78 that there is no higher *mens rea* standard for unlawful killing in common law (so that the drafters need to use the term 'murder' even if they want to provide for a higher standard) but this overlooks the concept of 'malice aforethought' in traditional common law (cf. Allen, *Criminal Law* (2011), p. 321; LaFave, *Criminal Law* (2010), § 14.1, pp. 765–7).

[271] *Kayishema and Ruzindana*, No. ICTR-95-1-T, para. 139.

[272] *Kayishema and Ruzindana*, No. ICTR-95-1-T, para. 139 (referring in n. 79 to French and US jurisprudence).

[273] See, for example, *Kupreškić et al.*, No. IT-95-16-T, para. 561; *Bagilishema*, No. ICTR-95-1A-T, para. 84; *Prosecutor v Semanza*, No. ICTR-97-20-T, Trial Chamber Judgment, para. 339 (15 May 2003); *Prosecutor v Muhimana*, No. ICTR- 95-1B-T, Trial Chamber Judgment, para. 569 (28 April 2005).

[274] See, for example, *Kordić and Čerkez*, No. IT-95-14/2-T, para. 235 (in n. 314 listing the case law without further differentiation). See also *Prosecutor v Krstić*, No. IT-98-33-T, Trial Chamber Judgment, para. 484, n. 1119 'the term "murder" is translated in French into "assassinat" (which supposes premeditation and may involve, if proven, a higher sentence) and stated that the term "meurtre" in French should be preferred, in keeping with customary international law. The Chamber subscribes to the position previously adopted by the ICTR in the *Akayesu* Judgment' (2 August 2001). There has not yet been an Appeals Judgment explicitly addressing this issue. For a critical perspective, see also Chesterman, *DukeJComp&IL*, 10 (2000), 333.

the rights of the accused who understandably relies on the statutory (French) text.[275] Another matter is, of course, what consequence the requirement of premeditation entails in concrete cases. The French Penal Code distinguishes explicitly between 'atteintes *volontaires* à la vie' (Article 221–3) and 'atteintes *involontaires* à la vie' (Article 221–6)[276] and includes premeditated killing ('*assassinat*') only in the former. From a systematic perspective, this means that any 'involuntary' (negligent, reckless) killing by definition is not premeditated; indeed, a premeditated killing ('*assassinat*') is an intentional killing ('*meurtre*') aggravated by the premeditation of the perpetrator.[277] Of course, the French Penal Code is of little relevance to ICL and thus the question arises whether this is an expression of a general principle and, in addition, whether such a clear-cut distinction between premeditated and involuntary killing makes sense at all. As premeditation refers to a mental state before the actual execution of the criminal act,[278] it is conceivable that a perpetrator's intent is preceded by 'a moment of cool reflection', that is, the preceding mental state does not necessarily affect the subsequent intent at the time of commission. Of course, such a separation of the agent's previous deliberation and his actual implementation of the deadly plan is excluded if one considers that the 'premeditation presupposes necessarily the criminal will'.[279] In any case, the issue is not relevant under Article 7(1)(a) ICC Statute since the French version employs the term '*meurtre*', which beyond any doubt does not require a form of premeditation.

Complementing this discussion, it is worthwhile pointing out that the ad hoc tribunals' case law sees no difference between the act of 'murder' as a crime against humanity and 'wilful killing' as a war crime with the exception, of course, of the different context elements.[280] The *Kupreškić* TC, in one of the more interesting decisions on the matter, considered that the two offences are *not* in a relationship of 'reciprocal speciality'.[281] In considering the nature of the values protected by each

[275] For the same result, see Chesterman, *DukeJComp&IL*, 10 (2000), 334. This deviates from the author's earlier view in Ambos and Wirth, *CLF*, 13 (2002), 57–8.

[276] Emphasis added.

[277] 'Préméditation' as 'élément moral de l'homicide volontaire', cf. Daury-Fauveau, *Droit pénal spécial* (2010), p. 196 mn. 18; Ambroise-Castérot, *Droit pénal spécial* (2009), p. 129 mn. 18.

[278] This is, for example, emphasized by Daury-Fauveau, *Droit pénal spécial* (2010), p. 185 mn. 204 (arguing that the special intent to kill, the *animus necandi*, must not be confused with premeditation since the former must exist at the moment of commission and the latter necessarily before that moment).

[279] Pradel and Danti-Juan, *Droit pénal spécial* (2010), p. 35 mn. 24 ('Modalité de la résolution criminelle, la préméditation suppose nécessairement la volonté criminelle, mais est davantage qu'elle'); for the same view in the result excluding 'reckless' murder, Chesterman, *DukeJComp&IL*, 10 (2000), 329.

[280] The Trial Chamber in *Delalić et al.*, No. IT-96-21-T, paras. 421 ff., concluding that there is no qualitative difference between 'wilful killing' and 'murder' (para. 433), including regarding the *mens rea* required (para. 439). In the same vein *Blaškić*, No. IT-95-14-T, para. 181; *Kordić and Čerkez*, No. IT-95-14/2-T, paras. 229, 236; *Tolimir*, No. IT-05-88/2-T, para. 714; *Perišić*, No. IT-04-81-T, para. 102; *Gotovina et al.*, No. IT-06-90-T, para. 1724; *Đorđević*, No. IT-05-87/1-T, para. 1708; *Stanišić and Župljanin*, No. IT-08-91-T, para. 42. See also the Separate and Dissenting Opinion of Judge Cassese, in *Prosecutor v Erdemovic*, No. IT-96-22-T, Trial Chamber Judgment, para. 12, n. 8 (7 October 1997), arguing, with regard to the application of duress to the 'killing of innocents', that it makes no difference 'whether one refers to such an offence as "killing", "unlawful killing", or "murder" provided that it is understood that it is the killing of innocents without lawful excuse or justification . . . '.

[281] *Kupreškić et al.*, No. IT-95-16-T, para. 701 ('while murder as a crime against humanity requires proof of elements that murder as a war crime does not require (the offence must be part of a systematic or widespread attack on the civilian population), this is not reciprocated'). The Chamber however considered

offence, the Chamber convincingly found that they are part of the common general framework of the Statute. They share the same general objectives and protect the same general values in that they are designed to ensure respect for human dignity, whatever their specific aims and values may be.[282] Thus, a different interpretation of the respective act of killing would be 'inconsequential'.[283] Indeed, the unlawful taking of life is recognized as an underlying act of all core crimes (with the exception of the special case of the crime of aggression), either as 'killing (of) members of the group' (genocide),[284] 'murder' (crimes against humanity),[285] or 'wilful killing'/'violence to life' (war crimes).[286]

(2) Extermination (Article 7(1)(b) ICC Statute)

Article 7(2)(b) ICC Statute defines 'extermination' as 'the intentional infliction of conditions of life . . . calculated to bring about the destruction of a part of a population', for example, by the deprivation of access to food and medicine. The use of the Latin term '*inter alia*' in the provision makes clear that the latter is only an example of such living conditions.[287] The crime essentially consists of the creation of *deadly living conditions* amounting to widespread ('mass') killings, which targets *groups* of persons.[288] As to the group element, extermination resembles the crime of genocide, but the individuals forming the group need not share any common characteristics, such as the same religion or nationality, as in the case of genocide.[289] While extermination generally involves a large number of victims, it is not necessary that a specific part of

that 'murder as a crime against humanity' is *lex specialis* to 'murder as a war crime' (*Kupreškić et al.*, No. IT-95-16-T, para. 701). Apart from the imprecise terminology ('murder' instead of 'wilful killing') this statement only applies to killing in non-international armed conflict pursuant to Common Article 3 GC I-IV (Article 3 ICTY Statute) as is evidenced by the Chamber's reference to the seminal *Tadić* jurisdictional decision (No. IT-94-1-AR72) in fn. 958. Otherwise, there would be a contradiction to the Chamber's previous statement regarding the non-existence of a 'reciprocal speciality'.

[282] *Kupreškić et al.*, No. IT-95-16-T, para. 702.

[283] *Kupreškić et al.*, No. IT-95-16-T, para. 703. See also on this issue, Swaak-Goldman, 'crimes against humanity', in McDonald and Swaak-Goldman, *Substantive and Procedural Aspects* (2000), pp. 164 ff. for discussion as to the relative seriousness of crimes against humanity and war crimes.

[284] Article 2(a) Convention on the Prevention and Punishment of the Crime of Genocide, 78 *UNTS* 277; Article 4 of the ICTY Statute; Article 2 of the ICTR Statute; Article 5 of the ICC Statute; and section 4(a) of Regulation 15/2000.

[285] References in note 245.

[286] Article 2(a) of the ICTY Statute, Article 4(a) of the ICTR Statute; Article 8(1)(a)(i) and (c)(i) of the ICC Statute; and section 5, 6.1.(a)(i) of UNTAET Regulation 2000/15.

[287] cf. Schabas, *ICC Commentary* (2010), p. 160; Hall, 'Article 7', in Triffterer, *Commentary* (2008), mn. 95. For other examples, see also *Kayishema and Ruzindana*, No. ICTR-95-1-T, para. 146. On 'ethnic cleansing' as a form of extermination, cf. Pégorier, *Ethnic Cleansing* (2013), pp. 121–4, 146, rejecting such classification (p. 124, 'fundamentally flawed'), on the grounds that ethnic cleansing requires additionally discriminatory motives.

[288] See, for example, *Prosecutor v Stakić*, No. IT-97-24-A, Appeals Chamber Judgment, para. 259 (22 March 2006); *Akayesu*, No. ICTR-96-4-T, para. 591 ('by its very nature is directed against a group of individuals . . . element of mass destruction which is not required for murder'); *Kayishema and Ruzindana*, No. ICTR-95-1-T, para. 144 ('mass killing of others or . . . creation of conditions of life that lead to mass killing of others . . . '); *Prosecutor v Ndahimana*, No. ICTR-01-68-T, Judgment and Sentence, para. 839 (30 December 2011).

[289] *Prosecutor v Lukić and Lukić*, No. IT-98-32/1-A, Appeals Chamber Judgment, para. 538 (4 December 2012).

the targeted population be eliminated.[290] Selective killings suffice, that is, the killing of some group members while others are spared.[291] A single killing may amount to extermination if it occurred in the broader context of a mass killing, and if the perpetrator acted in the knowledge of this context.[292] In sum, it is the combined effect of a vast murderous enterprise and the accused's part in it, in contrast to a simple murder, which gives the crime its specificity and distinctiveness.[293]

(3) Enslavement (Article 7(1)(c) ICC Statute)

The main element of the definition of 'enslavement' is the 'right of ownership' exercised by one person over another (Article 7(2)(c) ICC Statute). Thus, the *Kunarac* TC found in the *Foča* case, probably the most important precedent, that 'enslavement as a crime against humanity in customary international law consisted of the exercise of any or all of the powers attaching to the right of ownership over a person'.[294] Indicia of enslavement include: the control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality, and forced labour.[295] Buying, selling, trading, or inheriting a person or that person's labour or services could also be a relevant indicator.[296] The *Kunarac* AC follows this definition, stressing that 'it is not possible exhaustively to enumerate all of the contemporary forms of slavery which are comprehended in the expansion of the original idea'.[297] It further considers that lack of consent by the victims is not an element of the crime, since enslavement, rather, flows from claimed rights of ownership.[298] The required *mens rea* consists of the intentional exercise of power attaching to the right of ownership.[299]

(4) Deportation or forcible transfer of population (Article 7(1)(d) ICC Statute)

Historically, the deportation of (parts of) populations is by no means a new phenomenon; in fact, it was an essential part of the colonial policies of the old world powers.[300]

[290] Mettraux, *HarvILJ*, 43 (2002), 285, criticizing *Krstić*, No. IT-98-33, paras. 501–3.

[291] Report of the ILC on the Work of its Forty-Eighth Session 6 May–26 July 1996, UN Doc. A/51/10, 97.

[292] cf. Elements 3 and 4 to Article 7(1)(b) ICC Statute; see also *Kayishema and Ruzindana*, No. ICTR-95-1-T, paras. 146–7; Mettraux, *HarvILJ*, 43 (2002), 184–5. But see *Prosecutor v Vasiljevic*, No. IT-98-32-T, Trial Chamber Judgment, paras. 227–9 with n. 586 (29 November 2002) (criticizing the lack of state practice).

[293] Mettraux, *HarvILJ*, 43 (2002), 285. See also *Lukić and Lukić*, No. IT-98-32/1-A, para. 536: 'This element of "massiveness" is what distinguishes the crime of extermination from the crime of murder'. See also *Stanišić and Župljanin*, No. IT-08-91-T, para. 44.

[294] *Kunarac et al.*, No. IT-96-23-T & IT-96-23/1-T, para. 539.

[295] *Kunarac et al.*, No. IT-96-23-T & IT-96-23/1-T, para. 543; see also *Krnojelac et al.*, No. IT-97-25-T, para. 350.

[296] *Kunarac et al.*, No. IT-96-23-T & IT-96-23/1-T, para. 543.

[297] *Kunarac et al.*, No. IT-96-23 & IT-96-23/1-A, para. 119.

[298] *Kunarac et al.*, No. IT-96-23 & IT-96-23/1-A, para. 120.

[299] *Kunarac et al.*, No. IT-96-23 & IT-96-23/1-A, para. 122; previously *Kunarac et al.*, No. IT-96-23-T & IT-96-23/1-T, para. 540; *Krnojelac et al.*, No. IT-97-25-T, para. 350.

[300] Triffterer, 'Bestandsaufnahme zum Völkerstrafrecht', in Hankel and Stuby, *Strafgerichte gegen Menschheitsverbrechen* (1995), p. 197; de Zayas, *HarvILJ*, 6 (1975), 250–1; Haslam, 'Population', in Wolfrum, *MPEPIL,* (2008 ff.), mn. 3–11.

In a criminal law context the phenomenon was first dealt with, as far as can be seen, in the *Milch* case of Nuremberg Military Tribunal II. The Tribunal took a rather narrow approach, explained by Judge Phillips in his dissenting opinion as the '[d]isplacement of groups of persons from one country to another' and arguing that 'deportation of the population is criminal whenever there is no [legal] title in the deporting authority or whenever the purpose of the displacement is illegal or whenever the deportation is characterized by inhumane or illegal methods'.[301] While according to this definition—also adopted by Military Tribunal III in the *Krupp* case[302]—a transfer from one territory to another is required and a forced displacement is only criminal under special circumstances, current ICL—in line with the respective IHL provisions as primary rules of conduct[303]—covers also the forcible transfer *within one country* and declares it, as a rule, criminal, unless expressly permitted under international law. Thus, Article 7(2)(d) ICC Statute 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'.[304]

From this follows, first, that both the displacement of persons across borders, that is, classical 'deportation', and within one country, that is, 'forcible transfer',[305] are included in the offence definition. The use of the terms 'displacement'[306] (a kind of umbrella term)[307] and 'area' (instead of, for example, 'territory') confirms that movements of population within the borders of a country are included in the offence.[308] In the same vein, the first element of the Elements of Crimes speaks of a displacement 'to

[301] *US v Milch*, in US-GPO, *TWC*, ii (1997), p. 865.

[302] *US v Krupp et al.*, US-GPO, *TWC*, ix (1997), p. 1432.

[303] While Article 49 GC IV only prohibits 'forcible transfers' or 'deportations' across state borders ('from occupied territory to the territory of the Occupying Power or to that of any other country'), Article 85(4)(a) AP I defines as a 'grave breach', *inter alia*, the 'the deportation or transfer of all or parts of the population of the occupied territory *within* or outside this territory' (emphasis added). In addition, the Appeals Chamber in *Krnojelac et al.*, IT-97-25-A, para. 220 held that the term 'forced movement' in Article 17 AP II describes 'displacements *within* and across borders during an internal armed conflict' (emphasis added).

[304] Emphasis added.

[305] On this distinction see *Krstić*, No. IT-98-33-T, paras. 531–2; *Stakić*, No. IT-97-24-A, paras. 278, 289 ff., 317; *Prosecutor v Krajišnik*, No. IT-00-39-A, Appeals Chamber Judgment, para. 304 (17 March 2009); *Popović et al.*, No. IT-05-88-T, para. 892; *Gotovina et al.*, No. IT-06-90-T, para. 1738; *Stanišić and Župljanin*, No. IT-08-91-T, para. 61; Clark, *FS Ginsburg* (2001), p. 148; Meseke, *Verbrechen gegen die Menschlichkeit* (2004), pp. 202–3; Robinson, 'Crimes Against Humanity', in Cryer et al., *Introduction ICL* (2010), p. 249; Filippini, 'Materiales', in Parenti et al., *Los crímenes* (2007), p. 87; Werle and Burchards, '§ 7 VStGB', in Joecks and Miebach, *Münchener Kommentar*, vi/2 (2009), mn. 60; for a comparative legal analysis, Kreicker, 'Völkerstrafrecht', in Eser, Sieber, and Kreicker, *Strafverfolgung*, vii (2006), pp. 88–9. In favour of considering displacement of persons across *de facto* borders as 'deportation' *Stakić*, No. IT-97-24-T, para. 679; confirmed in *Stakić*, No. IT-97-24-A, para. 278; *Tolimir*, No. IT-05-88/2-T, para. 793; *Gotovina et al.*, No. IT-06-90-T, para. 1783; critically, Werle, *Völkerstrafrecht* (2012), mn. 924; Werle, *Priciples* (2009), mn. 849, who correctly points out that a broad understanding would negate the differences between the alternatives. The applicable IHL (Article 49 GC IV, 85 (4)(a) AP I and 17 AP II) does not, however, explicitly distinguish between deportation and forcible transfer.

[306] According to Article 17 AP II 'displacement' covers internal displacement.

[307] n. 13 to the Elements for Article 7(1)(d) states that '"[d]eported or forcibly transferred" is interchangeable with "forcibly displaced"'.

[308] See also von Hebel and Robinson, 'Crimes', in Lee, *The ICC* (1999), p. 99; Hall, 'Article 7', in Triffterer, *Commentary* (2008), mn. 33.

another State or *location*'.[309] While the Statutes of the ad hoc tribunals only criminalize 'deportation' (see for example Article 5(d) ICTY Statute), and indeed 'forcible transfer' was only codified in the ILC's 1996 Draft Code as a separate act,[310] it had been previously recognized by the case law.[311] As to the numbers of persons to be displaced, the same element refers to 'one or more persons', thereby suggesting that even the transfer of only one person suffices. Secondly, 'forcible displacement' is, as a rule, criminal unless the persons concerned have no lawful residence in the first place,[312] or the displacement is justified under international law. Thus, the first question to be asked is what makes the nature of the displacement 'forcible'. The term is understood broadly, encompassing physical force *stricto sensu* to the mere 'taking advantage of a coercive environment'.[313] The second question that must be addressed goes to a possible justification under international law. Such a justification may arise 'if the security of the population or imperative military reasons so demand' (Articles 49(2) GC IV, 17 AP II). In any case, the persons must be allowed to return if the reasons for the transfer have ceased to exist.[314]

Yet, even if these justifications apply, a forcible displacement can still be unlawful and turn criminal for the *way* in which it is conducted. Thus, Article 49 GC IV provides that it must be ensured 'to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated'.[315] If these minimum guarantees are not complied with, an in principle lawful displacement can be turned into a criminal one[316] and may even amount to a distinct crime against humanity, for example, an inhuman act.[317]

(5) Imprisonment or other severe deprivation of liberty (Article 7(1)(e) ICC Statute)

Article 7(1)(e) criminalizes 'imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law'. From the wording of the provision it is clear that only the liberty of physical movement is covered. The ad

[309] Emphasis added. See also s. 7(1) no. 4 VStGB covering the transfer to 'another area'.

[310] cf. Article 18(g) Draft Code.; cf. Werle, *Völkerstrafrecht* (2012), mn. 921.

[311] *Nikolić*, No. IT-94-2-R61, para. 23; *Prosecutor v Simić et al.*, No. IT-95-9, Second Amended Indictment, paras. 36–9 (25 March 1999) (emphasis added).

[312] See also the second Element of the Elements of Crimes specifying that only 'persons lawfully present in the area' can be victims of deportation or forcible transfer.

[313] cf. n. 12 to the Elements: 'The term "forcibly" is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment.'

[314] cf. Article 49 GC IV providing that '[p]ersons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased'.

[315] Similarly, Article 17 AP II requires that '[s]hould such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition'.

[316] *Nikolić*, No. IT-94-2-R61, para. 23.

[317] *Krstić*, No. IT-98-33-T, para. 532; *Kupreškić et al.*, No. IT-95-16, para. 566; *Tolimir*, No. IT-05-88/2-T, paras. 802–3; *Perišić*, No. IT-04-81-T, para. 114; *Đorđević*, No. IT-05-87/1-T, paras. 1614, 1610.

hoc tribunals have dealt with deprivation of liberty as a crime against humanity in only two decisions: *Kordić and Čerkez* and *Krnojelac*.[318] In *Kordić and Čerkez* the Trial Chamber held that the crime against humanity of imprisonment or other severe deprivation of liberty differs from the war crime of unlawful confinement only with regard to the context element.[319] Dealing with unlawful confinement, the Chamber distinguished between the lawfulness of the initial confinement and its conditions, that is, 'whether the confined persons had access to the procedural safeguards regulating their confinement'.[320] Both questions determine the overall legality of the confinement, taking into account the 'fundamental rules of international law' (Article 7(1)(e) ICC Statute). The *Krnojelac* TC deviates from *Kordić* in that it considers that imprisonment as a crime against humanity may exist independently of unlawful confinement as a war crime.[321] Accordingly, any form of *arbitrary* physical deprivation of liberty may constitute imprisonment as long as the other requirements of the crime are fulfilled. Arbitrariness presupposes that the deprivation of liberty is imposed without regard to the internationally recognized rules of due process.[322] In an armed conflict, Articles 42(1), 43(1) GC IV[323] and Article 5 AP II apply.[324] In peacetime, Article 9(1) of the International Covenant on Civil and Political Rights (ICCPR) applies, in particular

[318] However, deprivation of liberty has been considered as a persecutory act, see, for example, *Simić et al.*, No. IT-95-9-T, paras. 59–66; *Gotovina et al.*, No. IT-06-90-T, paras. 1848 ff.

[319] *Kordić and Čerkez*, No. IT-95-14/2-T, para. 301.

[320] *Kordić and Čerkez*, No. IT-95-14/2-T, para. 279.

[321] *Krnojelac*, No. IT-97-25-T, para. 111.

[322] *Krnojelac*, No. IT-97-25-T, paras. 112, 113.

[323] Article 42(1) GC IV provides: 'The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary.' Article 43(1) GC IV provides: 'Any protected person who has been interned or placed in assigned residence shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose.'

[324] Article 5 AP II reads: '1. In addition to the provisions of Article 4, the following provisions shall be respected as a minimum with regard to persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained: (a) The wounded and the sick shall be treated in accordance with Article 7 [i.e., "they shall be treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. There shall be no distinction among them founded on any grounds other than medical ones"]; (b) The persons referred to in this paragraph shall, to the same extent as the local civilian population, be provided with food and drinking water and be afforded safeguards as regards health and hygiene and protection against the rigours of the climate and the dangers of the armed conflict; (c) They shall be allowed to receive individual or collective relief; (d) They shall be allowed to practise their religion and, if requested and appropriate, to receive spiritual assistance from persons, such as chaplains, performing religious functions; (e) They shall, if made to work, have the benefit of working conditions and safeguards similar to those enjoyed by the local civilian population. 2. Those who are responsible for the internment or detention of the persons referred to in paragraph 1 shall also, within the limits of their capabilities, respect the following provisions relating to such persons: (a) Except when men and women of a family are accommodated together, women shall be held in quarters separated from those of men and shall be under the immediate supervision of women; (b) They shall be allowed to send and receive letters and cards, the number of which may be limited by the competent authority if it deems necessary; (c) Places of internment and detention shall not be located close to the combat zone. The persons referred to in paragraph 1 shall be evacuated when the places where they are interned or detained become particularly exposed to danger arising out of the armed conflict, if their evacuation can be carried out under adequate conditions of safety; (d) They shall have the benefit of medical examinations; (e) Their physical or mental health and integrity shall not be endangered by an unjustified act or omission. Accordingly, it is prohibited to subject the persons described in this Article to any medical procedure which is not indicated by the state of health of the person concerned, and which is not consistent with the generally accepted medical standards applied to free persons under similar medical circumstances . . .'

paras. 1 and 4.[325] Article 14 ICCPR, the general provision on fair trial, applies to both the original grounds of detention and any subsequent review.[326] As to the former, a deprivation of liberty is particularly arbitrary if it is imposed solely as a consequence of the lawful exercise of human rights.[327] On the other hand, an arrest which is no longer necessary may be considered as arbitrary as an arrest which was illegal from the outset.[328]

From the wording of Article 7(1)(e) ICC Statute, it follows that there is a distinction between 'imprisonment' and 'deprivation of liberty'. The fact that only the latter must be 'severe'—as deprivation of liberty 'other' than imprisonment—entails that imprisonment is considered as severe by definition. Imprisonment must be measured at least in weeks, that is, a deprivation of liberty coming close to such a period generally meets the severity requirement. Of course, the other factor to be taken into account is the conditions of the detention, that is, 'persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person' (Article 10 ICCPR). In practical terms this means that while a relatively short house arrest would not meet the 'severity' threshold, a detention for months would. On the other hand, a short period of detention under inhumane conditions, with insufficient food, hygiene, and space, accompanied by inhumane treatment (e.g., sexual abuse and mistreatments) certainly amounts to a severe deprivation of liberty.

(6) Torture (Article 7(1)(f) ICC Statute)

According to Article 7(2)(e) ICC Statute, torture—a *ius cogens* prohibition in international law[329]—is defined 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' excluding 'pain or suffering arising only from, inherent in or incidental to, lawful sanctions'. This definition differs from the one for torture as an individual crime,[330] provided for in Article 1(1) of the Torture Convention (CAT),[331] in two respects—it omits the *purpose* and *official capacity* requirements.[332] As to the latter, the

[325] Article 9(1) ICCPR provides: '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 procedures as are established by law.' With respect to procedural safeguards, para. (4) declares: 'Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.'

[326] cf. *Kordić and Čerkez*, No. IT-95-14/2-T, para. 303 (referring to the respective Geneva Law).

[327] Working Group on Arbitrary Detention, 'Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment', Report, UN Doc. E/CN.4/1998/44, Annex I, para. 8: The Working Group stated that a deprivation of liberty is illegal if 'the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights'.

[328] *Krnojelac*, No. IT-97-25-T, para. 114.

[329] *Furundžija*, No. IT-95-17/1-T, paras. 153–7; see for further references Ambos, *JICJ*, 6 (2008), 265 with fn. 15–17.

[330] For a more detailed treatment see Chapter V, E.

[331] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1987), 1465 *UNTS* 85 (Torture Convention or CAT).

[332] cf. Article 1(1) Torture Convention: '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

omission is in line with the more recent ICTY case law.[333] The *Kunarac* TC held that 'the presence of a state official or of any other authority-wielding person in the torture process is not necessary'.[334] In any case, given the context requirement of the chapeau of Article 7(1), it is clear that a link to a (state-like) organization is required, that is, an individual, purely private case of torture would not suffice.

As to the *purpose requirement*, a footnote to the Elements of Crimes explicitly notes 'that no specific purpose must be proved'.[335] In contrast, the jurisprudence of the ad hoc tribunals has always applied Article 1(1) of the Torture Convention, and essentially adopted its purpose requirement.[336] However, from the wording of the provision ('such purposes as'), it follows that the purposes listed are not exhaustive but only exemplary, that is, other, similar purposes may also suffice or complement the purposes mentioned.[337] It is, of course, another matter of whether such other purposes may also amount to customary international law.[338] Be that as it may, the ICC renounces—followed by some implementing legislation[339]—with

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' (emphasis added). See also von Hebel and Robinson, 'Crimes', in Lee, *The ICC* (1999), pp. 98–9.

[333] For the previous position including this requirement see *Akayesu*, No. ICTR-96-4-T, para. 594; *Delalić et al*., No. IT-96-21-T, paras. 473–4; *Prosecutor v Furundžija*, No. IT-95-17/1-A, Appeals Chamber Judgment, para. 111 (21 July 2000).

[334] *Kunarac et al*., No. IT-96-23-T & IT-96-23/1-T, para. 496; see also the confirming explanation of the Appeals Chamber in *Kunarac et al*., No. IT-96-23-A & IT-96-23/1-A, paras. 145–8 stating that 'the definition of torture in the Torture Convention reflects customary international law as far as the obligation of States is concerned', however, this 'must be distinguished from an assertion that this definition wholly reflects customary international law regarding the meaning of the crime of torture generally' (para. 147). Therefore, the Chamber comes to the conclusion that 'the public official requirement is not a requirement under customary international law in relation to the criminal responsibility of an individual for torture outside of the framework of the Torture Convention' (para. 148). Reaffirmed in *Kvočka et al*., No. IT-98-30/1-A, paras. 283–4. See also *Stanišić and Župljanin*, No. IT-08-91-T, para. 49.

[335] Elements of Crimes, Article 7(1)(f), n. 14; see, on the negotiations, Rückert and Witschel, 'Crimes against Humanity', in Fischer et al., *Prosecution* (2001), pp. 59, 79–80.

[336] *Akayesu*, No. ICTR-96-4-T, para. 593–4; *Delalić et al*., No. IT-96-21-T, paras. 456, 494; *Prosecutor v Furundžija*, No. IT-95-17/1-T, Trial Chamber Judgment, para. 111 (10 December 1998); *Kunarac et al*., No. IT-96-23-T & IT-96-23/1-T, paras. 483, 497; *Prosecutor v Naletilić and Martinović*, No. IT-98-34-T, Trial Chamber Judgment, para. 337 (1 March 2003); *Limaj et al*., No. IT-03-66-T, para. 239; *Haradinaj et al*., No. IT-04-84*bis*-T, paras. 416, 418; *Stanišić and Župljanin*, No. IT-08-91-T, para. 47.

[337] See also *Delalić et al*., No. IT-96-21-T, para. 470; *Kvočka et al*., No. IT-98-30/1-T, paras. 140, 153; *Kunarac et al*., No. IT-96-23-T & IT-96-23/1-T, para. 486. The same view is held by the German Supreme Court, cf. *BGHSt*, No. 3 StR 372/00, Judgment, in *BGHSt*, xlvi, p. 303–4 (21 February 2001); reprinted in *NJW*, 54 (2001), 2728. See also *Mettraux*, HarvILJ 43 (2002), 290; Meseke, *Verbrechen gegen die Menschlichkeit* (2004), p. 217. For an exhaustive list ('essential elements') see, apparently, *Akayesu*, No. ICTR-96-4-T, para. 594; similarly, *Furundžija*, No. IT-95-17/1-T, para. 111.

[338] See, for example, *Kunarac et al*., No. IT-96-23-T & IT-96-23/1-T, para. 485 (listing the purposes of the Convention and expressing doubts as to whether other purposes are recognized by customary international law).

[339] See, for example, s. 7(1) no. 5 German CCAIL; Article 607*bis*(2) no. 8 Spanish CP; s. 50(1) UK International Criminal Court Act 2001 (referring to the ICC Statute). Unclear, s. 4(3) (crimes within Canada) and s. 6(3) (crimes outside Canada) Canadian Crimes Against Humanity and War Crimes Act, SC 2000, c. 24, which generally refers to the ICC Statute but also to other 'existing or developing rules of international law' (cf. s. 4(4) and 6(4)); ambiguous, France where torture is only mentioned but not defined

good reason[340] the purpose requirement and instead provides for a *control requirement* to distinguish torture from other attacks on physical or mental integrity. With this requirement, the particular vulnerability of a victim who is 'in the custody or under the control' of the perpetrator and thus has no possibility to escape is expressed. The requirement must be interpreted broadly; in particular, control over a person is less than imprisonment.[341]

The 'pain or suffering' must be '*severe*'. It is this severity which distinguishes torture from other forms of inhumane treatment[342] which do not 'attain a minimum level of severity'.[343] Of course, there is no mathematical formula to distinguish 'severe' torture from 'non-severe' mistreatment. For example, the *Furundžija* AC considered it, somewhat apodictically, 'inconceivable that it could ever be argued that . . . the rubbing of a knife against a woman's thighs and stomach, coupled with a threat to insert the knife into her vagina, . . . are not serious enough to amount to torture'.[344] What this statement clearly shows—and what already follows from the wording of Article 1(1) CAT and Article 7(2)(e) ICC Statute—is that the infliction of *physical* pain is not a requirement of torture.[345] But does it qualify as (mental) torture to be 'forced to watch severe mistreatment inflicted on a relative'?[346] Also, while 'consciously attacking [a particular vulnerability] may well result in greater pain or suffering for that individual than for someone without that characteristic',[347] from the perpetrator's perspective it is doubtful whether such subjective characteristics of a particular victim, normally unknown to him, should be relevant in assessing the severity of that perpetrator's conduct.[348] In any case, what is clear is that there must be a difference between torture and other mistreatment if the severity element should have any significance. Ultimately, the correct qualification depends on the circumstances of each case.[349]

in Article 212-1 CP. Concurring, Italy, where reference is made to the UN Torture Convention (cf. Article 3 L. 3 November 1988, n. 498).

[340] For a more detailed discussion, see Ambos, *NStZ* (2001), 632; in the same vein, see Hall, 'Article 7', in Triffterer, *Commentary* (2008), mn. 109; concurring, Meseke, *Verbrechen gegen die Menschlichkeit* (2004), p. 216; Filippini, 'Materiales', in Parenti et al., *Los crímenes*, (2007), p. 92; Werle and Burchards, '§ 7 VStGB', in Joecks and Miebach, *Münchener Kommentar*, vi/2 (2009), mn. 68, 74; unclear Robinson, 'Crimes against Humanity', in Cryer et al., *Introduction ICL* (2010), pp. 252–3 with n. 151, who only points out the different treatment of torture as a crime against humanity and as a war crime.

[341] Hall, 'Article 7', in Triffterer, *Commentary* (2008), mn. 105.

[342] cf. Judgment, *Ireland v UK*, Application No. 5310/71 (18 January 1978), ECtHR, para. 167 where the ECtHR established its 'degrees test' distinguishing between torture, inhuman treatment and 'ordinary' ill treatment ('Although the five techniques, as applied in combination, undoubtedly amounted to *inhuman and degrading treatment*, although their object was the extraction of confessions, the naming of others and/or information and although they were used systematically, they did not occasion suffering of the particular intensity and cruelty implied by the word *torture* as so understood'). See also Benvenisti, *EJIL* 8 (1997), 604–5; Shany, *CathULR*, 56 (2007), 118–19. On the apparent contradiction between general human rights treaties (treating torture and other inhuman treatment equally) and the CAT, see Ambos, *JICJ*, 6 (2008), 266–7.

[343] Judgment, *Ireland v UK*, Application No. 5310/71 (18 January 1978), ECtHR, para. 162.

[344] *Furundžija*, No. IT-95-17/1-T, para. 114.

[345] See also *Kvočka et al.*, No. IT-98-30/1-T, para. 149; Byrnes, 'Torture', in McDonald and Swaak-Goldman, *Substantive and Procedural Aspects* (2000), p. 210.

[346] *Kvočka et al.*, No. IT-98-30/1-T, para. 149.

[347] Byrnes, 'Torture', in McDonald and Swaak-Goldman, *Substantive and Procedural Aspects* (2000), p. 209.

[348] In favour *Kvočka et al.*, No. IT-98-30/1-T, para. 143.

[349] *Delalić et al.*, No. IT-96-21-T, paras. 461 ff.; *Simić et al.*, No. IT-95-9-T, para. 80; *Limaj*, No. IT-03-66-T, para. 237; *Naletilić and Martinović*, No. IT-98-34-T, para. 299; *Martić*, No. IT-95-11-T, para. 75; *Haradinaj et al.*, No. IT-04-84*bis*-T, para. 422. See also Mettraux, *HarvILJ*, 43 (2002), 289.

If the 'pain or suffering' is the consequence of a '*lawful sanction*' (Article 7(2)(e) ICC Statute), for example the death penalty in some domestic jurisdictions, the conduct does not qualify as torture. To be lawful, a sanction must be imposed in a fair trial pursuant to the international minimum standards as codified, for example, in Articles 14 and 15 ICCPR. Moreover, the sanction itself must comply with the minimum conditions for the human treatment of detained persons (cf. in particular Article 10 ICCPR).

In sum, torture under Article 7(1)(f) ICC Statute requires the infliction of physical or mental pain or suffering which must attain a minimum level of severity. The victim must be under the control of the perpetrator, that is, in a situation from which there is no escape. The perpetrator need not pursue a certain purpose. If the pain or suffering is the consequence of a lawful sanction it does not constitute torture in the legally relevant sense.

(7) Sexual crimes (Article 7(1)(g) ICC Statute)[350]

While the issue of sexual violence was almost non-existent in the trials following World War II[351]—sexual crimes have even been labelled 'the "forgotten" crimes in international law'[352]—it has meanwhile taken centre stage in international policy debates.[353] Given this development, some *preliminary remarks* are at place before we analyse in detail the individual offences.

Perhaps the most important factor to be taken into account when talking about (international) sex crimes is the *cultural conditionality* of criminal prohibitions, particularly in this area. As sexual violence does not normally take place in conflicts in highly developed industrial societies, but rather in underdeveloped or developing countries[354] (especially Sub-Saharan Africa[355]), the (international) criminal law is confronted with highly traditional, sometimes even archaic conceptions, viewing sexual offences primarily as attacks on honour—yet not that of the female victim, but rather that of her male partner.[356] Thus, the rape of a woman is considered as the emasculation of her male guardian who failed to accomplish his protective function.[357] Additionally, there are numerous reports of cases where men left their raped women after they 'consented' to being raped to save their men from being killed. It is clear that the understanding of gender equality and rights that underlies such attitudes maximizes the harm that the victims of sexual violence suffer, and may even hinder the

[350] This section draws on Ambos, 'Sexual Offences', in Bergsmo et al., *Sex Crimes* (2012), pp. 143–73.

[351] Assessing the Nuremberg and Tokyo trials: Cole, 'Criminal Law', in McGlynn and Munro, *Rape* (2010), pp. 48–50, 58–9.

[352] See Chinkin, 'Gender-related Violence', in Cassese, *Companion* (2009), p. 76; Askin, 'Women', in Askin and Koenig, *Women* (2001), p. 64. In a similar vein, see Hayes, 'Definition of Rape', in Darcy and Powderly, *Judicial Creativity* (2010), p. 129 ('extraordinarily little appetite historically to prosecute the crime, in part due to the continuing perception that sexual violence was simply one of the "spoils of war" ').

[353] For an enlightening summary of the approaches to sexual violence by the different ICL institutions, see Cole, 'Criminal Law', in McGlynn and Munro, *Rape* (2010), pp. 48 ff.

[354] On a worldwide study of sexual violence in conflict, cf. Francesch et al., *Alert* (2009).

[355] Critical of the focus on Africa, Arieff, *Sexual Violence* (2010), p. 3.

[356] On rape as an offence against the property and honour of a third person (the female's owner, husband, and/or relatives), see Dube, *Rape Laws in India* (2008), pp. 1 ff., 11 ff., 161 ff.; similarly, Müting, *Sexuelle Nötigung* (2010), pp. 8 ff.

[357] Statement of a participant of the international master's programme 'transcrim' of the University of Western Cape and the Humboldt University Berlin, during a lecture by this author on 9 March 2011.

imposition of adequate punishment. Also, the obvious secondary rank accorded to women in a male-dominated society entails the downplaying of sexual violence and the risk of secondary victimization for the respective women.[358]

As to the criminalization of sexual violence, one should first note that the scope of *protection* of the respective offences, the *Rechtsgut* protected,[359] depends on the understanding of sexual violence, which, due to these cultural conditions, has differed widely from ancient times up to now and still seems to be developing.[360] From a modern perspective, sexual offences protect primarily physical/mental integrity,[361] dignity and personal (sexual) autonomy;[362] as part of international crimes these offences may also contribute to the maintenance of international peace and security.[363] Secondly, as to the method of *criminalization*, sexual violence may be criminalized explicitly or implicitly.[364] A classical implicit criminalization constitutes the classification of a sexual offence as an offence against the honour or dignity of the victim. Indeed, older IHL definitions focus on the attack of the woman's honour.[365] Similarly, while in national law there is a clear tendency to qualify sexual violence as offences against sexual integrity or autonomy,[366] the respective conduct is often still subsumed under offences against dignity.[367]

[358] cf. on the perception of women and the role of sexual violence in the DRC, see RFDA and RFDP, *Women's Bodies as a Battleground* (2005), pp. 25–8.

[359] On *Rechtsgut* and harm principle in general, see Volume I of this treatise, pp. 60 ff.

[360] Most important for the modern understanding of sexual violence and its meaning was, with a rather sociological perspective on rape, see Brownmiller, *Against Our Will* (1976) (on pp. 23 ff. dealing with rapes in wartimes).

[361] See also Schomburg and Peterson, *AJIL*, 101 (2007), 126.

[362] For instance, in the German Criminal Code ('German StGB'), sexual offences are contained in Chapter 13 as 'Offences against sexual self-determination', cf. German Criminal Code in the version promulgated on 13 November 1998, Federal Law Gazette (Bundesgesetzblatt) I, p. 3322. The English Sexual Offences Act 2003, Chapter 43, 20 November 2003, is designed to protect several interests, among them to punish non-consensual sexual activity. Thus, sexual offences on adults each include the element that the victim 'does not consent' (cf. Sexual Offences Act 2003, Part 1: 1 Rape (1)(b), 2 Assault (1)(c), 3 Sexual Assault (1)(c), 4 Causing Sexual Activity without Consent (1)(c)). See also Card, Gillespie, and Hirst, *Sexual Offences* (2008), para. 1.14.

[363] As recognized in the UN SC Res. 1820, 19 June 2008, para. 1; UN SC Res. 1880, 30 September 2009, para. 1 and UN SC Res. 1960, 16 December 2010 all stating that 'sexual violence may impede the restoration of international peace and security'. Previous resolutions referred to sexual violence in conflict situations, without linking this to international peace and security: UN SC Res. 820, 17 April 1993, para. 6, condemned the 'massive, organized and systematic . . . rape of women' in the Former Yugoslavia's conflict (see de Brouwer, *Prosecution* [2005], p. 16 emphasizing that this resolution, for the first time, explicitly recognized rape as having taken place in conflict); see also UN SC Res. 1325, 31 October 2000, calling upon conflict parties to protect women's rights and in this context (in paras. 10–11) calling on all parties to armed conflict to 'take measures to protect women and children from gender-based violence'.

[364] Generally on the status of sexual violence in international law, see Dyani, *AfrJICompL*, 15 (2007), 230–54. Equally distinguishing between explicit and implicit criminal provisions, see Luping, *AmUJ-GenderSocPol'ye&L*, 17 (2009), 431–92.

[365] See, for example, Article 27 GC IV (women 'shall be especially protected against any attack on their honor, in particular against rape, enforced prostitution, or any form of indecent assault') and Article 75(2)(b) AP I. See further Boot revised by Hall, 'Article 7', in Triffterer, *Commentary* (2008), mn. 42, 48 with n. 246; Cottier, 'Article 8', in Triffterer, *Commentary* (2008), mn. 202, 209. On other international instruments regarding sexual violence and gender crimes, see Askin, 'Crimes against Women', in Brown, *Handbook ICL* (2011), pp. 86 ff.

[366] For examples see note 362.

[367] Criminalization of rape and sexual violence has experienced several changes worldwide, closely linked to the current understanding of gender equality and rights. As described in Dube, *Rape Laws in India*

Clearly, this honour and dignity link to sexual violence explains why, in the negotiations leading to the ICC Statute, the first war crimes proposals still understood sexual offences as outrages upon personal dignity; it was only in December 1997 that the Preparatory Committee created a separate category for sexual offences.[368] In any case, today, the ICC Statute, unlike the Statutes of the ad hoc tribunals,[369] includes explicit penalizations of sexual violence both as crimes against humanity (Article 7(1)(g)) and as war crimes (Article 8(2)(b)(xxii) and (e)(vi)) and has been widely praised for that.[370] Moreover, one may also implicitly read the criminalization of sexual offences into several other crimes against humanity (and also war crimes), in particular those referring to acts against the bodily integrity and right to reproduction. Notwithstanding their different context element as crimes against humanity or war crimes, these offences are defined identically. As we will see later, more precise definitions are mainly contained in the Elements of Crimes, and the jurisprudence of the ad hoc tribunals has dealt with several such offences.[371] Interestingly, all sexual offences (except forced pregnancy) are defined to be gender-neutral, applying equally to male and female victims.[372] Of course, this cannot conceal the fact that the victims of sexual violence are predominantly female[373] while the perpetrators are practically always male, including in case of sexual violence against men.

(2008), pp. 1–2, 11–15 and 161 ff., and similarly in Müting, *Sexuelle Nötigung* (2010), pp. 8 ff., rape once was considered as an offence against property or the honour of third parties (the women's owner, husband, and/or family members), before it was considered as an offence against the honour of the actual female victim. See, for example, the Indian Penal Code of 6 October 1860 (reprinted in Kannabiran, *Halsbury's Laws of India* (2006), p. 193) where rape is incorporated in Section 375, Chapter 12 under 'Offences against Women'. Dube, op. cit., p. 1, describes rape in Indian law as 'violence of the private person of the woman' and welcomes developments in the Indian jurisprudence until 2003 as 'the recognition of the rights of rape victims [which] have enabled women to secure their dignity and honor' (p. 135). See also, as an example from Latin America, the situation in Uruguay, where rape is criminalized (unaltered since 1933), by Article 272 of the Código Penal under the heading of 'good customs and family order' ('Titulo X: De los delitos contra las buenas costumbres y el orden de la familia').

[368] Reproducing Article 75(2)(b) AP I, see Cottier, 'Article 8', in Triffterer, *Commentary* (2008), mn. 203.

[369] For the legal position in these Statutes, see Chinkin, 'Gender-related Violence', in Cassese, *Companion* (2009), pp. 76 ff.

[370] cf. Gabriel, *EICC*, 1 (2004), 47 ('landmark in codifying crimes of sexual and gender violence'); Zimmermann and Geiß, '§ 8 VStGB', in Joecks and Miebach, *Münchener Kommentar*, vi/2 (2009), mn. 139 ('milestone'); similarly, Chinkin, 'Gender-related Violence', in Cassese, *Companion* (2009), pp. 77; on gender issues during the negotiations of the ICC Statute, see Bedont and Hall-Martinez, *BJWA*, 6 (1999), 66 ff.

[371] See for a concise summary of the jurisprudence of ICTY, ICTR, and SCSL, UN DPKO, *Sexual Violence Elements* (2010). See further for an interesting study on the ICTY prosecutions, Mischkowski and Mlinarevic, *Rape Trials* (2009), pp. 15 ff.; for an analysis of the ad hoc tribunals' contributions to substantial criminal law, Ayat, *ICLR*, 10 (2010), 807 ff; Askin, 'Crimes against Women', in Brown, *Handbook ICL* (2011), pp. 94 ff.; Gil Gil, 'Derecho penal', in Ramírez Moncayo, *Realidades y tendencias* (2010), pp. 11 ff. (on the ICC Statute at 17 ff.). See also on the several forms of sexual offences in the ICC Statute, with a special focus on previous laws and jurisdictions, Luping, *AmUJGenderSocPolL*, 17 (2009), 452 ff.

[372] cf. Article 7(3) ICC Statute ('. . . term "gender" refers to the two sexes, male and female, within the context of society'). On gender neutrality, see also Cottier, 'Article 8', in Triffterer, *Commentary* (2008), mn. 203. A gender neutral application of international sex crimes can be explained by the fact that women, children, and men are equally victims of sexual violence in conflict, see UN DPKO, *Sexual Violence Elements* (2010), para. 53; focusing on sexual violence against men, see Mouthaan, *ICLR*, 13 (2013), 665 ff. On the controversies regarding the gender definition in the ICC negotiations, see Chinkin, 'Gender-related Violence', in Cassese, *Companion* (2009), pp. 77; critical of the still 'female-specific' approach of the ICC Statute, see Mouthaan, *ICLR*, 13 (2013), 676–7.

[373] This is also admitted by Mouthaan, *ICLR*, 13 (2013), 677 who demands more attention for sexual violence against men in armed conflict.

(a) Rape

Rape is defined in the Elements of Crimes as follows:[374]

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

The Elements provide a gender-neutral definition ('invasion', 'person'),[375] requiring a physical invasion of any part of the victim's body (penetration) and force/coercion.[376] Paragraph 1 refers to the (objective) conduct of the perpetrator, paragraph 2 to the opposing will of the victim.[377] Any *forced penetration*, be it in the classical sense (as forced sex meaning penetration of the male penis into the vagina) or in any other sense (insertion of the perpetrator's sexual organ into other body cavities, oral and anal penetration, or insertion of other parts of the perpetrator's body or of objects into the vagina or the anus) is covered.[378] In other words, every penetration involving sexual organs may constitute rape, but sexual behaviour falling short of penetration is not covered.[379] The definition in the

[374] Elements of Crimes for Article 7(1)(g)-1 of the ICC Statute. The same definition was used at the SCSL in the 'RUF' Trial Judgment, cf. *Sesay et al.*, No. SCSL-04-15-T, paras. 145, 146 (whereby the Trial Chamber abstained from using the further—here not reproduced—Elements on intent and coercion, cf. Oosterveld, *CornILJ*, 44 (2011), 57).

[375] cf. n. 15 to the Elements of Crimes: 'The concept of "invasion" is intended to be broad enough to be gender-neutral'. Concurring, de Brouwer, *Prosecution* (2005), p. 133.

[376] Boot revised by Hall, 'Article 7', in Triffterer, *Commentary* (2008), mn. 45.

[377] Werle, *Principles* (2009), mn. 875–8; Werle, *Völkerstrafrecht* (2012), mn. 953–6, sees a definitional shift from the focus on the perpetrator's objective conduct to the victim's opposing will.

[378] Similarly, Zimmermann and Geiß, '§ 8 VStGB', in Joecks and Miebach, *Münchener Kommentar*, vi/2 (2009), mn. 142; for a broader understanding of the definition, see Werle, *Principles* (2009), mn. 876; Werle, *Völkerstrafrecht* (2012), mn. 954; Cottier, 'Article 8', in Triffterer, *Commentary* (2008), mn. 206. Critically, de Brouwer, *Prosecution* (2005), p. 132 (arguing that the Elements' definition does not seem to cover the penetration of the mouth of the victim with an object, probably due to the missing sexual aspect of this act).

[379] Similarly de Brouwer, *Prosecution* (2005), p. 132.

[380] cf. de Brouwer, *Prosecution* (2005), p. 130, who sees the Elements' definition as closest to the ICTY in *Furundžija*, No. IT-95-17/1-T, para. 185, where the objective elements of rape have been defined as follows:

(i) the sexual penetration, however slight:
  (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
  (b) of the mouth of the victim by the penis of the perpetrator;
(ii) by coercion or force or threat of force against the victim or a third person.

Similarly Oosterveld, *CornILJ*, 44 (2011), 55 (distinguishing between four approaches for the definition of rape).

[381] Another, broader definition of rape was given by the ICTR in *Akayesu*, No. ICTR-96-4-T, paras. 598, 688 ('physical invasion of a sexual nature, committed on a person under circumstances who are coercive'), which also seems to cover, for example, enforced masturbation and sexual mutilations, cf. de Brouwer,

Elements of Crimes was originally influenced by the ICTY's and ICTR's jurisprudence,[380] although it also deviated from it in some instances.[381]

As rape infringes upon the (sexual) autonomy of the victim, a key issue is what role a 'genuine' *consent* may play. As explained in Volume I of this treatise, while consent may, in principle, operate as a failure of proof defence negating the *actus reus* of the respective sex offence, it plays, for factual reasons, a minor rule in rape committed as a crime against humanity (or war crime in armed conflict situations).[382] Thus, suffice to recall here that the jurisprudence takes the view that the existing climate of coercion

Prosecution (2005), p. 133. Calling this approach a 'conceptual' rather than a 'cataloguing' one: Munro, 'Coercion', in McGlynn and Munro, *Rape* (2010), p. 17. The subsequent case law often invoked the *Akayesu* precedent, for example, *Kvočka et al.*, No. IT-98-30/1-T, para. 175; *Muhimana*, No. ICTR-95-1B-T, para. 551. On the development, see de Brouwer, *Prosecution* (2005), pp. 105–29 (on ad hoc tribunals' definitions) and pp. 131–7 (on the Elements' definition). Generally on this jurisprudence, see also Hayes, 'Definition of Rape', in Darcy and Powderly, *Judicial Creativity* (2010), pp. 129 ff.; Schabas, *ICC Commentary* (2011), p. 171; Werle, *Principles* (2009), mn. 875–9; Werle, *Völkerstrafrecht* (2012), mn. 953–7; Schomburg and Peterson, *AJIL*, 101 (2007), 132–8; Luping, *AmUJGenderSocPol'y&L*, 17 (2009), 448 ff.; Ayat, *ICLR*, 10 (2010), 809 ff.; on the relevant ICTR jurisprudence, see also Askin, *JICJ*, 3 (2005), 1007 ff.; critical of the related ICTR jurisprudence, Buss, 'Prosecuting Rape', in McGlynn and Munro, *Rape* (2010), pp. 61 ff. (regretting that the jurisprudence post-*Akayesu* has not fully applied this approach). For relevant decisions of the SCSL, see Oosterveld, *CornILJ*, 44 (2011), 49 ff.

[382] Volume I of this treatise, pp. 387–8.

[383] See originally *Akayesu*, No. ICTR-96-4-T, paras. 598, 688 ('committed on a person under circumstances who are coercive'). In the same vein, *Kunarac et al.*, No. IT-96-23 & IT-96-23/1-A, para. 130 ('[C]rimes against humanity will be almost universally coercive . . . true consent will not be possible') and *Muhimana*, No. ICTR-95-1B-T, para. 546 ('vitiating true consent'); *Sesay et al.* No. SCSL-04-15-T, para. 1577; *Bemba Gombo*, No. ICC-01/05-01/08-424, para. 162 ('. . . coercion may be inherent in certain circumstances, such as armed conflict or military presence'); *Katanga and Ngudjolo Chui*, No. ICC-01/04-01/07-717, para. 440 ('. . . coercion may be inherent in certain circumstances, such as armed conflict or military presence'). In a similar vein, see Schomburg and Peterson, *AJIL*, 101 (2007), 138, 140 ('make genuine consent by the victim impossible'); Aranburu, *LJIL*, 23 (2010), 617 ('unlikely to carry any weight in a context of mass coercion and violence'); Zimmermann and Geiß, '§ 8 VStGB', in Joecks and Miebach, *Münchener Kommentar*, vi/2 (2009), mn. 143 (arguing that in a situation of armed conflict with the presence of armed units and/or groups, a coercive situation will normally exist which excludes genuine consent); cf. also Amnesty International, 'Rape', IOR 53/001/2011 (March 2011), pp. 6, 16 ff. (differentiating between several situations of force and threat), pp. 29 ff. Contrary to this view, the implicit presumption of coercion has been criticized as making consensual sexual relationships per se 'legally impossible, in some sets of circumstances', cf. Engle, *AJIL*, 99 (2005), 804. For a more general discussion (partly referring to the above mentioned *Akayesu* case) about the relationship and effect of consent and coercion, see, for example, Munro, 'Coercion', in McGlynn and Munro, *Rape* (2010), pp. 17 ff. (calling for a 'consent-plus' approach, pp. 22 ff.); on possible justification of a penetration through consent in general, see Herring and Madden Dempsey, 'Sexual Penetration', in McGlynn and Munro, *Rape* (2010), pp. 30 ff. On the importance of the *Akayesu* Judgment's approach (No. ICTR-96-4-T) in this regard, see also Cole, 'Criminal Law', in McGlynn and Munro, *Rape* (2010), pp. 54–5.

[384] On the negotiations in this regard, see Cottier, 'Article 8', in Triffterer, *Commentary* (2008), mn. 207. See also Rule 70 of the ICC Rules of Procedure and Evidence:

> In cases of sexual violence, the Court shall be guided by and, where appropriate, apply the following principles:
> (a) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent;
> (b) Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent;
> (c) Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence;
> (d) Credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness.

and violence in an armed conflict makes 'genuine' consent impossible.[383] This is, as in para. 2 of the Elements, also implied by the term 'coercive environment'.[384] By no means does this imply, however, that consent, as a *general* ground excluding criminal responsibility, is an 'outdated concept';[385] rather, consent is, as we have seen in Volume I of this treatise,[386] recognized as a defence in ICL in principle, but the typical coercive circumstances of an armed conflict normally render it factually impossible. Clearly, the domestic concept of consent[387] cannot simply be 'transplanted' without further qualification to the international arena, but this only confirms the truism in comparative law methodology that 'legal transplants' from one jurisdiction to another are not possible, or at least not functional.[388] In any case, only 'genuine' consent may exclude the unlawfulness of the act, that is, a consent not obtained through any act excluding the free will of the person concerned in the first place, for example through deception or coercion.[389] A person may also be incapable of giving genuine consent if affected by natural, induced or age-related incapacity.[390] In practice, the case law infers the lack of consent from the—already mentioned—normally coercive environment which exists in an armed conflict situation and thus relies, as in other cases, on circumstantial evidence. From this perspective one may speak of a *presumption of non-consent*,[391] which converts the traditional defence of consent to an affirmative one to be brought forward by the defence and only admissible in exceptional circumstances.[392] This also

[385] As suggested by Boot and Hall, 'Article 7', in Triffterer, *Commentary* (2008), mn. 45. For the same result, see Luping, *AmUJGenderSocPol'y&L*, 17 (2009), 474, who sees the rape definition as 'not based on concepts related to the consent of the victim'.

[386] Volume I of this treatise, pp. 387–8.

[387] As an example of national law precluding consent in case of force or threat, see Article 120(t)(14) US Uniform Code of Military Justice (United States Code, Title 10, Subtitle A, Part II, Chapter 47, hereinafter: 'US UCMJ'): 'The term "consent" means words or overt acts indicating a freely given agreement to the sexual conduct at issue by a competent person. . . . Lack of verbal or physical resistance or submission resulting from the accused's use of force, threat of force, or placing another person in fear does not constitute consent.'

[388] See the seminal work of Watson, *Legal Transplants* (1993), esp. pp. 95 ff.; see for a recent assessment of legal transplants: Cohn, *AJCompL*, 58 (2010), 583, 587 ff.; and Alton, *Transnat'lLCP*, 19 (2010), 355 ff.

[389] As to deception, see also n. 20 to the Elements of Crimes: 'It is understood that "genuine consent" does not include consent obtained through deception.'

[390] Elements of Crimes, see n. 16 to Article 7(l)(g)-l: 'It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity.' This footnote also applies to the corresponding elements of Article 7(1)(g)-3, 5 and 6. See also the identical n. 51 applying to the *war crimes* of Article 8(2)(b)(xxn)-l. 8(2)(b)(xxh)-3, 8(2)(b)(xxh)-5, 8(2)(b)(xxh)-6; and identical fn. 63 applying to Article 8(2)(e)(vi)-l, 8(2)(e)(vi)-3, 8(2)(e)(vi)-5, 8(2)(e)(vi)-6.

[391] See also Cottier, 'Article 8', in Triffterer, *Commentary* (2008), mn. 207, referring to the *Kunarac et al.*, No. IT-96-23 & IT-96-23/1-A and the *Furundžija*, No. IT-95-17/1-T, Judgments and mn. 208 (p. 444) referring to sexual slavery. In *Kunarac et al.*, paras. 129–31, the Appeals Chamber notes that 'the circumstances . . . will be almost universally coercive. That is to say, true consent will not be possible' (para. 130); it further sees, after a comparative view of some national legislations, a 'need to presume non-consent here' (para. 131). Similarly, Boot revised by Hall, 'Article 7', in Triffterer, *Commentary* (2008), mn. 46, speaks of a 'concept of non-consent'; Schomburg and Peterson, *AJIL*, 101 (2007), 138.

[392] In this vein, see *Gacumbitsi*, No. ICTR-001-64-A, paras. 151–7. Similarly, Schomburg and Peterson, *AJIL*, 101 (2007), 139.

[393] See the notorious case of the boxer Mike Tyson who was convicted in Indianapolis in 1992 (confirmed by the Indiana Court of Appeals in 1993 [cf. 'BOXING; Tyson Loses Appeal On a Split Decision', *The New York Times*, 7 August 1993, <http://www.nytimes.com/1993/08/07/sports/boxing-tyson-loses-appeal-on-a-split-decision.html> accessed 4 April 2013) of having raped the eighteen-year-old Desiree Washington, although he invoked the victim's consent in his defence. Hereto, see Cavallaro,

entails that the classic 'mistake of fact' problem—the perpetrator argues that he thought that the victim consented to sexual intercourse[393]—cannot credibly be brought up by the accused. A 'mistake of law' defence challenging the scope of the consent defence or, more radically, claiming an alleged right to sexual assault in armed conflict would border on the absurd and, in any case, be irrelevant since it would not negate the mental element (Article 32(2) ICC Statute).[394]

The *coercion* required has been quite broadly defined by the ICC *Bemba* PTC, holding that:

> [w]ith regard to the term 'coercion', the Chamber notes that it does not require physical force. Rather, threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or military presence.[395]

Apart from this decision, the Court confirmed the charge of rape in the *Katanga* case;[396] in addition, several warrants of arrest[397] and summons to appear[398] include charges of

JCL&Crim, 86 (1996), 815 ff. (on the *Tyson* case in n. 90). The US UCMJ explicitly contains a provision on 'mistakes of fact as to consent' in Article 120(t)(15): '(15) Mistake of fact as to consent. —The term "mistake of fact as to consent" means the accused held, as a result of ignorance or mistake, an incorrect belief that the other person engaging in the sexual conduct consented. The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. To be reasonable the ignorance or mistake must have been based on information, or lack of it, which would indicate to a reasonable person that the other person consented. Additionally, the ignorance or mistake cannot be based on the negligent failure to discover the true facts. Negligence is the absence of due care. Due care is what a reasonably careful person would do under the same or similar circumstances. The accused's state of intoxication, if any, at the time of the offense is not relevant to mistake of fact. A mistaken belief that the other person consented must be that which a reasonably careful, ordinary, prudent, sober adult would have had under the circumstances at the time of the offense.'

[394] Assuming that a possible consent does not exclude the objective elements of the offence ('*actus reus*' or '*Tatbestand*') but operates as a ground excluding responsibility (more exactly as a cause of justification), see Volume I of this treatise, pp. 387–8. On the delicate provision on mistake in Article 32 ICC Statute, cf. Volume I of this treatise, pp. 366 ff.

[395] *Bemba Gombo*, No. ICC 01/05-01/08, para. 162; for a similar interpretation, see *Akayesu*, No. ICTR-96-4-T, para. 688.

[396] *Katanga and Ngudjolo Chui*, No. ICC-01/04-01/07-717, paras. 442–4.

[397] See, for example, *Situation in Uganda*, No. ICC-02/04-01/05-53, 'Warrant of Arrest for Joseph Kony issued on 8 July 2005 as amended on 27 September 2005', Public redacted version, Count 2,3 on pp. 12–13; *Situation in Uganda*, No. ICC-02/04-01/05-54, 'Warrant of Arrest for Vincent Otti', Public redacted version, Count 3 on p. 13 (8 July 2005). *Situation in Darfur, Sudan*, No. ICC-02/05-01/07-3, 'Warrant of Arrest for Ali Kushayb', Count 13, 14, 42, 43 on pp. 8–9 and 14–15 (27 April 2007). *Situation in Darfur, Sudan*, No. ICC-02/05-01/07-2, 'Warrant of Arrest for Ahmad Harun', Count 13, 14, 42, 43 on pp. 8–9 and 13–14 (27 April 2007); *Situation in Darfur, Sudan,* No. ICC-02/05-01/09-1, 'Warrant of Arrest for Omar Hassan Ahmad Al Bashir', p. 6 (considering thousands of rapes) and para. vii on p. 8 (charge of rape as a crime against humanity in indirect perpetration) (4 March 2009).

[398] The ICC summons to appear in the case regarding the Kenyan 'post election violence' for the suspects Muthaura, Kenyatta, and Ali include the allegation, that 'Muthaura and Kenyatta are criminally responsible as indirect co-perpetrators in accordance with Article 25(3)(a) ICC Statute for the crimes against humanity of murder, forcible transfer, rape, persecution and other inhumane acts', cf. ICC Press Release, ICC-CPI-20110309-PR637, 'Pre-Trial Chamber II delivers six summonses to appear in the Situation in the Republic of Kenya', 9 March 2011, available at <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/press%20releases%20(2011)/Pages/pre_trial%20chamber%20ii%20delivers%20six%20summonses%20to%20appear%20in%20the%20situation%20in%20t.aspx> accessed 5 April 2013.

[399] cf. ICC Prosecutor, 'Statement to the United Nations Security Council on the situation in the Libyan Arab Jamahiriya, pursuant to UNSCR 1970 (2011)', para. 12 (4 May 2011), available at <http://www.icc-cpi.int/NR/rdonlyres/0BDF4953-B5AB-42E0-AB21-25238F2C2323/0/OTPStatement04052011.pdf> accessed 12 February 2013.

rape. Allegations of rape are also under investigation in the situation in Libya,[399] but the corresponding charges have not been included in either of the two warrants of arrest.

(b) Sexual slavery

Sexual slavery is a *specific form of enslavement* within the meaning of Article 7(1)(c) ICC Statute.[400] It is defined in the Elements of Crimes as follows:

1. 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.
2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.[401]

As in the case of the 'general' offence of enslavement,[402] *ownership* ('chattel slavery') and *deprivation* of one's *liberty* are also essential elements of this specific sexual offence.[403] The powers of ownership listed in para. 1 are non-exhaustive.[404] Deprivation of liberty may include extracting forced labour or otherwise reducing a person to servile status.[405] The sexual acts mentioned in para. 2 need not necessarily amount to rape but in any case aggravate the attack on the victim's autonomy.[406] The element of the deprivation of liberty turns the offence into a continuing one.[407] Given the structure of the offence, it may be committed by a group of persons as part of a common criminal purpose.[408]

[400] Cottier, 'Article 8', in Triffterer, *Commentary* (2008), mn. 208; Schabas, *ICC Commentary* (2011), p. 172; Werle, *Principles* (2009), mn. 880; Werle, *Völkerstrafrecht* (2012), mn. 958; also *Katanga and Ngudjolo Chui*, No. ICC-01/04-01/07-717, para. 430; *Brima et al.*, No. SCSL-04-16-T, para. 706.

[401] Elements of Crimes for Article 7(1)(g)-2 and also for the war crimes of Article 8(2)(b)(xxii)-2, Article 8(2)(e)(vi)-2 ICC Statute; the same definition was used in *Sesay et al.*, No. SCSL-04-15-T, para. 158 and in *Brima et al.*, No. SCSL-04-16-T, para. 708. Dyani, *AJICL*, 15 (2007), 237 in fn. 69, sees this definition elaborating on the slavery definition as contained in the Slavery Convention from 1926 (Slavery Convention (1926), 60 *UNST* 254); Luping, *AmUJGenderSocPol'y&L*, 17 (2009), 477, sees parallels to the supplementary slavery convention (Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956), 266 *UNTS* 3).

[402] See Section C. (3).

[403] See also Cottier, 'Article 8', in Triffterer, *Commentary* (2008), mn. 208.

[404] *Brima et al.*, No. SCSL-04-16-T, para. 709.

[405] *Brima et al.*, No. SCSL-04-16-T. See also n. 18 of the Elements of Crimes: 'It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.'

[406] Luping, *AmUJGenderSocPol'y&L*, 17 (2009), 477.

[407] Boot revised by Hall, 'Article 7', in Triffterer, *Commentary* (2008), mn. 49.

[408] See n. 17 of the Elements of Crimes: 'Given the complex nature of this crime, it is recognized that its commission could involve more than one perpetrator as a part of a common criminal purpose.'

[409] *Prosecutor v Gagović et al.* ('*Foča*'), No. IT-96-23, Initial Indictment, paras. 1.5, 4.8 (18 June 1996).

[410] As prosecuted by the ICTY in *Kunarac et al.*, No. IT-96-23-T & IT-96-23/1-T, para. 744. As the ICTY Statute does not contain a special provision on sexual slavery, the conviction was based on crimes against humanity in the form of rape and enslavement (Article 5(c) and (g) ICTY Statute).

Forms of sexual slavery can range from the detention of women in 'rape camps'[409] to sexual exploitation in 'comfort stations' (as set up by the Japanese army during World War II) or in a private house.[410] Sexual slavery may also encompass forced temporary 'marriages' to soldiers and other practices involving the treatment of women as chattel, thereby violating the peremptory prohibition on slavery.[411] The SCSL was the first ICL institution that addressed sexual slavery and *forced marriages*.[412] In the *AFRC* case (*Brima et al.*) the Trial Chamber first considered forced marriages to be covered by sexual slavery[413] but was then overruled by the Appeals Chamber, qualifying this phenomenon as a distinct crime against humanity in form of an 'other inhuman act' (Article 2(i) SCSL Statute).[414] The Chamber held:

> While forced marriage shares certain elements with sexual slavery such as non-consensual sex and deprivation of liberty, there are also *distinguishing factors*. First, forced marriage involves a perpetrator compelling a person by force or threat of force, through the words or conduct of the perpetrator or those associated with him, into a forced conjugal association with a another person resulting in great suffering, or serious physical or mental injury on the part of the victim. Second, unlike sexual slavery, forced marriage implies a relationship of exclusivity between the 'husband' and 'wife', which could lead to disciplinary consequences [sic!] for breach of this exclusive arrangement. These distinctions imply that forced marriage is *not predominantly a sexual crime*.[415]

Another SCSL TC held that the RUF had been using 'bush wives'—who were forced into marriage by means of threat and duress—deliberately and strategically to enslave and psychologically manipulate civilian women and girls.[416] The accused were convicted, cumulatively, for sexual slavery as well as for forced marriages (as a separate crime against humanity consisting of 'other inhumane acts').[417] In contrast, the ICC PTC I did take the view that sexual slavery also encompasses forced 'marriage' situations, domestic servitude or other forced labour involving compulsory sexual activity, including rape.[418] As to the *mens rea*, the SCSL required that the perpetrator

[411] *Katanga and Ngudjolo Chui*, No. ICC-01/04-01/07-717, para. 431.

[412] Hereto, Oosterveld, *CornILJ*, 44 (2011), 61 ff.; Wharton, *ICLR*, 11 (2011), 217 ff. (esp. 230 ff. on the possibility of residual crimes constituting 'new' crimes in accordance with *nulla poena sine lege* principle); Njikam, *Special Court for Sierra Leone* (2013), 123 ff.

[413] *Brima et al.*, No. SCSL-04-16-T, paras. 703–13; cf. also Wharton, *ICLR*, 11 (2011), 227 ff.

[414] *Prosecutor v Brima et al.*, No. SCSL-04-16-A, Appeals Chamber Judgment, paras. 181–203, esp. 195 and 202 (22 February 2008). This view was welcomed in the literature, see, for example, Jain, *JICJ*, 6 (2008), 1013, 1022 ('long overdue'); similarly Doherty, *JGSPL*, 17 (2009), 331 ff.; see also Cole, 'Criminal Law', in McGlynn and Munro, *Rape* (2010), p. 57; Wharton, *ICLR*, 11 (2011), pp. 228 ff.; also Scharf and Mattler, 'Forced Marriage', *LSWP*, 05-35 (2005), 6.

[415] *Brima et al.*, No. SCSL-04-16-A, para. 195 (emphasis added).

[416] *Sesay et al.*, No. SCSL-04-15-T, paras. 1465–73; hereto Oosterveld, *CornILJ*, 44 (2011), 52 ff., esp. 66.

[417] *Sesay et al.*, No. SCSL-04-15-T, para. 2307.

[418] *Katanga and Ngudjolo Chui*, No. ICC-01/04-01/07-717, para. 431; see also Cottier, 'Article 8', in Triffterer, *Commentary* (2008), mn. 208. The charge was confirmed without further substantial considerations at *Katanga and Ngudjolo Chui*, No. ICC-01/04-01/07-717, para. 436. It was also included in two warrants of arrest against members of the LRA (*Situation in Uganda*, No. ICC-02/04-01/05-53, Kony Warrant of Arrest, Count 1 on p. 12; *Situation in Uganda*, No. ICC-02/04-01/05-54, Otti Warrant of Arrest, Count 1 on p. 12).

[419] *Brima et al.*, No. SCSL-04-16-T, para. 708.

intended to engage in the act of sexual slavery or acted with the reasonable knowledge that it was likely to occur.[419]

(c) Enforced prostitution

The Elements of Crimes define enforced prostitution as follows:

1. The perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.
2. The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature.[420]

The first element constitutes a quite broad definition of causing one or more persons to engage in sexual acts by any form of coercion, including through the creation of a 'coercive environment'. According to the second element, the perpetrator's expectation as to a financial or other advantage, rather than the perspective of the victim, is of relevance.[421] It is thus clear that the sexual conduct is not initiated by the person engaging in the sexual acts, as may be the case with domestic prostitution offences, but by the perpetrator (who 'caused one or more persons . . . ').[422] Enforced prostitution is distinct from 'sexual enslavement' in that it captures 'those situations that lack slavery-like conditions',[423] that is, it has a residual function.[424] Enforced prostitution contains an element of continuity and thus may qualify as a continuing offence since the victim may be 'forced' for a prolonged period of time. On the other hand, it may also constitute a separate offence of result if it only consists of one act of a sexual nature.[425]

(d) Forced pregnancy

Forced pregnancy is the only conduct defined explicitly in the ICC Statute, namely 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. (Article 7(2)(f))

[420] Elements of Crimes for Article 7(1)(g)-3 and for the war crimes of Article 8(2)(b)(xxii)-3, Article 8(2)(e)(vi)-3 ICC Statute.

[421] For a similar national provision, see s. 181a German Criminal Code (StGB).

[422] cf. Boot revised by Hall, 'Article 7', in Triffterer, *Commentary* (2008), mn. 48–9; see also (regarding war crimes) Cottier, 'Article 8', in Triffterer, *Commentary* (2008), mn. 209.

[423] Bedont and Hall-Martinez, *BJWA*, 6 (1999), 73; see also Boot revised by Hall, 'Article 7', in Triffterer, *Commentary* (2008), mn. 49.

[424] But see also Werle and Burchards, '§ 7 VStGB', in Joecks and Miebach, *Münchener Kommentar*, vi/2 (2009), mn. 82, arguing that the conduct also typically fulfills the crime of enslavement in armed conflicts.

[425] Boot revised by Hall, 'Article 7', in Triffterer, *Commentary* (2008), mn. 50; see also Cottier, 'Article 8', in Triffterer, *Commentary* (2008), mn. 209.

[426] Elements of Crimes for Article 7(1)(g)-4 and for the war crimes of Article 8(2)(b)(xxii)–4, Article 8(2)(e)(vi)–4 ICC Statute.

According to the Elements, the 'perpetrator confined one or more women forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law'.[426]

The offence encompasses both (en)forced *impregnation* (pregnancy as a result of rape or of an illegal medical procedure) and (en)forced *maternity* (being forced to carry the pregnancy). It has no historical precedents.[427] Unlawful confinement is, as in the case of Article 7(1)(e), any form of deprivation of physical liberty contrary to international law and standards.[428] The force used to bring about pregnancy ('forcibly made pregnant') 'does not necessarily require the use of violence, but includes any form of coercion'.[429] The female victim may have been 'made pregnant' before the actual confinement since the crime only requires the 'unlawful confinement of a woman forcibly made pregnant', that is, the sexual intercourse causing the pregnancy could have occurred earlier.[430]

The perpetrator has to act with the '*intent* of affecting the ethnic composition of any population or carrying out other grave violations of international law' (Article 7(2)(f)). This has been interpreted as a 'specific'[431] or 'special intent'.[432] This is not entirely convincing since the term 'intent' is, at best, ambiguous and may also be understood in a cognitive sense.[433] Thus, if the drafters sought to require a special intent in a volitional sense, this could have been stated explicitly. In any case, the 'speciality' of the intent required consists in the conduct's orientation towards the ethnic composition of the population affected. In other words, what is 'special' about the intent is that it goes beyond the normal intent regarding the 'ordinary' *actus reus* (here the unlawful confinement) by requiring an ulterior intent (a surplus of intent) with a view to changing the ethnic composition of the targeted population.[434]

The (other) 'grave violations of international law' referred to include genocide, crimes against humanity, war crimes, torture, and enforced disappearances.[435] The reservation that the 'definition shall not in any way be interpreted as affecting national laws relating to pregnancy' shall ensure that national policies in favour of abortion may not be promoted under the guise of policies against forced pregnancy.[436]

(e) Enforced sterilization

Enforced sterilization as defined by the Elements of Crimes requires that:

[427] For the historical development, see de Brouwer, *Prosecution* (2005), pp. 143 ff.; also Cottier, 'Article 8', in Triffterer, *Commentary* (2008), mn. 210.

[428] Boot revised by Hall, 'Article 7', in Triffterer, *Commentary* (2008), mn. 111.

[429] Boot revised by Hall, 'Article 7', in Triffterer, *Commentary* (2008), mn. 112 (stating that the act of forcibly making a woman pregnant might be covered by the crime of rape or 'any other form of sexual violence of comparable gravity').

[430] Werle, *Principles* (2009), mn. 883–4; Werle, *Völkerstrafrecht* (2012), mn. 961–2.

[431] Boot revised by Hall, 'Article 7', in Triffterer, *Commentary* (2008), mn. 113.

[432] Cottier, 'Article 8', in Triffterer, *Commentary* (2008), mn. 210.

[433] See Volume I of this treatise, pp. 266–8.

[434] Gabriel, *EICC*, 1 (2004), 49 (arguing regarding the underlying cultural conditions: 'the rapist is a person of different ethnicity and belongs to a culture, society, or religion in which the ethnicity of the father is considered to determine the ethnicity of the child').

[435] Boot revised by Hall, 'Article 7', in Triffterer, *Commentary* (2008), mn. 113.

[436] Boot revised by Hall, 'Article 7', in Triffterer, *Commentary* (2008), mn. 51, 114; on the position of the Holy See, see Cottier, 'Article 8', in Triffterer, *Commentary* (2008), mn. 210.

1. The perpetrator deprived one or more persons of biological reproductive capacity.
2. The conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent.

According to a footnote in the Elements, the 'deprivation is not intended to include birth-control measures which have a non-permanent effect in practice'.[437] It is, of course, questionable whether this footnote is consistent with international law since such measures violate one's right to self-determination based on the principle of personal autonomy and may even amount to genocide if carried out with the required special intent to destroy.[438] Classical examples of the crime are policies of 'racial hygiene' and medical experiments on prisoners, both practised by the Nazi regime.[439] 'Enforced' has to be understood as in the previous forms of sexual violence. The second Element makes clear that a necessary medical treatment and a (genuine and informed) consent exclude the crime.[440]

(f) Any other form of sexual violence of comparable gravity

The reference to 'any other form of sexual violence of comparable gravity' in Article 7(1)(g) ICC Statute makes clear that the list of forms of sexual conduct is not exhaustive. The Elements of both crimes against humanity and war crimes define this residual conduct as follows:

> 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.[441]

Given this broad and quite imprecise definition, the question of legal certainty and the limits of this criminalization arise. What is clear is that the definition includes conduct which could previously, at best, be subsumed under the residual clause of other inhumane acts (see e.g. Article 5(i) ICTY Statute).[442] In any case, a restrictive interpretation is called for guided by the specific forms of sexual conduct listed in subparagraph (g).[443] Thus, the 'other form of sexual violence' must be of '*comparable gravity*'

[437] n. 19 to the Elements. See also Cottier, 'Article 8', in Triffterer, *Commentary* (2008), mn. 211.
[438] See also Boot revised by Hall, 'Article 7', in Triffterer, *Commentary* (2008), mn. 52.
[439] Werle, *Principles* (2009), mn. 885; Werle, *Völkerstrafrecht* (2012), mn. 963; Boot revised by Hall, 'Article 7', in Triffterer, *Commentary* (2008), mn. 52.
[440] For a discussion see Cottier, 'Article 8', in Triffterer, *Commentary* (2008), mn. 211.
[441] Elements of Crimes for Article 7(1)(g) and for the war crimes of Article 8(2)(b)(xxii)-6 and (e)(vi)-6 ICC Statute.
[442] See also Werle, Principles (2009), mn. 886; Werle, *Völkerstrafrecht* (2012), mn. 964.
[443] For a restrictive interpretation, see also Cottier, 'Article 8', in Triffterer, *Commentary* (2008) mn. 316.
[444] See respective Element 2 to Article 7(1)(g) and for the war crimes of Article 8(2)(b)(xxii)-6 and (e)(vi)-6 ICC Statute.
[445] Boot revised by Hall, 'Article 7', in Triffterer, *Commentary* (2008), mn. 53 (at the end).
[446] See for a good account of the drafting history Cottier, 'Article 8', in Triffterer, *Commentary* (2008), mn. 212.

to these forms of conduct.[444] This is an objective test[445] introducing a minimum threshold of (comparable) gravity and thereby excluding lesser forms of sexual violence[446] (which may anyway be covered by way of the implicit criminalizations, i.e. by other crimes against humanity). Concretely speaking, one wonders whether, for example, acts that do not even require physical contact—take *Akayesu*[447] with physical exercises performed naked and in front of a crowd—amount to 'sexual violence of comparable gravity'.[448] Such acts constitute, in any case, a dignity violation and may be punished as such (e.g., pursuant to Article 8(2)(c)(ii) ICC Statute).

According to the Elements of Crimes, the sexual act could be directly committed by the perpetrator, or the victim could be caused to engage in such an act by different forms of force or coercion, including 'taking advantage of a coercive environment' or the victim's 'incapacity to give genuine consent'. Thus, here again, taking recourse to the concept of a 'coercive environment', a *broad concept of coercion* is used, similar to the one advanced by the *Akayesu* TC.[449]

(8) Persecution (Article 7(1)(h) ICC Statute)

Persecution is not a self-standing crime. It requires an *underlying act*—in the words of Article 7(1)(h) ICC Statute a 'connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court'. While this requirement does not explicitly follow from the wording of the respective provisions of the ad hoc tribunals (cf. e.g., Article 5(h) ICTY Statute), the jurisprudence has long recognized that the

[447] *Akayesu*, No. ICTR-96-4-T, para. 688.

[448] In favour, Boot revised by Hall, 'Article 7', in Triffterer, *Commentary* (2008), mn. 53; contrary apparently de Brouwer, *Prosecution* (2005), pp. 159 ff.

[449] *Akayesu*, No. ICTR-96-4-T, para. 598; Boot revised by Hall, 'Article 7', in Triffterer, *Commentary* (2008), mn. 53.

[450] *Kupreškić et al.*, No. IT-95-16-A, para. 98; *Prosecutor v Banović*, No. IT-02–65/1-S, Sentencing Judgment, para. 38 (28 October 2003); *Popović et al.*, No. IT-05-88-T, para. 965; *Đorđević*, No. IT-05-87/1-T, para. 1756; *Stanišić and Župljanin*, No. IT-08-91-T, para. 67.

[451] *Tadić*, No. IT-94-1-T, paras. 704, 710 ('variety of acts, including, *inter alia*, those of a physical, economic or judicial nature that violate an individual's right'); *Kupreškić et al.*, No. IT-95-16-T, para. 615 ('acts such as murder, extermination, torture, and other serious acts on the person', 'other discriminatory acts, involving attacks on political, social, and economic rights'); *Kvočka et al.*, No. IT-98-30/1-T, para. 186 (listing a series of acts); *Krnojelac*, No. IT-97-25-T, para. 433 ('acts . . . listed in the Statute as well as acts . . . not listed in the Statute. . . . may encompass physical and mental harm as well as infringements upon individual freedom'); *Krnojelac*, No. IT-97-25-A, para. 219 ('one of the other acts constituting a crime under Article 5 of the Statute or one of the acts constituting a crime under other articles of the Statute'); *Stakić*, No. IT-97-24-T, para. 735 ('acts that are or are not enumerated in the Statute'); *Brđanin*, No. IT-99-36-T, para. 994 ('act or omission . . . may assume different forms . . . acts . . . listed in the Statute, as well as acts . . . not listed in the Statute'); concurring, *Krajisnik*, No. IT-00-39-T, para. 735; *Sainović et al.*, No. IT-05-87-T, para. 175 ('number of underlying offences'), para. 178 ('act or omission underlying persecution . . . may be listed under the other sub-headings of Article 5'); *Popović et al.*, No. IT-05-88-T, para. 965 ('a single or a series of intentional act(s) or omission(s) . . . no comprehensive list of acts or omissions . . . Prosecution must plead . . . particular acts or omissions'); *Tolimir*, No. IT-05-88/2-T, para. 847 ('An act or omission enumerated in other sub-clauses of Article 5, as well as those which are not listed in the Statute'); *Perišić*, No. IT-04-81-T, para. 119 ('acts . . . can include those listed under the other sub-headings of Article 5 . . . or provided elsewhere in the Statute, as well as other acts not explicitly mentioned in the Statute'); *Gotovina et al.*, No. IT-06-90-T, para. 1803 ('Acts listed under the other sub-headings of Article 5 . . . or provided elsewhere in the Statute, as well as other acts not explicitly mentioned in the Statute'); *Đorđević*, No. IT-05-87/1-T, para. 1757 ('acts which are listed as crimes under Article 5 . . . or under other articles of

crime of persecution—constituting a kind of '*umbrella crime*'[450]—can only be carried out by way of concrete (underlying) acts or omissions amounting to serious human rights violations.[451] Article 7(1)(h) ICC Statute is also in other aspects more explicit than the Statutes of the ad hoc tribunals. First, it extends the (discriminatory) *grounds of persecution* beyond 'political, racial and religious' ones (Article 5(h) ICTY Statute) to 'national, ethnic, cultural . . . , gender as defined in paragraph 3, or [sic!] other grounds that are universally recognized as impermissible under international law'. Secondly, the object of the persecution is determined as 'any identifiable group or collectivity'. Finally, persecution is defined as 'the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity' (Article 7(2)(g) ICC Statute).

As to the *connection requirement*, originating in Article 6(c) of the Nuremberg Charter[452] and adopted by the ICC Statute ('connection with any . . . crime within the jurisdiction of the Court'), there is a controversy regarding its recognition in customary international law. The Statutes of the ad hoc tribunals do not provide for this requirement and the relevant jurisprudence has invariably held that the underlying act can also encompass acts not explicitly listed in the Statute.[453] The *Kupreškić* TC has even taken the view that the ICC Statute, in this way, 'is not consonant with customary international law'.[454] Be that as it may, the requirement is part of Article 7(1)(h) ICC Statute and thus has to be accepted. In fact, the controversy surrounding the requirement[455] explains its twofold character, referring, on the one hand, to 'any act referred to in this paragraph', that is, to the underlying acts of crimes against humanity, and, on the other, to 'any crime within the jurisdiction of the Court', that is, to the underlying acts of genocide and war crimes. This means that the persecutory conduct must only be connected to a (single) underlying act of Article 5-8*bis* ICC Statute, that is, any of the acts contained in these provisions, for example, murder, torture, rape, etc. While this seems to be a low threshold, it serves, in any case, to narrow the scope of persecution to cases where connected underlying acts are committed simultaneously. However, the connection must only exist objectively, that is, the existence of the underlying acts need not be encompassed by the *mens rea* of the perpetrator,[456] that is, it does not determine his culpability. This confirms that the

the Statute, as well as acts which are not listed in the Statute'); *Stanišić and Župljanin*, No. IT-08-91-T, para. 70 ('acts that are listed as crimes under Article 5 of the Statute or under other articles of the Statute, as well as acts not listed in the Statute').

[452] On its roots in the war nexus (discussed in Section B. (1)(a)), see von Hebel and Robinson, 'Crimes', in Lee, *The ICC* (1999), p. 101.

[453] See references in note 451 and also *Kupreškić et al.*, No. IT-95-16-T, para. 581; *Kordić and Čerkez*, No. IT-95-14/2-T, paras. 193–4; *Popović et al.*, No. IT-05-88-T, para. 966.

[454] *Kupreškić et al.*, No. IT-95-16-T, para. 580; in a similar vein, see *Kordić and Čerkez*, No. IT-95-14/2-T, para. 197; for a further discussion, see Ambos and Wirth, *CLF*, 13 (2002), 71–2; concurring, Meseke, *Verbrechen gegen die Menschlichkeit* (2004), p. 249; Robinson, 'Crimes against Humanity', in Cryer et al., *Introduction ICL* (2010), p. 260.

[455] See on the negotiations, von Hebel and Robinson, 'Crimes', in Lee, *The ICC* (1999), p. 101.

[456] See n. 22 to Element 4 of the Elements of Crimes stating that 'no additional mental element is necessary for this element'.

[457] See, more detailed, Ambos and Wirth, *CLF*, 13 (2002), 73–4 (also pointing to the difficulty of determining the mental element).

connection requirement serves the sole purpose of limiting the Court's jurisdiction to forms of persecution which are of an elevated objective dangerousness.[457]

The *persecutory conduct* consists in the 'severe deprivation of fundamental rights contrary to international law' (Article 7(2)(g) and Element 1). Thus, it must violate fundamental human rights and the violation must be severe. As to the first requirement, the *Kupreškić* TC, referring to Article 7(1)(g) ICC Statute,[458] and drawing on 'a set of fundamental rights appertaining to any human being', considered that 'the gross or blatant denial . . . of a fundamental human right' can amount to persecution.[459] As to the *severity* threshold, apart from being implicit in the 'gross' or 'blatant' qualifiers, the case law invokes the *ejusdem generis* doctrine,[460] that is, it evaluates the severity of the persecutory conduct with a view to the other underlying acts of crimes against humanity.[461] Thus, 'not every denial of a human right' may amount to persecution as a crime against humanity,[462] but only such a denial which reaches 'the same level of gravity as the other crimes against humanity enumerated in Article 5 of the [ICTY] Statute'.[463] Moreover, the persecutory conduct 'must not be considered in isolation' but in 'context' weighting 'their *cumulative effect*'.[464] Thus, while isolated acts may not be considered inhumane *tel quel*, 'their overall consequences' may 'offend humanity in such a way that they may be termed "inhumane"'.[465] The following persecutory acts have been listed by the case law: 'seizure, collection, segregation and forced transfer of civilians to camps, calling-out of civilians, beatings and killings'; 'murder, imprisonment, and deportation', 'attacks on property' amounting to 'a destruction of the livelihood of a certain population'; 'destruction and plunder of property', 'unlawful detention', 'deportation or forcible transfer of civilians'; 'physical and mental injury'; 'bodily and mental harm and infringements upon individual

[458] *Kupreškić et al.*, No. IT-95-16-T, para. 617.

[459] *Kupreškić et al.*, No. IT-95-16-T, para. 621; also para. 627; concurring, *Ruggiu*, No. ICTR-97-32-T, para. 21; *Kordić and Čerkez*, No. IT-95-14/2-T, para. 195; similarly, *Tadić*, No. IT-94-1-T, para. 703. A similar approach was used by the ECtHR in asylum cases concerning persecution where the so-called 'flagrant denial test' was adopted, cf. Leboeuf and Tsourdi, *HRLR*, 13 (2013), 408 ff. The European Court of Justice, on the other hand, follows the 'concrete consequences test' limiting the notion of persecution 'to a breach of non-derogable rights', cf. Leboeuf and Tsourdi, *HRLR*, 13 (2013), 411 ff.

[460] The Latin phrase means 'of the same kind'. The doctrine had been applied in this context for the first time in *Flick and Others* (*Flick* case), in US-GPO, *TWC*, iv (1997), p. 1215.

[461] *Kupreškić et al.*, No. IT-95-16-T, para. 620; also *Kvočka et al.*, No. IT-98-30/1-T, para. 197.

[462] *Kupreškić et al.*, No. IT-95-16-T, para. 617; concurring, *Kordić and Čerkez*, No. IT-95-14/2-T, para. 196.

[463] *Kupreškić et al.*, No. IT-95-16-T, para. 621; concurring, *Kordić and Čerkez*, No. IT-95-14/2-T, para. 195.

[464] *Kupreškić et al.*, No. IT-95-16-T, para. 615 (e) (emphasis added).

[465] *Kupreškić et al.*, No. IT-95-16-T, para. 622; concurring, *Kordić and Čerkez*, No. IT-95-14/2-T, para. 199; *Kvočka et al.*, No. IT-98-30/1-T, para. 185; *Krnojelac*, No. IT-97-25-T, para. 434.

[466] *Kordić and Čerkez*, No. IT-95-14/2-T, para. 198 (references omitted); concurring, *Kvočka et al.*, No. IT-98-30/1-T, para. 186.

[467] *Kvočka et al.*, IT-98-30/1-T, para. 190. See for further references and in particular on the destruction of property (burning of houses) and the forcible transfer of persons Ambos and Wirth, *CLF*, 13 (2002), 77 ff.; on whether 'ethnic cleansing' is a form of persecution see Pégorier, *Ethnic Cleansing* (2013), pp. 124–9, 146 (answering the question in the affirmative in terms of the *actus reus,* but rejecting it in terms of the *mens rea*: 'ethnic cleansing does require discriminatory motive', but not 'a particular discriminatory intent', at 128).

[468] Hebel and Robinson, 'Crimes', in Lee, *The ICC* (1999), p. 102.

freedom';[466] 'psychological abuses', 'humiliation', and 'harassment'.[467] Given the possible extension and systematicity of the persecutory acts, the ensuing persecutory conduct may in itself amount to a *widespread or systematic attack* within the meaning of the context element of Article 7(1) ICC Statute.[468]

The persecutory conduct must be directed against 'any identifiable *group or collectivity*' (Article 7(1)(h) ICC Statute) '*by reason* of the identity' of this 'group or collectivity' (Article 7(2)(g) ICC Statute). While there seems to be an inconsistency between subparas. 1(h) and 2(g) of Article 7—targeting a group 'by reason of' its identity requires more than just targeting the group as such—the Elements allow for both possibilities in the alternative.[469] Thus, it suffices if the perpetrator targets a group or collectivity defined by one of the characteristics mentioned in Article 7(1)(h) ICC Statute ('political, racial, national, ethnic, cultural, religious, gender'), for example a group of women because of their gender.[470]

Taken together with the objective elements of persecution, a single, only sufficiently serious human rights violation may amount to persecution if connected to any international crime contained in the Statute (ICC) or outside of it (ad hoc tribunals). Yet, neither the connection requirement, nor the *ejusdem generis* doctrine appear as particularly serious restrictions of the *actus reus* of persecution. Thus, any such restriction must follow from the *mens rea* requirement of the crime. While the perpetrator must act, as in all other crimes against humanity, with *knowledge* with regard to the context element[471] and with the *general intent* (Article 30 ICC Statute) regarding the *actus reus* of persecution (excluding, as explained earlier, the connection requirement, which is only a jurisdictional requirement), it is the special mental element of a *discriminatory intent*[472] which serves as a significant restriction of the crime. The requirement follows from the fact that the group or collectivity must be targeted on particular grounds,[473] either limited to political, racial, or[474] religious grounds (Article 5(h) ICTY and Article 3(h) ICTR Statutes) or, even, including any other ground 'impermissible under international law' (Article 7(1)(h) ICC Statute). Thus, the rationale of the discriminatory intent is to select particular victims on particular (impermissible) grounds. In other words, if the perpetrator has chosen the victim independent of the particular characteristics, he does not possess a discriminatory intent. However, it does not matter if the perpetrator acts with a mixed intent,

[469] Element 2 reads: '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).

[470] cf. Ambos and Wirth, *CLF*, 13 (2002), 76–7.

[471] cf. Element 6 of the Elements regarding Article 7(1)(h).

[472] *Tadić*, No. IT-94-1-T, para. 700; *Kupreškić et al.*, No. IT-95-16-T, para. 605; *Kordić and Čerkez*, No. IT-95-14/2-T, paras. 202, 217; *Blaškić*, No. IT-95-14-T, para. 235; *Kvočka et al.*, No. IT-98-30/1-T, para. 185; *Krnojelac*, No. IT-97-25-T, para. 435; *Tolimir*, No. IT-05-88/2-T, paras. 849–50; *Perišić*, No. IT-04-81-T, paras. 121–2; *Gotovina et al.*, No. IT-06-90-T, para. 1803; *Đorđević*, No. IT-05-87/1-T, para. 1759.

[473] cf. Element 3 of the Elements: 'Such targeting was based on political, racial, national . . . grounds . . . '

[474] The conjunctive 'and' in Article 3(h) ICTR Statute and Article 5(h) ICTY Statute must be read as 'or', cf. *Tadić*, No. IT-94-1-T, para. 713. See also Roberts, *LJIL*, 15 (2002), 635; Roberts, 'Striving for Definition', in Abthai and Boas, *Dynamics* (2006), pp. 284–5; Mettraux, *Crimes* (2005), p. 186.

[475] *Kordić and Čerkez*, No. IT-95-14/2-T, para. 217; Roberts, *LJIL* 15 (2002), 636. For a broader approach, see, apparently, *Kvočka et al.*, No. IT-98-30/1-T, paras. 199–201, arguing that the discriminatory intent may be inferred 'from knowingly participating in a system or enterprise that discriminates on

that is, if in addition to the discriminatory intent he possesses a further intent, for example, the intent to steal. The discriminatory intent must be present in every single individual perpetrator and with regard to the persecutory conduct, not just with regard to a possibly discriminatory policy within the framework of the context element.[475] Otherwise, the persecution's distinguishing feature with regard to the other crimes against humanity and its particular gravity would disappear.[476]

The flip side to this restricting feature of the discriminatory intent is that, once it exists, even 'a single act may constitute persecution'.[477] While this is in line with the analysis here as long as this single act amounts to a sufficiently grave human rights violation, this objective threshold must not be lowered even further by allowing for 'less serious' acts with the argument that the low seriousness will be compensated by the aggravated discriminatory intent.[478]

(9) Enforced disappearance of persons (Article 7(1)(i) ICC Statute)

Article 7(2)(i) ICC Statute offers, for the first time, a definition of the crime of enforced disappearance which complies with minimum standards of legal certainty. Accordingly, the conduct is characterized by the 'arrest, detention or abduction of persons by, or with the authorisation, support or acquiescence of, a State or a political organisation and the subsequent 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'.

While the enforced disappearance of persons has, sadly, always been used by totalitarian regimes to get rid of dissident or enemy forces,[479] the crime was practised to a large extent in the Latin American dictatorships of the 1970s. It is for this reason that the Inter-American Court of Human Rights (IACtHR) has, since the seminal

political, racial or religious grounds' (concurring, apparently, *Simić*, No. IT-95-9-T, para. 51). In the view of the present author, this is not correct. While a knowing participation may constitute (part of) the evidence necessary to prove discriminatory intent, it is not, as such, sufficient to prove this specific intent. It may be possible, for example, that the perpetrator only participated in the enterprise to personally enrich himself without having any particular feeling towards the attacked group (see also *Simić*, No. IT-95-9-T, para. 203 where the Chamber recognizes that a person could participate 'for purely personal reasons').

[476] *Kordić and Čerkez*, No. IT-95-14/2-T, para. 217; *Martić*, No. IT-95-11-T, para. 115; *Kupreškić et al.*, No. IT-95-16-T, para. 607; *Perišić*, No. IT-04-81-T, para. 121.

[477] *Kupreškić et al.*, No. IT-95-16-T, para. 624; *Kordić and Čerkez*, No. IT-95-14/2-T, para. 199.

[478] In this line, see, apparently, *Blaškić*, No. IT-95-14-T, para. 233: 'The Trial Chamber finds . . . that the crime of "persecution" encompasses . . . also acts which appear *less serious*, such as those targeting property, so long as the victimised persons were specially selected on grounds linked to their belonging to a particular community' (emphasis added).

[479] See, for example, Hitler's 'Night and Fog Decree' of 7 December 1941; English translation in *TWC*, xi (1997), pp. 195–7; see also Robinson, *AJIL*, 93 (1999), 56; Filippini, 'Materiales', in Parenti et al., *Los crímenes contra la humanidad* (2007), p. 105; Vermeulen, *Enforced Disappearance* (2012), pp. 2–3, 23–5.

[480] *Velásquez Rodríguez v Honduras* was—together with *Godínez Cruz v Honduras*—the first of two cases in which the Court held a State party (Honduras) accountable for the forced disappearance of persons (Judgments of 29 July 1988 and 20 January 1989, Series C, No. 4 and 5, available at <http://www.corteidh.or.cr/casos.cfm> accessed 15 March 2013).

[481] See from the earlier judgments in *Neira-Alegría et al. v Peru*, Judgment of 19 January 1995, Series C, No. 20, para. 91; *Caballero-Delgado and Santana v Colombia*, Judgment of 8 December 1995, Series C, No. 22, para. 72; *Castillo-Páez v Peru*, Judgment of 3 November 1997, Series C, No. 34, pp. 21–2 to the more

Velásquez Rodríguez case,[480] repeatedly held that this conduct violates the right to personal liberty (Article 7 American Convention of Human Rights (ACHR)), the right to humane treatment (Article 5 ACHR), and, possibly, the right to life (Article 4 ACHR); further, it imposed a duty on the states parties to prosecute and punish this crime.[481] The same view has been taken by the European Court of Human Rights (ECtHR) in respect of the European Convention on Human Rights (ECHR).[482] In 1994, the practice was classified, for the first time, as a crime against humanity in a regional convention, namely the Inter-American Convention on Forced Disappearance of Persons.[483] Two years earlier, the UN General Assembly (GA) adopted a 'Declaration of the Protection of All Persons from Enforced Disappearances'[484] which in 2006 turned into the respective international Convention.[485] The ICC Statute's definition of enforced disappearance is based on the Preamble of the GA Declaration.[486]

While the practice has turned into a true crime against humanity with its inclusion in the ICC Statute, its *concrete elements* are far from clear. There is no ICL case law and the human rights jurisprudence has not further developed the offence definition.[487] The respective Elements of Crimes structure the offence as follows:

1. The perpetrator:
   (a) Arrested, detained or abducted one or more persons; or

recent ones in *Radilla-Pacheco v Mexico*, Judgment of 23 November 2009, Series C, No. 209, pp. 105–6; *Chitay Nech et al. v Guatemala*, Judgment of 25 May 2010, Series C, No. 212, para. 309; *Torres Millacura et al. v Argentina*, Judgment of 26 August 2011, Series C, No. 229, para. 213 and *Gudiel Álvarez et al. ('Diario Militar') v Guatemala*, Judgment of 20 November 2012, Series C, No. 253, para. 391. Critical of the Court's approach, see Modolell G., *ICLR*, 10 (2010), 476–80.

[482] See the various judgments of the ECtHR: *Kurt v Turkey*, Judgment of 25 May 1998; *Cakici v Turkey*, Judgment of 8 July 1999; *Timurtas v Turkey*, Judgment 13 June 2000; *Cicek v Turkey*, Judgment of 27 February 2001; *Tas v Turkey*, Judgment of 27 November 2001; see more recently *Varnava and Others v Turkey*, Judgment of 18 September 2009; *Aslakhanova and Others v Russia*, Judgment of 18 December 2012; *El-Masri v the Former Yugoslav Republic of Macedonia*, Judgment of 13 December 2012. In this latter case on the practice of extraordinary renditions, the Court's Grand Chamber found, depending on the circumstances of each case, the following rights to be violated: Article 2 ECHR (right to life), Article 3 ECHR (prohibition of torture), Article 5 ECHR (right to liberty and security), Article 8 ECHR (right to respect for family and private life) and Article 13 ECHR (right to an effective remedy). It further considered that enforced disappearances constitute a crime against humanity. For a commentary, see Ambos, *StV*, 33 (2013), 129; Ambos, *ZIS*, 8 (2013), 161. For a profound comparative analysis of the jurisprudence of the IACtHR, the ECtHR, and the HRC, see Vermeulen, *Enforced Disappearance* (2012), pp. 157–431.

[483] Inter-American Convention on the Forced Disappearance of Persons, OEA/Ser P, AG/doc 3114/94 rev 1, available at <http://www.oas.org/juridico/english/treaties/a-60.html> accessed 15 March 2013.

[484] Res. 47/133 of 18 December 1992, UN Doc. A/47/49 (1992).

[485] International Convention for the Protection of All Persons from Enforced Disappearances, UN GA Res. A/Res/61/177, 20 December 2006.

[486] The respective part of the Preamble reads: '. . . enforced disappearances occur, in the sense that 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 . . . '

[487] cf. Ambos, *Impunidad* (1999), pp. 66 ff. (77 ff, 113 ff).

(b) Refused to acknowledge the arrest, detention or abduction, or to give information on the fate or whereabouts of such person or persons.

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

(b) Such refusal was preceded or accompanied by that deprivation of freedom.

3. The perpetrator was aware that:
   (a) Such arrest, detention or abduction would be followed in the ordinary course of events by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons; or
   (b) Such refusal was preceded or accompanied by that deprivation of freedom.
4. Such arrest, detention or abduction was carried out by, or with the authorization, support or acquiescence of, a State or a political organization.
5. Such refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons was carried out by, or with the authorization or support of, such State or political organization.
6. The perpetrator intended to remove such person or persons from the protection of the law for a prolonged period of time.[488]

The offence has also been incorporated in the domestic law of several states, in particular of Latin America.[489] Section 7(1) no. 7 of the German VStGB proposes the following definition:

> . . . with the intention of removing him or her from the protection of the law for a prolonged period of time,
> (a) by abducting that person on behalf of or with the approval of a State or a political organisation, or by, otherwise severely depriving such person of his or her physical liberty, followed by a failure immediately to give truthful information, upon inquiry, on that person's fate and whereabouts, or
> (b) by refusing, on behalf of a State or of a political organisation or in contravention of a legal duty, to give information immediately on the fate and whereabouts of the person deprived of his or her physical liberty under the circumstances referred to under letter (a) above, or by giving false information thereon.

While subparagraph (a) adopts the combination of deprivation of liberty and the subsequent refusal to provide (truthful) information on the person's whereabouts as known from the ICC Statute—arrest etc. followed by refusal to acknowledge or give information (Article 7(2)(i) ICC Statute; see also Elements 1 and 2 with respective lit. (a) and (b))—subparagraph (b) further criminalizes the mere refusal of immediate

[488] fn. and Elements 7 and 8 (referring to the context element) omitted.

[489] See for an analysis of Latin-American countries Malarino, 'Argentina', pp. 3–37; Alflen da Silva, 'Brasil', pp. 39–52; López D., 'Colombia', pp. 75–103; Guzmán D., 'Chile', pp. 53–73; Meini, 'Perú', pp. 105–31 and Galain P., 'Uruguay', pp. 133–75, in Ambos, *Desaparición forzada* (2009).

[490] cf. Motives, BR-Drucksache 29/02, at 48–9; available in English at <www.department-ambos.uni-goettingen.de/index.php/Forschung/uebersetzungen.html> accessed 9 August 2013.

[491] For a detailed comparative and international analysis, see the work of Grammer, *Verschwindenlassen* (2005); see also Meseke, *Verbrechen gegen die Menschlichkeit* (2004), pp. 229–233, 290–1; Kuschnik, *Gesamttatbestand* (2009), pp. 396–407.

information or the giving of false information on the assumption that the perpetrator acts in collusion with the State or organization responsible for the deprivation of liberty ('on behalf of') or 'in contravention of a legal duty'.[490] Insofar as the German law goes beyond the ICC Statute (by criminalizing the mere refusal of information under certain circumstances), yet in both instruments the *actus reus* of the offence consists, notwithstanding the complex details,[491] of *two interrelated* acts, that is deprivation of liberty and omission of information.[492] Both acts need to be carried out 'with the authorization, support or acquiescence of, a State or a political organization'.[493]

The meaning of '*political organization*' in this context is unclear. Given that one of the legal interests protected by the crime of enforced disappearance is the effective access to the administration of justice (or any effective legal remedy),[494] the offence can only refer to organizations that can grant such an access.[495] Also, given that the punishability of the omission (to inform) is premised on a duty to act[496] (i.e. to inform about the whereabouts of the victims of a deprivation of liberty), the offence can only include organizations which have such a duty.[497] What is clear is that 'organization' in Article 7(2)(i) cannot be understood in the same way as organization in relation to a policy within the meaning of Article 7(2)(a), that is, the term must, apparently, be understood more narrowly.[498] In fact, a state-like organization with territorial control which detains a person, transfers that person to 'its' territory and thereby impedes that person access to the administration of justice does not omit, but indeed commits, a crime of deprivation of liberty with the subsequent impediment of an access to justice.[499]

[492] In the same vein, see Werle, *Völkerstrafrecht* (2012), mn. 986. Weigend, 'Völkerstrafgesetzbuch', in Triffterer, *GS Vogler* (2004), p. 204, considers the equal treatment of these two acts as problematic, especially as they are usually committed by different persons. See on this Kuschnik, *Gesamttatbestand* (2009), pp. 401–2.

[493] cf. Article 7(2)(i) and Elements 4 and 5.

[494] cf. Ambos and Böhm, 'La desaparición forzada', in Ambos, *Desaparición forzada* (2009), pp. 246–7. This also follows from the IACtHR's application of the effective remedy clause of Article 25 of the ACHR (notes 480–8). See also Grammer, *Verschwindenlassen* (2005), pp. 101–2; Hall, 'Article 7', in Triffterer, *Commentary* (2008), mn. 128, 132. For the individual interests protected, see Modolell G., *ICLR*, 10 (2010), 480–3; Kälin and Künzli, *Human Rights Protection* (2009/2011), pp. 339–43.

[495] Ambos and Böhm, 'La desaparición forzada', in Ambos, *Desaparición forzada* (2009), p. 247; Werle, *Völkerstrafrecht* (2012), mn. 989; Grammer, *Verschwindenlassen* (2005), pp. 183–5 (state-like organizations which have either taken over or dispossessed the official capacities); Kuschnik, *Gesamttatbestand* (2009), p. 404 (differentiating with regard to the necessary involvement of the State: acquiescence suffices regarding the deprivation of liberty but not regarding the refusal to provide information).

[496] cf. Volume I of this treatise, pp. 183 ff.

[497] In a similar vein, Grammer, *Verschwindenlassen* (2005), 184; Werle, *Völkerstrafrecht* (2012), mn. 989; also Modolell G., *ICLR*, 10 (2010), 486–7.

[498] In the same vein, see Werle, *Völkerstrafrecht* (2012), mn. 989; Modolell G., *ICLR*, 10 (2010), 486–7.

[499] cf. Ambos and Böhm, 'La desaparición forzada', in Ambos, *Desaparición forzada* (2009), pp. 247–8.

[500] See fn. 26 to the Elements ('It is understood that under certain circumstances an arrest or detention may have been lawful'). See also Grammer, *Verschwindenlassen* (2005), p. 188; Kuschnik, *Gesamttatbestand* (2009), p. 403; Werle, *Völkerstrafrecht* (2012), mn. 987; for a different, but incorrect view, Modolell G., *ICLR*, 10 (2010), 483–4 (misreading the refusal alternative).

[501] Werle, *Völkerstrafrecht* (2012), mn. 987–8.

The *deprivation of liberty* need not necessarily be unlawful; rather, a lawful arrest with a subsequent refusal of information may also fulfil the *actus reus* of the offence.[500] A *refusal* to give information presupposes that an interested person, for example, a family member has inquired or asked about the victim's whereabouts in the first place.[501] The ICC Elements clarify that the refusal can occur after the arrest etc. (lit. (a) of Elements 1 and 2), prior to it (lit. (b) of Elements 1 and 2) or simultaneously with it (lit. (a) and (b) of Element 2: 'accompanied').

While the elements of the offence are fulfilled with the refusal, the actual criminal conduct, being of a continuous nature ('*Dauerdelikt*'),[502] starts with the detention of the individual and only terminates if (correct)[503] information about the victim's whereabouts has been provided or the person has been discovered (dead or alive) by other means.[504] Given this offence structure, it is possible for the criminal conduct to begin before the entry into force of the Statute (in general or for a particular state) and terminate after. Consequently, if one were to take the beginning of the criminal conduct as the decisive moment for the determination of the Court's jurisdiction, the crime would have a *retroactive effect*, thereby infringing the rationale of Articles 11 and 24 ICC Statute.[505] It is for this reason that the states parties have inserted footnote 24 into the Elements, determining that enforced disappearance 'falls under the jurisdiction of the Court only if the [widespread or systematic] attack' within the meaning of Article 7(1) 'occurs after the entry into force of the Statute'. This restricts the Court's jurisdiction too far, though, since it may even exclude individual acts of enforced disappearance committed after the entry into force of the Statute but before the collective attack.[506]

Finally, the perpetrator must, apart from possessing the *general intent* (Article 30 ICC Statute) with regard to these two interrelated acts,[507] act 'with the *intention*

[502] cf. IACtHR, *Heliodore Portugal v Panama*, Preliminary exceptions 12 August 2008, para. 14; *Ticona Estrada et al. v Bolivia*, Merits 27 November 2008, paras. 28 ff.; see also Modolell G., *ICLR*, 10 (2010), 487; Ambos and Böhm, ' La desaparición forzada', in Ambos, *Desaparición forzada* (2009), at pp. 235–6, 249–50.

[503] Werle, *Völkerstrafrecht* (2012), mn. 987 (conscious/intentional false information equal to refusal to inform); see also sect. 7(1) no. 7 (b) last alternative VStGB (as quoted in main text).

[504] Ambos and Böhm, 'La desaparición forzada', in Ambos, *Desaparición forzada* (2009), at p. 250.

[505] The issue was still controversial in Rome (cf. Draft Report of the Drafting Committee to the Committee of the Whole, Part 3, General Principles of Criminal Law, 14 July 1998, A/Conf 183/C.1./L.65/Rev. 1, fn. 4 on Article 33 (non-retroactivity) which reads: 'The question has been raised as regards a conduct which started before the entry into force and continues after the entry into force.'). Yet, later, the restrictive position of the drafters was expressed by footnote 24 of the Elements of Crimes providing that the crime against humanity of enforced disappearance of persons falls under the jurisdiction of the court only if the attack occurred after the entry into force of the Statute (cf. Rückert and Witschel, 'Article 7(1)(i)', in Lee, *The ICC* (2001), p. 102; Olásolo, *CLF*, 18 (2007), 307 with fn. 22).

[506] cf. Ambos and Böhm, 'La desaparición forzada', in Ambos, *Desaparición forzada* (2009), pp. 240–1, 250.

[507] See Werle, *Völkerstrafrecht* (2012), mn. 990.

[508] Emphasis added; see also Element 6: 'The perpetrator intended to remove such person or persons from the protection of the law for a prolonged period of time'.

[509] Ambos, *Der Allgemeine Teil* (2002/2004), p. 799; concurrring, Meseke, *Verbrechen gegen die Menschlichkeit* (2004), p. 233; Robinson, 'Crimes Against Humanity', in Cryer et al., *Introduction ICL* (2010), pp. 263–4; Kolb, 'Droit international pénal', in Kolb, *Droit international pénal* (2008), p. 111; Werle and Burchards, '§ 7 VStGB', in Joecks and Miebach, *Münchener Kommentar*, vi/2 (2009), mn. 90; for a different view, apparently, see Werle, *Völkerstrafrecht* (2012), mn. 991.

of removing' the victim 'from the protection of the law for a prolonged period of time' (Article 7(2)(i) ICC Statute).[508] This is a separate special intent element requiring that the perpetrator wants, desires, or wishes the victim's removal from legal protection.[509]

(10) The crime of apartheid (Article 7(1)(j) ICC Statute)

Apartheid means 'segregation' in Afrikaans and stands for a system of racial segregation practised in South Africa since 1948 until the African National Congress's (ANC's) election victory in 1994. The practice was declared a crime against humanity in a series of international instruments, from the 1968 Non-Statutory Limitations Convention[510] to the 1973 UN Apartheid Convention.[511] Its inclusion in the ICC Statute (Article 7(2)(j)) was proposed by South Africa,[512] pursuant to similar proposals in the ILC Draft Codes.[513] Still, the customary law character of the crime is controversial.[514]

Article 7(2)(h) ICC Statute now defines the *actus reus* as 'inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an

[510] Article 1(b) ('and inhuman acts resulting from the policy of apartheid') of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.

[511] Article 1(1) ('The States Parties to the present Convention declare that apartheid is a crime against humanity') of the International Convention on the Suppression and Punishment of the Crime of Apartheid, A/RES/3068(XXVIII), 28 UN GAOR Supp. (No. 30) at 75, UN Doc. A/9030 (1974).

[512] cf. von Hebel and Robinson, 'Crimes', in Lee, *The ICC* (1999), p. 102, fn. 75; on the negotiations, see also Bultz, *CLF*, 24 (2013), 220–2.

[513] Article 18(f) of the 1991 Draft Code lists '[i]nstitutionalized discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population' as a crime against humanity. The respective commentary explains that '[i]t is in fact the crime of apartheid under a more general denomination', *YbILC*, ii/2, 94 (1991). The 1996 Draft Code lists apartheid as an independent crime in its Article 20, *YbILC*, ii/2, 15 (1996); it enumerates several acts which if 'based on policies and practices of racial segregation and discrimination committed for the purpose of establishing or maintaining domination by one racial group over any other racial group and systematically oppressing it' constitute the crime of apartheid: Article 20(2).

[514] See for a discussion, Bultz, *CLF*, 24 (2013), 212–19 (arguing that the ambiguities and weaknesses of the Apartheid Convention and its lack of application speak against the customary nature of the crime).

[515] See also Elements 1, 2 and 4 of the Elements of Article 7(1)(j).

[516] See for examples of apartheid-like acts and measures Article II UN Apartheid Convention: '(a) Denial . . . of the right to life and liberty of person: (i) By murder . . . ; (ii) By the infliction . . . of serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment; (iii) By arbitrary arrest and illegal imprisonment . . . ; (b) Deliberate imposition . . . of living conditions calculated to cause . . . physical destruction in whole or in part; (c) Any legislative measures and other measures calculated to prevent . . . participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying . . . basic human rights and freedoms, including the right to work, the right to form recognized trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association; (d) Any measures including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos . . . , the prohibition of mixed marriages among members of various racial groups, the expropriation of landed property . . . ; (e) Exploitation of the labour . . . , in particular . . . forced labour; (f) Persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid.' But see for the differences with regard to the ICC Statute Hall, 'Article 7', in Triffterer, *Commentary* (2008), mn. 116–22.

[517] Also critical, Bultz, *CLF*, 24 (2013), 222 ff. (especially criticizing the concept of the 'institutionalized regime' as 'overbroad and inoperable' [225] and proposing a restrictive interpretation linking it to a

institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups'.[515] Thus, the inhumane acts committed must either correspond to those criminalized in Article 7(1)(a)–(i) and (k) or be 'similar' to those acts.[516] Of course, there exists a problem of legal certainty which increases with the recourse to the definition of inhumane acts outside the ICC Statute.[517] The inhumane acts must occur within the framework of an institutionalized system of racist oppression, that is, a system where the racial oppression and discrimination is institutionalized in particular by a special legislation but also by a *de facto* policy.[518] In subjective terms, the acts have to be committed 'with the intention of maintaining' the racist regime.[519] Thus, as in the case of enforced disappearance and persecution,[520] a specific purpose, apart from the general intent,[521] is required.[522]

(11) Other inhumane acts (Article 7(1)(k) ICC Statute)

'Other inhumane acts' is the catch-all, residual, or default category of the underlying acts of crimes against humanity.[523] Yet, while the Statutes of the ad hoc tribunals only

'recognizable state' [229]). For reasons of greater certainty the German VStGB construes the crime of apartheid as a qualification to the other individual acts contained in sect. 7(1) VStGB (corresponding to Article 7(1) ICC Statute). Thus, the perpetrator of one of the underlying acts of crimes against humanity receives an aggravated sentence if he commits these acts with the (additional) intention of maintaining an institutionalized regime of systematic oppression and domination (cf. Motives, BR-Drs. 29/02, 51).

[518] cf. Bultz, *CLF*, 24 (2013), 223–4; Werle, *Völkerstrafrecht* (2012), mn. 997.

[519] See also Element 5 of the Elements ('perpetrator intended to maintain such regime').

[520] On the ensuing problems of delimitation, see Bultz, *CLF*, 24 (2013), 225–8.

[521] See in this regard Element 3 of the Elements requiring the perpetrator's awareness 'of the factual circumstances that established the character of the act'.

[522] See also Meseke, *Verbrechen gegen die Menschlichkeit* (2004), p. 265; Robinson, 'Crimes Against Humanity', in Cryer et al., *Introduction ICL* (2010), p. 265; Werle, *Völkerstrafrecht* (2012), mn. 999; Bultz, *CLF*, 24 (2013), 225, 229–30 (advocating an additional specific intent 'to bring about discriminatory consequences').

[523] In this sense it has been held that such a provision is important because 'one would never be able to catch up with the imagination of future torturers who wished to satisfy their bestial instincts; and the more specific and complete a list tries to be, the more restrictive it becomes' (Pictet et al., *Commentary on the Geneva Conventions of 12 August 1949*, i (2006), Article 3, p. 54); or, as an ICTY TC put it, an exhaustive enumeration of the individual criminal acts 'would merely create opportunities for evasion of the letter of the prohibition' (*Kupreškić et al.*, No. IT-95-16-T, para. 563).

[524] cf. *Kupreškić et al.*, No. IT-95-16-T, para. 563 ('There is a concern that this category lacks precision and is too general to provide a safe yardstick for the work of the Tribunal and hence, that it is contrary to the principle of the "specificity" of criminal law. It is thus imperative to establish what is included within this category'); but see the quote of the same decision in the previous note. See also *Blagojević and Jokić*, No. IT-02-60-T, para. 625 ('the principle of legality requires . . . great caution in finding that an alleged act . . . forms part of this crime'); *Stakić*, No. IT-97-24-T, paras. 719–24 ('might violate the fundamental criminal law principle *nullum crimen sine lege certa*', para. 719); *Kordić and Čerkez*, No. IT-95-14/2-A, para. 117 ('the potentially broad range of the crime of inhumane acts may raise concerns as to a possible violation of the *nullum crimen* principle'); but see also *Stakić*, No. IT-97-24-A, para. 315 ('the notion of "other inhumane acts" contained in Article 5(i) of the Statute cannot be regarded as a violation of the principle of *nullum crimen sine lege* as it forms part of customary international law', footnote omitted) and *Muvunyi*, No. ICTR-2000-55A-T, para. 527 ('The ICTY Appeals Chamber recently noted that the crime of "other inhumane acts" cannot in itself violate the principle of *nullum crimen sine lege certa* as it proscribes conduct which is forbidden under customary international law', referring to the *Stakić* Appeals Judgment, footnote omitted).

[525] cf. *Katanga and Ngudjolo Chui*, No. ICC-01/04-01/07-717, para. 450 (distinguishing the ICC Statute, containing 'certain limitations', from the Statutes of the ad hoc tribunals).

refer in a very unspecific way to 'other inhumane acts' (Article 5(i) ICTY and Article 3 (i) ICTR Statutes) and indeed the ensuing problem of legal certainty has been acknowledged in the case law,[524] the Rome Statute defines these acts in a more precise way.[525] According to Article 7(1)(k) ICC Statute, other inhumane acts are 'acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health'. Thus, the perpetrator must inflict 'great suffering, or serious injury to body or to mental or physical health' to the victims[526] and the respective act must be 'of a character similar to any other act' referred to in Article 7(1) ICC Statute.[527] 'Character' refers to the 'nature and gravity of the act'.[528] Thus, it is clear that this wording is intended to *restrict* the provision by linking it to the specific underlying acts of crimes against humanity listed in para. 1, using the criterion of *similar nature and gravity*.[529] This is nothing else than the *ejusdem generis* doctrine already employed with regard to persecution, and understood in this context as requiring violations at least as similarly grave as the other inhumane criminal acts.[530]

The hard question is how far the similarity approach goes, in particular whether it would also allow for the inclusion of (basic) human rights violations in the category of 'other inhumane acts'. This seems to be difficult to reconcile with Article 7(1)(k) ICC Statute requiring '*great* suffering' and '*serious* injury'.[531] Also, the jurisprudence of the ad hoc tribunals, albeit focusing on the individual circumstances of each case,[532] developed similar restrictive criteria in order to determine whether an act was 'inhumane' in the sense of the respective statute: '(i) the occurrence of an act or omission of similar seriousness to the other enumerated acts under the Article; (ii) the act or omission caused serious mental or physical suffering or injury or constituted a serious attack of human dignity'.[533] Accordingly, in some cases the ad hoc tribunals have found acts to fall under this residual clause that now constitute independent alternatives of Article 7(1).[534] What is more, the lack of statutory precision sometimes led the

[526] cf. Element 1 of the Elements.
[527] cf. Element 2 of the Elements.
[528] cf. fn. 29 and 30 to Element 2 of the Elements.
[529] cf. *Muthaura et al.*, No. ICC-01/09-02/11-382-Red, para. 269 ('this residual category of crimes against humanity must be interpreted conservatively and must not be used to expand uncritically the scope of crimes against humanity').
[530] *Tadić*, No. IT-94-1-T, para. 729; *Kupreškić et al.*, No. IT-95-16-T, para. 566; *Musema*, No. ICTR-96-13-T, para. 232; *Kordić and Čerkez*, No. IT-95-14/2-T, para. 269; *Bagilishema*, No. ICTR-95-1A-T, para. 92; *Kvočka et al.*, No. IT-98-30/1-T, para. 206; *Vasiljević*, No. IT-98-32-A, para. 165; *Popović et al*, No. IT-05-88-T, para. 888; *Prosecutor v Bagosora et al.*, No. ICTR-98-41-T. Trial Chamber Judgment, para. 2218 (18 December 2008). See also Kuschnik, *Gesamttatbestand* (2009), pp. 450–1; Bassiouni, *Crimes Against Humanity* (2011), p. 406.
[531] Emphasis added.
[532] *Kordić and Čerkez*, No. IT-95-14/2-A, para. 117; *Muvunyi*, No. ICTR-2000-55A-T, para. 527; *Popović et al.*, No. IT-05-88-T, para. 889.
[533] *Prosecutor v Vasiljević*, No. IT-98-32-T, Trial Chamber Judgment, para. 234 (29 November 2002); confirmed by *Vasiljević*, IT-98-32-A, para. 165. Similar *Galić*, No. IT-98-29-T, para. 152; *Blagojević and Jokić*, No. IT-02-60-T, para. 626; *Kordić and Čerkez*, No. IT-95-14/2-A, para. 117; *Lukić and Lukić*, No. IT-98-32/1-T, para. 960; *Prosecutor v Kamuhanda*, No. ICTR-95-54A-T, Trial Chamber Judgment, para. 718 (22 January 2004); *Bagosora et al.*, No. ICTR-98-41-T, para. 2218.
[534] See only *Stakić*, IT-97-24-A, para. 317 (forcible transfer of civilians); *Kamuhanda*, No. ICTR-95-54A-T, para. 710 (sexual violence).
[535] *Kupreškić et al.*, No. IT-95-16-T, para. 566.
[536] *Akayesu*, No. ICTR-96-4-T, para. 697 (but taking note of Article 7 ICC Statute in para. 577).
[537] *Kordić and Čerkez*, No. IT-95-14/2-T, para. 270.

tribunals to take a broader approach, declaring that, inter alia, inhuman or degrading treatment,[535] 'forced undressing',[536] and 'beatings and other acts of violence'[537] can constitute 'other inhumane acts'. In any case, given that the rationale of crimes against humanity consists of protecting against the most serious human rights violations, the concept of 'inhumane acts' should be understood in the same restrictive sense as denial of a fair trial or infringements on property, excluding basic human rights violations. In line with this, the *Katanga* PTC convincingly understood inhumane acts, invoking the *nullum crimen* principle and the similarity rule, as 'serious violations of international customary law and the basic rights pertaining to human beings . . . '.[538]

In subjective terms, Article 7(1)(k) ICC Statute penalizes only acts 'intentionally causing great suffering, or serious injury' and the Elements of Crimes demand that '[t]he perpetrator was aware of the factual circumstances that established the character of the act'.[539] The *Katanga and Chui* PTC apparently holds the view that only the awareness requirement amounts to an additional subjective qualifier, while the term 'intentional' in Article 7(1)(k) does not entail a standard different from Article 30 ICC Statute.[540] In any case, by requiring the perpetrator to intend the great suffering or serious injury, Article 7(1)(k) goes beyond the 1996 ILC Draft Code, which did not include such a subjective threshold in its Article 18(k).[541] In contrast, the jurisprudence of the ad hoc tribunals does not seem to be uniform in this regard. On the one hand, it is required that the perpetrator caused the suffering intentionally,[542] on the other, it is considered sufficient that he knew that his conduct was 'likely to cause' such consequences.[543] Even though the latter approach seems to prevail,[544] it cannot be transferred to Article 7(1)(k) ICC Statute since it explicitly provides for intentional conduct.

[538] *Katanga and Ngudjolo Chui*, No. ICC-01/04-01/07-717, para. 448. It therefore goes too far if Scheinert, *ICLR*, 13 (2013), 656 ff. argues that the refusal to accept life-saving humanitarian aid (for example, HIV/AIDS drugs by the South African Mbeki government) amounts to inhumane acts 'notwithstanding the fact that they [Mbeki and other responsible politicians] played no role in creating the conditions in which the rights were violated' (at 659). This does not only stretch the interpretation of crimes against humanity and inhumane acts too far but also flies in the face of basic rules of imputation which require a legal duty to act and a guarantor status for omission liability (cf. Volume I of this treatise, pp. 180 ff.).

[539] Element 3 of the the Elements of Article 7(1)(k).

[540] *Katanga and Ngudjolo Chui*, No. ICC-01/04-01/07-717, para. 455 (unfortunately, the PTC did not elaborate further on this, but only made a cursory statement: 'This offence encompasses, first and foremost, cases of *dolus directus* of the first and second degree.', *Katanga and Ngudjolo Chui*, No. ICC-01/04-01/07-717, para. 455). Concurring, Werle, *Völkerstrafrecht* (2012), mn. 1003; Meseke, *Verbrechen gegen die Menschlichkeit* (2004), p. 237.

[541] Article 18(k) with commentary 17 of the Draft Code of 1996, YbILC, ii/2, 15 (1996). See on this Boot revised by Hall, 'Article 7', in Triffterer, *Commentary* (2008), mn. 82–3.

[542] *Blaškić*, No. IT-95-14-T, para. 243; *Kordić and Čerkez*, No. IT-95-14/2-T, para. 271; *Kordić and Čerkez*, No. IT-95-14/2-A, para. 117; *Bagosora et al.*, No. ICTR-98-41-T, para. 2218; *Muvunyi*, No. ICTR-2000-55A-T. para. 529 (but broader with regard to third parties); *Bagilishema*, No. ICTR-95-1A-T, para. 92.

[543] *Krnojelac*, No. IT-97-25-T, para. 132; *Blagojević and Jokić*, No. IT-02-60-T, para. 628; *Galić*, No. IT-98-29-T, para. 154; *Prosecutor v Milošević*, No. IT-98-29/1-T, Trial Chamber Judgment, para. 935 (12 December 2007); *Martić*, No. IT-95-11-T, para. 85; *Lukić and Lukić*, No. IT-98-32/1-T, para. 962. With regard to the suffering of a third party witnessing the act, see *Kayishema and Ruzindana*, No. ICTR-95-1-T, para. 153.

[544] See Werle, *Völkerstrafrecht* (2012), mn. 1003.

Chapter III
War Crimes

*The full chapter bibliography can be downloaded from **http://ukcatalogue.oup.com/product/9780199665600.do.**

A. General Observations

(1) Concept and protected legal interests

The concept of 'war crime' may be understood in both a broad and a narrow sense. In a broad sense, it encompasses all criminal acts committed in a 'war' or an armed conflict, notwithstanding their character as war crimes in a narrow sense (i.e., IHL violations converted into 'war crimes')[1] or other international crimes, in particular crimes against humanity.[2] In this chapter we deal with war crimes *stricto sensu*, specifically the ones codified in Article 8 ICC Statute. We can speak in this regard of the ICL of armed conflict encompassing the 'ICL of war' ('*droit pénal international de la guerre*', '*derecho penal internacional de la guerra*', '*Kriegsvölkerstrafrecht*') and the 'ICL of civil war' ('*droit pénal international de la guerre civile*', '*derecho penal internacional de la guerra civil*', '*Bürgerkriegsvölkerstrafrecht*').[3] It is clear from this terminological dichotomy that 'war crimes', in line with the *assimilation thesis* already explained in Volume I of this treatise,[4] are no longer limited to international armed conflicts (between states) but can be committed in internal (non-international) conflicts as well. Thus, contrary to Article 8 ICC Statute, the correct term would be '*crimes of armed conflict*' ('*crimes de conflit armé*').

Crimes of armed conflict belong—as punishable violations of IHL—to the '*ius in bello*' and thus, must be distinguished from punishable acts based on violations of the '*ius ad bellum*', that is, the right to wage a war against another state.[5] Criminal

[1] cf. Werle, *Völkerstrafrecht* (2012), mn. 1021; Werle, *Principles* (2009), mn. 929 with further references, especially to US Army Military Manual, § 499, FM 27-10; Kreicker, 'Völkerstrafrecht im Ländervergleich', in Eser, Sieber, and Kreicker, *Nationale Strafverfolgung*, vii (2006), pp. 110 ff; as for the development of concepts of war crime, see Cullen, 'War Crime', in Schabas and Bernaz, *Routledge Handbook ICL* (2011), pp. 139 ff.; see for several IHL rules emanating from 'Islamic International Law' (e.g. on non-combatants, prohibited weapons, protection of property), Badar, *ICLR*, 13 (2013), 602 ff.

[2] In this sense see, for example, the ICTY's reference to 'Serious Violations of International Humanitarian Law' in its official name, although its Statute also includes genocide and crimes against humanity. On this broader understanding, see also Ambos, 'Bestrafung', in Haase, Müller, and Schneider, *Humanitäres Völkerrecht* (2001), p. 347.

[3] See for the terminology, Werle, *Völkerstrafrecht* (2012), mn. 1021; Werle, *Principles* (2009), mn. 929; see also Abi-Saab and Abi-Saab, 'Les crimes de guerre', in Ascensio, Decaux, and Pellet, *Droit international pénal* (2000), p. 278; Cassese et al., *ICL* (2013), pp. 65–7; Satzger, *International Criminal Law* (2012), § 14 mn. 53; Nerlich, 'War Crimes (International Armed Conflicts)', in Cassese, *Companion* (2009), p. 566.

[4] Volume I of this treatise, p. 13.

[5] cf. Kolb, 'Droit international pénal', in Kolb, *Droit international pénal* (2008), p. 124; Olásolo, *Unlawful Attacks* (2008), p. 1; Greenwood, 'Scope of Application of Humanitarian Law', in Fleck, *Handbook IHL* (2008), mn. 101, 103; Schmitt, *Tallinn Manual Cyber Warfare* (2013), p. 77; for an instructive

responsibility in the latter case is now encompassed by the recently codified crime of aggression (Article 8*bis* ICC Statute).[6] As a consequence of this distinction, the punishability of armed conflict related conduct cannot be derived solely from the fact that it happened in the context of a (criminal) war of aggression (in violation of *ius ad bellum*); instead, what is required is an autonomous violation of the *ius in bello* that amounts to a crime of armed conflict. On the other hand, a justified ('just') war does not exempt the states concerned from their *ius in bello* obligations.[7] Indeed, in armed conflict the '*equality of belligerents*' *principle* (also called the 'symmetry' or 'duality' principle) applies, that is, the rules of IHL are equally applied to all parties to an (international) armed conflict irrespective of who first violated the *ius in bello*.[8]

The *legal interests* protected by the crimes of armed conflict are, as argued in Volume I of this treatise,[9] global peace and security[10] as well as the legal interests of the persons who find themselves in the midst of the conflict, in particular life, liberty, and property.[11] However, the ICL of armed conflict protects, in line with the primary norms of IHL and their protective purpose, only the legal interests of the other (adversary) party and, therefore, only exceptionally criminalizes conduct against one's own party.[12]

(2) Structure of Article 8 ICC Statute

According to Article 8(1), the ICC has *jurisdiction* over war crimes 'in particular' when committed as part of a plan or policy or as part of a large-scale commission. This is the

historical account of the debate, see Weiler and Deshman, *EJIL*, 24 (2013), 25 ff. (distinguishing between the mainstream legal 'separationist' and the rather moral-philosophical 'conflationist' view). The distinction has been reinforced by ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, ICJ Reports 226, para. 34, 36, 37 ff. vs. 51 ff. (distinguishing between the law on the use of force, i.e., the *ius ad bellum*, and the law of armed conflict, i.e., the *ius in bello*); thereto, Weiler and Deshman, *EJIL*, 24 (2013), 45–9.

[6] Ambos, 'Vorb. §§ 8 ff. VStGB', in Joecks and Miebach, *Münchener Kommentar*, viii (2013), mn. 1. The crime of aggression is analysed in more detail in Chapter IV.

[7] cf. Robinson, 'War Crimes', in Cryer et al., *Introduction ICL* (2010), pp. 269–70; Olásolo, *Unlawful Attacks* (2008), p. 42; Gasser and Melzer, *Humanitäres Völkerrecht* (2012), p. 25; see also Robert, *IRRC*, 90 (2008), 931 ff.

[8] The symmetry or equality approach has, however, recently come under attack by Mandel, *LJIL*, 24 (2011), 627 ff. (arguing that the radical separation of *ius ad bellum* and *ius in bello* is unconvincing in light of the Nuremberg and other ICL precedents, and also since it favours impunity for *ius ad bellum* violations, at 627–9, 649–50; for the current debate on separation versus conflation see Weiler and Deshman, *EJIL*, 24 (2013), 49 ff.). While the symmetry thesis may indeed be questionable from a moral perspective (see for a discussion also Dill, *LJIL*, 26 (2013), 262 ff.; Shue, *LJIL*, 26 (2013), 278–9), it is firmly embedded in IHL (cf. Koutroulis, *LJIL*, 26 (2013), 449, 451 ff. *contra* Mandel) and also convincing for policy reasons (468 ff.). The conflationist view is predicated on the empirically mistaken assumption that there is consensus on what a legitimate or just war is. Given the reciprocity of IHL rules, it further runs the risk that ultimately no party to the conflict plays by the rules since both are convinced that they fight a just war and therefore can relax or even fully ignore the rules (in a similar vein, see Walzer, *EJIL*, 24 (2013), 439, 442).

[9] Volume I of this treatise, p. 66.

[10] cf. also Werle, *Völkerstrafrecht* (2012), mn. 1066; Werle, *Principles* (2009), mn. 974; Satzger, *International Criminal Law* (2012), § 14 mn. 53; Kolb, 'Droit international pénal', in Kolb, *Droit international pénal* (2008), p. 122; Bock, *Opfer* (2010), p. 116; for a different opinion, see Kreicker, 'Völkerstrafrecht im Ländervergleich', in Eser, Sieber, and Kreicker, *Nationale Strafverfolgung*, vii (2006), p. 119.

[11] Triffterer, *Dogmatische Untersuchungen* (1966), p. 200; Werle, *Völkerstrafrecht* (2012), mn. 1065; Werle, *Principles* (2009), mn. 973; Gless, *Internationales Strafrecht* (2011), mn. 833; Bock, *Opfer* (2010), pp. 115–16.

[12] cf. Werle, *Völkerstrafrecht* (2012), mn. 1248 with n. 556, who cites the prohibition on the use of child soldiers as an exception.

result of a compromise resulting from the negotiations in the Preparatory Committee, which floated between a restriction of the Court's jurisdiction to systematic or large-scale war crimes (employing the qualifier 'only') and no restriction at all.[13] The term finally adopted ('in particular') makes clear that single or isolated war crimes are not completely excluded. In fact, the wording grants the Prosecutor and the Judges discretion regarding the exercise of jurisdiction over single or isolated war crimes[14] and serves as an important practical guideline regarding the Office of the Prosecutor (OTP) prosecution strategy.[15] Critics of this wording[16] often overlook its nature as a mere jurisdictional limitation leaving the substance of war crimes in Article 8 and in customary international law untouched.[17]

Although Article 8 of the ICC Statute explicitly recognizes the existence of 'war crimes' in non-international armed conflicts and insofar improves the (penal) protection in this type of conflict,[18] it does not fully 'assimilate' the crimes committed in international conflict to the ones committed in non-international armed conflict[19] by creating one category of 'crimes of armed conflict', as already mentioned.[20] On the contrary, Article 8 ICC Statute maintains the traditional *two-box approach*,[21] dividing 'international' and 'non-international crimes' into four subparagraphs: grave breaches

[13] For a good summary of the discussion, see von Hebel and Robinson, 'Crimes within the Jurisdiction of the Court', in Lee, *The ICC* (1999), p. 107.

[14] McCormack and Robertson, *MelbourneJIL*, 23 (1999), 662; Cottier, 'Article 8', in Triffterer, *Commentary* (2008), mn. 9.

[15] Schabas, *ICC Commentary* (2010), p. 200; Cottier, 'Article 8', in Triffterer, *Commentary* (2008), mn. 9; Bothe, 'War Crimes', in Cassese et al., *Rome Statute*, i (2002), p. 380; *Prosecutor v Jean-Pierre Bemba Gombo*, No. ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, para. 211 (15 June 2009); OTP response to communications received concerning Iraq (9 February 2006) ('For war crimes, a specific gravity threshold is set down in Article 8(1), which states that "the Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes". This threshold is not an element of the crime, and the words "in particular" suggest that this is not a strict requirement. It does, however, provide Statute guidance that the Court is intended to focus on situations meeting these requirements'), <http://www.iccnow.org/documents/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf> accessed 26 June 2012. See generally on the prosecution strategy, Ambos and Stegmiller, *Crime Law Soc Change*, 58 (2012), 391–413.

[16] cf. Sunga, *EJCCLCJ*, 6 (1998), 392; Fenrick, 'Article 8', in Triffterer, *Commentary* (1999), mn. 4; Fischer, 'Jurisdiction', in Epping et al., *Brücken* (2000), p. 85; Robinson, 'War Crimes', in Cryer et al., *Introduction ICL* (2010), p. 267; in favour of stressing the collective dimension of war crimes, Fletcher, *Grammar* (2007), p. 335. Generally against such a requirement for war crimes, cf. *Prosecutor v Tadić*, No. IT-94-1-T, Opinion and Judgment, para. 573 (7 May 1997); *Prosecutor v Delalić et al*., No. IT-96-21-T, Trial Chamber Judgment, para. 195 (16 November 1998); concurring, *Prosecutor v Blaskić*, No. IT-95-14-T, Trial Chamber Judgment, para. 70 (3 March 2000); *Prosecutor v Milutinović et al*., No. IT-05-87-T, Trial Chamber Judgment, para. 128 (26 February 2009).

[17] cf. Cottier, 'Article 8', in Triffterer, *Commentary* (2008), mn. 9; Bothe, 'War Crimes', in Cassese et al., *Rome Statute*, i (2002), pp. 379 ff.; König, *Legitimation* (2003), p. 273; Werle and Jessberger, *JICJ*, 3 (2005), 50–1; Werle, *Völkerstrafrecht* (2012), mn. 464; Werle, *Principles* (2009), mn. 435; Moneta, 'Gli elementi costitutivi dei crimini internazionali', in Cassese et al., *Problemi attuali* (2005), pp. 288–9; Borsari, *Diritto punitive* (2007), p. 50; Kirsch, 'Zweierlei Unrecht', in Michalke et al., *FS Hamm* (2008), p. 286; Olásolo, *Unlawful Attacks* (2008), pp. 250 ff.

[18] Zimmermann and Geiß, '§ 8 VStGB', in Joecks and Miebach, *Münchener Kommentar*, viii (2013), mn. 51.

[19] Critically, Bassiouni, *Transnat'lLCP*, 8 (1998), 232–3; Zimmermann, 'Article 8', in Triffterer, *Commentary* (2008), mn. 235.

[20] Note 4 and main text.

[21] See, for example, Sager, *Voraussetzungen der Strafbarkeit* (2011), pp. 36–7, 58–9.

of the Geneva Conventions (GCs) and other serious violations of the law and customs of war (para. 2(a), (b)) *versus* serious violations of Common Article 3 GCs and other serious violations of the laws and customs of non-international conflict (para. 2(c), (e)). Moreover, Article 8 does not provide—as the Statutes of the ad hoc tribunals do—for an opening formula ('such violations shall include, but not be limited to . . . ')[22] but, rather, presents a closed and exhaustive list of the individual crimes.[23] While this technique of codification may be welcomed in light of the principle of legality (*nullum crimen sine lege certa*),[24] it has the disadvantage of being static and thereby precluding judicial interpretation beyond *legem* to fill alleged lacunae in the codification of war crimes, especially with regard to the ones committed in non-international conflict. As a consequence, any alleged shortcoming of Article 8 ICC Statute compared to customary international law[25] may only be remedied by amendments to the ICC treaty according to Articles 121–123 of the Statute, that is, a two-thirds majority is required (Article 121(3)). Indeed, the first review conference, held in Kampala from 31 May to 10 June 2010,[26] extended Article 8(2)(b)(xvii)–(xix) ICC Statute to non-international armed conflicts, attaching to Article 8(2)(e) the new subparagraphs (xiii)–(xv).[27]

While the rather cautious approach of Article 8 ICC Statute may be justified, from a legal perspective, by a similarly cautious interpretation of the *Tadić* precedent,[28] States Parties may go further when implementing war crimes in their domestic penal laws and opt for a category of crimes of armed conflict. This is perfectly in line with the ICC Statute since, according to its Article 10, 'nothing . . . shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute'. In other words, States Parties are not prevented from incriminating certain acts committed during non-international armed conflicts as 'war crimes', as long as this is in line with the existing customary international law.[29]

A good example for such a broader approach is the German VStGB[30] whose ss. 8–12 essentially abolish the separation of crimes of international and non-international

[22] cf. Article 3 ICTYS and Article 4 ICTRS.

[23] See also Condorelli, 'War Crimes', in Politi and Nesi, *Rome Statute* (2002), pp. 107, 112.

[24] Similarly, Schabas, *HRLJ*, 20 (1999), 163. On this principle generally, see Volume I of this treatise, pp. 88 ff.

[25] Fischer, 'Jurisdiction', in Epping et al., *Brücken* (2000), pp. 77, 86 ff.; see also Sunga, *EJCCLCJ*, 6 (1998), 395; Askin, *CLF*, 10 (1999), 57; Condorelli, 'War Crimes', in Politi and Nesi, *Rome Statute* (2002), pp. 111 ff.

[26] cf. Volume I of this treatise, pp. 34–5.

[27] Resolution RC/Res. 5, Amendments to Article 8 of the Rome Statute (16 June 2010).

[28] cf. Kreß, *IsYbHR*, 30 (2000), 103, 132, questioning the trend towards a complete elimination of the dichotomy between crimes committed in international and non-international armed conflicts and invoking *Prosecutor v Tadić*, No. IT-94-1-AR72, Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 126 (2 October 1995), where it was stated that '[t]he emergence of the aforementioned general rules on internal armed conflicts does not imply that internal strife is regulated by general international law in all its aspects'. The AC continued: 'Two particular limitations may be noted: (i) only a number of rules and principles governing international armed conflicts have gradually been extended to apply to internal conflicts; and (ii) this extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts.'

[29] cf. Momtaz, *YbIHL*, 2 (1999), 188; Boot, *Nullum Crimen* (2002), mn. 594.

[30] For an English translation see <www.department-ambos.uni-goettingen.de/index.php/Forschung/uebersetzungen.html> accessed 21 May 2013.

armed conflict and propose an overlapping category of crimes of armed conflict.[31] In opting for this solution the VStGB takes into account the current status of customary international law, relying in particular on relevant statements by states in international organizations or as expressed in military manuals. The relevant provisions (s. 8–12 VStGB) distinguish offences according to the legal interests or objects protected: war crimes against persons (s. 8),[32] against property and other rights (s. 9), against humanitarian operations and emblems (s. 10), employing prohibited methods of warfare (s. 11), or means of warfare (s. 12). This approach entails a system which is guided by the scope and ambit of protection of the respective offences, reflecting the distinction between the protection of persons and property on the one side (Geneva Law) and the limitation of the use of certain methods and means of warfare (Hague Law) on the other.[33] The twofold protective purpose of the provisions results from the fact that the respective legal interests are sometimes protected by different provisions. Thus, for example, s. 8 VStGB protects life and bodily integrity, which are at the same time protected by the prohibition against using human shields as an unlawful method of conduct of hostilities in s. 11(1)(4) and the prohibition of employment of certain projectiles in s. 12(1)(3) VStGB. The right to property is protected, on the one hand, by the prohibition of pillage contained in s. 9(1) and, on the other, by the prohibition against attacking civilian objects in s. 11(1)(2) VStGB.[34]

While the offences contained in ss. 8–12 are, in principle, applicable independently of the type of armed conflict (international or non-international), the traditional distinction has been retained where the state of customary law does not allow for the same treatment. Whereas ss. 10 and 12 treat international and non-international armed conflicts equally, ss. 8, 9, and 11 take a differentiated approach. Thus, for example, s. 8, paras. (1) and (2), deal with war crimes against persons in connection with both an international and non-international armed conflict, while para. (3) only criminalizes acts committed in an international armed conflict.

Other jurisdictions take other approaches. In *Italy*, there is generally no differentiation between international and non-international armed conflict. According to Article 165 *Codice Penale Militare di Guerre* (Military Penal Code of War), all rules of the fourth chapter of the code, regulating breaches of the laws and customs of war, are

[31] cf. the official motives of the legislator reprinted in Lüder, *Materialien* (2002), p. 50 (draft bill according to Federal Republic print 29/02); for an English translation see <http://www.department-ambos.uni-goettingen.de/index.php/Forschung/uebersetzungen.html>. For a detailed analysis of this German solution see Darge, *Kriegsverbrechen* (2010), pp. 241 ff.; see also Werle, *Völkerstrafrecht* (2012), mn. 1412–13; Sager, *Voraussetzungen der Strafbarkeit* (2011), pp. 186 ff.

[32] Subpara. (6), no. 1 of s. 8 defines persons to be protected under IHL in an international armed conflict as 'persons protected for the purposes of the Geneva Conventions and of the Protocol Additional to the Geneva Conventions (Protocol I) . . . namely the wounded, the sick, the shipwrecked, prisoners of war and civilians'.

[33] cf. Preamble, in Lüder, *Materialien* (2002), p. 40; see also Kreß, *Nutzen* (2000), pp. 21–2; Werle, *JZ*, 56 (2001), 885, 893; Werle, *Völkerstrafrecht* (2012), mn. 1130–1; Gropengießer, 'Die völkerstrafrechtlichen Verbrechen', in Eser and Kreicker, *Nationale Strafverfolgung völkerrechtlicher Verbrechen*, i (2003), pp. 151 ff.; Ambos, 'Vorb. §§8 ff. VStGB', in Joecks and Miebach, *Münchener Kommentar*, viii (2013), mn. 17–18; Kolb, 'Droit international pénal', in Kolb, *Droit International Pénal* (2008), pp. 140 ff.; Olásolo, *Unlawful Attacks* (2008), p. 57; Darge, *Kriegsverbrechen* (2010), pp. 325 ff., 355 ff.

[34] Ambos, 'Vorb. §§8 ff. VStGB', in Joecks and Miebach, *Münchener Kommentar*, viii (2013), mn. 19.

applicable in all types of armed conflict.[35] In *France*, certain war crimes were originally considered special crimes against humanity (Article 212–2 Code Pénal), that is, crimes against resistance fighters in times of war. It was unclear whether this rule applied only to an international or also to a non-international armed conflict.[36] In 2010, a new chapter (*Livre* IV*bis*) concerning war crimes was incorporated into the Code Pénal (CP).[37] This chapter structures war crimes according to the protected objectives and the means and methods of warfare, which is different from the ICC Statute but similar to the German VStGB, however, the traditional two-box approach has mostly been retained.[38] Common law jurisdictions normally adopt Article 8 ICC Statute literally. Thus, in *Australia*, Article 8 of the ICC Statute has been implemented without any notable modifications regarding the *actus reus*. Thus, this jurisdiction follows the ICC Statute's two-box approach in its ss. 268.24 to 268.101 of the ICC (Consequential Amendments) Act of 2002.[39] In the same vein, s. 50(1) of the ICC Act of 2001 of *England and Wales* adopts the definition of war crimes in Article 8(2) of the ICC Statute, including the differentiation between international and non-international armed conflict.[40] In *Canada*, the understanding of war crimes is more nuanced: while there is a general reference to the definition of the ICC Statute (s. 4(4) of Crimes Against Humanity and War Crimes Act of 2000) and thus its two-box approach, the respective Act also defines the means of a 'war crime' as 'an act or omission . . . that . . . constitutes a war crime according to customary international law' and that the application of the definition of the ICC Statute 'does not limit or prejudice in any way the application of existing or developing rules of international law' (cf. s. 4(3) and (4)). Accordingly, the Canadian understanding of war crimes is dependent on the development of international customary law and does easily adjust to future developments.

(3) Existence of an armed conflict (context element)

(a) Basic concept

The existence of an armed conflict constitutes the international or context element ('*Gesamttat*')[41] of war crimes.[42] There is, however, no positive *definition* of 'armed

[35] cf. Jarvers, 'Italien', in Eser, Sieber, and Kreicker, *Nationale Strafverfolgung*, iv (2005), pp. 357–8, 374.

[36] cf. FIDH, *La loi francaise d'adaption* (2001), pp. 27–8; Grynfogel, *JurisClasseur Pénal*, ii (1998), mn. 96 ff.

[37] cf. Assemblée Nationale, Projet de Loi portant adaptation du droit penal à l'institution de la Cour pénale international (13 July 2010) <http://www.assemblee-nationale.fr/13/pdf/ta/ta0523.pdf> accessed 4 July 2013.

[38] Article 461-2 to 461-18 CP criminalize crimes in international and non-international armed conflicts; Article 461-19 to 461-29 CP codify crimes in international armed conflicts and Article 461-30 to 461-31 CP crimes in non-international armed conflicts. See also Vesper-Gräske, *ZIS*, 10 (2011), 825.

[39] cf. Triggs, *SydLR*, 25 (2003), 520; Biehler and Kerll, 'Australien', in Eser, Sieber, and Kreicker, *Nationale Strafverfolgung*, vi (2005), pp. 32–3, 35–6.

[40] cf. also Rabenstein and Bahrenberg, 'England und Wales', in Eser, Sieber, and Kreicker, *Nationale Strafverfolgung*, vi (2005), p. 273.

[41] On individual acts in a collective context with regard to imputation in ICL, see Volume I of this treatise, pp. 84 ff.

[42] Werle, *Völkerstrafrecht* (2012), mn. 403; Werle, *Principles* (2009), mn. 375; Moneta, 'Gli elementi', in Cassese et al., *Problemi attuali* (2005), pp. 21 ff.; Schabas, *UN International Criminal Tribunals* (2006),

conflict' in international law, there are only some references or indications. It follows from Common Article 2 GCs that apart from 'cases of declared war' other types of armed conflicts exist ('any other armed conflict'). The famous negative definition in Article 1(2) AP II, taken up in Article 8(2)(d) and (f) of the ICC Statute, clarifies that 'internal disturbances and tensions' do not amount to an armed conflict; yet, this exclusion clause is—like AP II—only applicable to non-international armed conflicts, and thus the intensity and length of the conflict and the degree of organization of the parties are not relevant in the case of an international conflict.[43] Thus, arguably, less is required to demonstrate the existence of an international armed conflict.

The notion 'armed conflict' presupposes the resort to *armed force or violence* between different (state or non-state) actors[44] and the existence of hostilities.[45] In positive terms, the existence of an armed conflict is to be determined in view of the actual nature of the conflict; formalities, such as a declaration of war or belligerency, are, in principle, not decisive.[46] Instead, what is of relevance is the employment of armed force and its attribution to one of the parties to the conflict.[47] The concept is

pp. 229 ff.; Borsari, *Diritto punitive* (2007), p. 314; Olásolo, *Unlawful Attacks* (2008), pp. 29 ff. (p. 30: 'cornerstone').

[43] Queguiner, *IRRC*, 85 (2003), 275; see also Ambos and Alkatout, *IsLR*, 45 (2012), 346 ('no threshold of violence or duration'); for a differentiated intensity, see Robinson, 'War Crimes', in Cryer et al., *Introduction ICL* (2010), p. 279 (arguing that such required intensity is needed to distinguish armed conflict from internal disturbances and riots).

[44] *Tadić*, No. IT-94-1-T, para. 561; *Tadić*, No. IT-94-1-AR72, para. 70; concurring, *Prosecutor v Kupreskić et al.*, No. IT-95-16-T, Trial Chamber Judgment, para. 545 (14 January 2000); *Blaskić*, No. IT-95-14-T, para. 63; *Prosecutor v Haradinaj et al.*, No. IT-04-84*bis*-T, Retrial Judgment, para. 392 (29 November 2012). See also *Prosecutor v Akayesu*, No. ICTR-96-4-T, Trial Chamber Judgment, para. 620 (2 September 1998) ('existence of hostilities between armed forces organized to a greater or lesser extent'). See also Ipsen, 'Bewaffneter Konflikt', in Ipsen and Epping, *Völkerrecht* (2004), § 65 mn. 9, § 66 mn. 7; Greenwood, 'Scope of Application', in Fleck, *Handbook IHL* (2008), mn. 202.

[45] Hostilities 'refers to the (collective) resort by the parties to the conflict to means and methods of injuring the enemy', Melzer, *Interpretive Guidance* (2009), p. 43.

[46] Greenwood, 'Scope of Application', in Fleck, *Handbook IHL* (2008), mn. 202, 203; Ipsen, 'Bewaffneter Konflikt und Neutralität', in Ipsen, *Völkerrecht* (2004), § 66 mn. 5 ff., § 68 mn. 1.

[47] *Tadić*, No. IT-94-1-AR72, para. 70; *Tadić*, No. IT-94-1-T, para. 561; concurring, *Delalić et al.*, No. IT-96-21-T, para. 183; *Prosecutor v Furundzija*, No. IT-95-17/1-T, Trial Chamber Judgment, para. 59 (10 December 1998); *Kupreskić*, No. IT-95-16-T, para. 545; *Blaskić*, No. IT-95-14-T, para. 63; *Prosecutor v Kunarac et al.*, No. IT-96-23 & IT-96-23/1-A, Appeal Chamber Judgment, para. 56 (12 June 2002); *Prosecutor v Naletilić and Martinović*, No. IT-98-34-T, Trial Chamber Judgment, para. 177 (31 March 2003); *Prosecutor v Martić*, No. IT-95-11-T, Trial Chamber Judgment, para. 41 (12 June 2007); *Prosecutor v Limaj et al.*, No. IT-03-66-A, Appeal Chamber Judgment, para. 84 (27 September 2007); *Milutinović et al.*, No. IT-05-87-T, para. 125; *Prosecutor v Lukić and Lukić*, No. IT-98-32/1-T; Trial Chamber Judgment, para. 868 (20 July 2009); *Prosecutor v Popović*, No. IT-05-88-T, Trial Chamber Judgment, para. 740 (10 June 2010); *Prosecutor v Đorđević*, No. IT-05-87/1-T, Trial Chamber Judgment, para. 1522 (23 February 2011); *Prosecutor v Perišić*, No. IT-04-81-T, Trial Chamber Judgment, para. 72 (6 September 2011); *Prosecutor v Stanišić and Župljanin*, No. IT-08-91-T, Trial Chamber Judgment, para. 32 (27 March 2013); *Akayesu*, No. ICTR-96-4-T, paras. 438, 620 ('existence of hostilities between armed forces organized to a greater or lesser extent'); *Prosecutor v Rutaganda*, No. ICTR-96-3-T, Trial Chamber Judgment and Sentence, para. 91 (6 December 1999); *Prosecutor v Kayishema and Ruzindana*, No. ICTR-95-1-T, Trial Chamber Judgment, para. 171 (21 May 1999); *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, Trial Chamber Judgment, para. 101 (7 June 2001); *Prosecutor v Semanza*, No. ICTR-97-20-T, Trial Chamber Judgment and Sentence, para. 357 (15 May 2003); *Prosecutor v Karemera and Ngirumpatse*, No. ICTR-98-44-T, Trial Chamber Judgment, para. 1695 (2 February 2012); *Prosecutor v Sesay, Kallon and Gbao*, No. SCSL-04-15-T, Trial Chamber Judgment, para. 95 (2 March 2009). See also Ipsen, 'Bewaffneter Konflikt', in Ipsen, *Völkerrecht* (2004), § 65 mn. 7, 9; Greenwood, 'Scope of Application', in Fleck, *Handbook IHL* (2008), mn. 202.

flexible enough to encompass a single *drone strike*[48] or a *cyber attack*.[49] The latter may be defined as 'a cyber operation . . . that is reasonably expected to cause injury or death to persons or damage or destruction to objects'.[50] It clearly reaches the armed conflict threshold if one focuses more on the intensity and effects of the attack than on its concrete attribution to a party to the conflict.[51]

(b) Parties, including belligerency

Parties to the conflict are either in an international conflict—two or more states—or in a non-international conflict—the armed forces of the government and dissident state or non-state forces. These opposing forces need not be of the same nationality. Take for example the Taliban and the Al Qaeda presence in Pakistan, turning the ensuing armed conflict into a non-international one.[52] Non-international armed conflicts between

[48] cf. Casey-Maslen, *IRRC*, 94 (2012), 602.

[49] For the general definition of an attack in IHL, see Article 49(1) AP I ('act of violence against the adversary . . . ').

[50] Rule 30 Tallinn Manual, in Schmitt, *Tallinn Manual Cyber Warfare* (2013), p. 106–10 (focusing on the effects or consequences of a cyber operation and therefore including also acts which are not per se violent, i.e., do not release kinetic force, but cause the damage set forth in the Rule; there was however disagreement as to the exact meaning and scope of damage); for an even broader definition see Lin, *IRRC*, 94 (2012), 518–19; see also Droege, *IRRC*, 94 (2012), 556–61 (including the interference 'with the functioning of an object by disrupting the underlying computer system', at 560); Lülf, *HuV-I*, 26 (2013), 76–7 (discussing different cyber operations and attacks). A '*cyber operation*', unlike a 'cyber attack', does not necessarily cause injury or damage (cf. Schmitt, *Tallinn Manual Cyber Warfare* (2013), at 258 defining the former as 'the employment of cyber capabilities with the primary purpose of achieving objectives in or by the use of cyberspace'). The '*cyberspace*' is defined as a domain characterized by 'the use of electronics . . . and the electromagnetic spectrum to store, modify, and exchange data via networked systems and associated physical infrastructures' (US Dept. of Defense according to Lin, *IRRC*, 94 (2012), 516; similarly Schmitt, *Tallinn Manual Cyber Warfare* (2013), p. 258). On the differences between conflict in cyberspace and physical space (i.e. traditional conflict), see Lin, *IRRC*, 94 (2012), 520; on the different understandings of 'cyber warfare' in state practice, see Droege, *IRRC*, 94 (2012), 536–7; on the application of the rules of conduct of hostilities (Article 48 ff. AP I) to cyber operations discussing the different thresholds ('attacks', 'military operations', 'hostilities'), see Droege, *IRRC*, 94 (2012), 553 ff.

[51] For such a more flexible approach apparently, see for example, Schmitt, *Tallinn Manual Cyber Warfare* (2013), pp. 75 ff. (armed forces are not a definite prerequisite of the 'armed' element, at 83; 'Application of the law of armed conflict does not depend on the type of military operation or on the specific means and methods of warfare employed', 85). In a similar vein, see Lülf, *HuV-I*, 26 (2013), 77–8 (also focusing on the effects of a cyber operation and arguing that it reaches the threshold 'whenever' it 'endangers protected persons or objects' and 'is more than a sporadic and isolated incident'). For a more traditional and thus more restrictive approach, see Droege, *IRRC*, 94 (2012), 542 ff. (distinguishing between international and non-international conflict and specifically focusing, apart from the armed conflict threshold/intensity (545–9, 551), on the problems of attribution in light of the anonymity of the attacker (541, 543–5) and the organizational level of the armed groups (550–1) but ultimately also affirming that IHL applies to cyber warfare, at 578). Generally more cautiously see also Lin, *IRRC*, 94 (2012), 515 ff. (concluding that many of the traditional IHL assumptions 'either are not valid in cyberspace or are applicable only with difficulty', at 530). For a broader concept of 'war' with regard to cyber operations, see the 2009 regional agreement adopted by the Member States of the Shanghai Cooperation Organisation (quoted in Droege, *IRRC*, 94 (2012), 535 with fn. 9 and 10).

[52] cf. ICRC, *Annual Report* (2010), p. 260, available at <http://www.icrc.org/eng/resources/documents/annual-report/icrc-annual-report-2010.htm> accessed 6 December 2012; Boor, *HuV-I*, 24 (2011), 100; Schaller, *HuV-I*, 24 (2011), 94; Rudolf and Schaller, *SWP-Studien*, S1 (2012), p. 16, available at <http://www.swp-berlin.org/fileadmin/contents/products/studien/2012_S01_rdf_slr.pdf> accessed 14 January 2013 (identifying a non-international armed conflict throughout the entire Pakistan territory independent of any spillover effect from the Afghan conflict).

organized armed groups without state participation can also qualify as armed conflicts within the meaning of IHL[53] and are as such recognized by Article 8(2)(f), although Article 1(1) AP II does not encompass a conflict exclusively between non-state actors. As a consequence, IHL's scope of protection also extends to situations in which a state monopoly of force does not exist anymore ('failed state'), but a (non-state) armed conflict, comparable to a conflict between a state and insurgents in terms of its intensity, nevertheless occurs.[54]

The term, '*armed forces*' is to be understood broadly, so as to cover all armed forces as provided for by national legislations.[55] Historically, since the days of the Lieber Code (1863), non-state actors have been compared to state actors and defined accordingly.[56] The 1874 Brussels Declaration extended the 'laws, rights, and duties of war' to 'militia and volunteer corps'.[57] The dissident non-state actors must be under responsible command, that is, there must be 'some degree of organization within the armed groups or dissident armed forces, but this does not necessarily mean that there is a hierarchical system of military organization similar to that of regular armed forces':[58] 'The leadership of the group must, as a minimum, have the ability to exercise some control over its members so that the basic obligations of Common Article 3 of the Geneva Conventions can be implemented.'[59] Thus, the respective organization must be 'capable of, on the

[53] cf. *Tadić*, No. IT-94-1-AR72, para. 70 ('between such groups within a State'); *Milutinović et al.*, No. IT-05-87-T, para. 126; *Lukić and Lukić*, No. IT-98-32/1-T, para. 686; Zimmermann, 'Article 8', in Triffterer, *Commentary* (2008), mn. 349 ff.; in terms of the problem in Lebanon and Gaza, Heinsch, *HuV-I*, 23 (2010), 139–40.

[54] Thürer, *IRRC*, 81 (1999), 744 (arguing that IHL applies, other than HRL, not only to states, but also to non-state groups and individuals and that it must be interpreted broadly so as to protect also victims in armed conflicts in 'failed states'; in his view the IHL principles are to be regarded as basic humanitarian demands applicable in any armed conflict); in a similar vein, Judgment in the Case concerning Military and Paramilitary Activities in and against Nicaragua, *ICJ Reports* (1986), pp. 14, 122 ff.; Pictet et al., *Commentary on the Geneva Conventions of 12 August 1949*, iv (1994), Article 3, pp. 35 ff.; Junod, 'Article 1 Protocol II', in Sandoz, Swinarski, and Zimmerman, *Commentary* (1987), pp. 1348 ff.

[55] cf. Junod, 'Article 1 Protocol II', in Sandoz, Swinarski, and Zimmermann, *Commentary* (1987), mn. 4462. See also *Akayesu*, No. ICTR-96-4-T, para. 625; *Prosecutor v Musema*, No. ICTR-96-13-T, Trial Chamber Judgment, para. 256 (27 January 2000).

[56] cf. Giladi, *GoJIL*, 4 (2012), 448, 452–5.

[57] Article 9 of the 1874 Brussels Declaration reads: 'The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions: 1. That they be commanded by a person responsible for his subordinates; 2. That they have a fixed distinctive emblem recognizable at a distance; 3. That they carry arms openly; and 4. That they conduct their operations in accordance with the laws and customs of war…', available at <http://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=FFEBAB4AC03FB12563CD00515516> accessed 29 May 2013. On the historical context, see Volume I of this treatise, p. 11 with fn. 64.

[58] *Musema*, No. ICTR-96-13-T, para. 257. See also *Prosecutor v Kamuhanda*, No. ICTR-95-54A-T, Trial Chamber Judgment, paras. 723–4 (22 January 2004); *Bagilishema*, No. ICTR-95-1A-T, paras. 99–101; *Akayesu*, No. ICTR-96-4-T, paras. 619–26.

[59] *Haradinaj et al.*, No. IT-04-84*bis*-T, para. 393; see also *Akayesu*, No. ICTR-96-4-T, paras. 120, 625; *Tadić*, No. IT-94-1-T, para. 562; *Prosecutor v Milošević*, No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, paras. 23–5 (16 June 2004); *Prosecutor v Limaj et al.*, No. IT-03-66-T, Trial Chamber Judgment, para. 89 (30 November 2005). For the ICC see *Prosecutor v Thomas Lubanga Dyilo*, No. ICC-01/04-01/06-803-tEN, Decision on the Confirmation of Charges, para. 233 (29 January 2007); *Prosecutor v Omar Hasan Ahmad Al Bashir*, No. ICC-02/05-01/09-3, Decision on the Prosecution's Application for a Warrant of Arrest, para. 59 (4 March 2009). Concurring, Schmitt, *Tallinn Manual Cyber Warfare* (2013), p. 88; dissenting view Cullen, *Non-International Armed Conflict* (2010), p. 157 (arguing that using this criterion the application of Common Article 3 would be limited to high-intensity armed conflicts).

one hand, planning and carrying out sustained and concerted military operations—operations that are kept up continuously and that are done in agreement according to a plan, and on the other hand, of imposing discipline in the name of the *de facto* authorities'.[60] The ICTY jurisprudence offers a list of indicia including 'factors signalling the presence of a command structure; factors indicating that the armed group could carry out operations in an organised manner; factors indicating a level of logistic; factors relevant to the armed group's level of discipline and its ability to implement the basic obligations of Common Article 3; and factors indicating that the armed group was able to speak with one voice'.[61] The ICC *Lubanga* TC suggests the following non-exhaustive list of relevant factors: 'the force or group's internal hierarchy; the command structure and rules; the extent to which military equipment, including firearms, are available; the force or group's ability to plan military operations and put them into effect; and the extent, seriousness, and intensity of any military involvement'.[62] However, '[n]one of these factors are individually determinative' and they 'should be applied flexibly'.[63]

The formal recognition of an insurgent movement as a party to the conflict (*recognition of belligerency*) is not of importance with regard to the existence of a non-international conflict and the respective application of IHL.[64] This already follows from the last sentence of Common Article 3 GCs which makes clear that the application of the minimum rules provided for by this provision 'shall not affect the legal status of the Parties to the conflict'. However, such recognition may entail the possibility that the insurgents, having effective political authority over a certain territory,[65] become a *de facto* regime and thereby—at least partially—a subject of international law.[66] While the transition from partial to full legal personality under international law is fluent, the latter gives the insurgents a state-like status and turns the originally non-international conflict into an international one.[67]

[60] *Musema*, No. ICTR-96-13-T, para. 257. See also *Limaj et al.*, No. IT-03-66-T, paras. 95–134, especially 113–17.

[61] *Haradinaj et al.*, No. IT-04-84*bis*-T, para. 395; *Đorđević*, No. IT-05-87/1-T, para. 1526.

[62] *Lubanga*, No. ICC-01/04-01/06-2842, para. 537 (footnote omitted).

[63] *Lubanga*, No. ICC-01/04-01/06-2842, para. 537.

[64] cf. Cullen, *Non-International Armed Conflict* (2010), p. 23; Paulus and Vashakmadze, *IRRC*, 91 (2009), 99; UK Ministry of Defence, *Manual* (2004), p. 382; for a contrary view, see Thielbörger, *HuV-I*, 26 (2013), 35 (arguing that the recognition of insurgent groups protects them from being treated as regular criminals; otherwise, the adversary government gains an enormous power to the detriment of these groups. Also, recognition entails that these groups are also bound by IHL); Solis, *Law of Armed Conflict* (2010), pp. 152–3 (arguing that 'the recognition of belligerency indicates that the parties are entitled to exercise belligerent rights, thus accepting that the rebel group possesses sufficient international personality to support the possession of such rights and duties', p. 152, but also pointing out that this formal instrument has become very uncommon); discussing special problems regarding the definition and recognition of belligerency, see Azarov and Blum, 'Belligerency', in Wolfrum, *MPEPIL* (2008 ff.), mn. 19–22.

[65] Note the importance of territorial control in this context against the general trend discussed at note 77 and main text.

[66] Hobe and Kimminich, *Völkerrecht* (2008), p. 175; Doehring, *Völkerrecht* (2004), § 2 mn. 261; Epping, 'Sonstige Völkerrechtssubjekte', in Ipsen and Epping, *Völkerrecht* (2004), § 8 mn. 15; concurring, Schaller, *SWP-Studien*, S24 (2005), pp. 16–17; about a 'legal status similar to a State', Herdegen, *Völkerrecht* (2012), § 11 mn. 1; Dahm, Delbrück, and Wolfrum, *Völkerrecht*, i/2 (2002), pp. 303–4; Frau, *HuV-I*, 26 (2013), 16.

[67] David, *Principes* (2008), pp. 157 ff., mn. 1.101 ff.; Bothe, 'Friedenssicherung und Kriegsrecht', in Vitzthum, *Völkerrecht* (2010), pp. 737–8, mn. 127–8; Epping, 'Sonstige Völkerrechtssubjekte', in Ipsen and Epping, *Völkerrecht* (2004), § 8 mn. 13; Herdegen, *Völkerrecht* (2012), § 11 mn. 2; Dahm, Delbrück, and Wolfrum, *Völkerrecht*, i/2 (2002), pp. 296 ff.; Kolb, 'Droit international pénal', in Kolb, *Droit international*

(c) Intensity

The intensity of the conflict plays out differently with respect to an international and non-international conflict. While in the former IHL may be applicable even in the absence of armed force or violence if a declaration of war or military occupation exists, in the case of a non-international armed conflict[68] the focus is on the intensity of the conflict and the organization of the parties in order to distinguish this situation from ordinary criminality, unorganized and short-lived insurrections, or terrorist activities.[69] The degree of intensity does not depend on the subjective judgment of the parties but must be assessed objectively on the basis of the conditions laid down in Common Article 3 GCs and AP II.[70] If it were otherwise, that is, the application of IHL depended on the discretionary (subjective) judgement of the parties, in most cases there would be a tendency for the conflict to be minimized so as not to apply the humanitarian rules. As a consequence, IHL's very purpose, namely the protection of the victims of armed conflicts, would not be achieved.[71] This is why Common Article 3 GCs is also applicable to 'each Party to the conflict', no matter whether it is a State Party to the GCs or not.[72] In practical terms, the intensity may, as correctly argued by the ICC *Lubanga* TC, be derived from factual indicators such as 'the scale, seriousness and increase of the attacks; type of operations; the mobilisation and distribution of weapons; length of time of combat operations; geographical expansion as well as whether the conflict has attracted the attention of the United Nations Security Council, and, if so, whether any resolutions on the matter have been passed'.[73] Further relevant, in part similar, factors suggested by the case law include 'the gravity of attacks and their recurrence; the temporal and territorial expansion of violence and the collective character of hostilities; whether various parties were able to operate from a territory under their control; an increase in the number of government forces; the mobilization of volunteers and the distribution and type of weapons among both parties to the conflict; the fact that the conflict led to a large displacement of people'.[74] As to

pénal (2008), p. 130; La Haye, *War Crimes* (2008), p. 14; on Colombia as an example, see Ramelli Arteaga, *El reconocimiento* (2000); Frau, *HuV-I*, 26 (2013), 16.

[68] Werle, *Völkerstrafrecht* (2012), mn. 1078–9; Werle, *Principles* (2009), mn. 985–6; Schmitt, *Tallinn Manual Cyber Warfare* (2013), p. 87; Queguiner, *IRRC*, 85 (2003), 276.

[69] *Akayesu*, No. ICTR-96-4-T, paras. 620, 625; *Tadić*, No. IT-94-1-T, para. 562; *Musema*, No. ICTR-96-13-T, paras. 256–7; OTP Situation in Colombia—Interim Report (14 November 2012), para. 125. See also Cullen, *Non-International Armed Conflict* (2010), pp. 122–33.

[70] *Akayesu*, No. ICTR-96-4-T, para. 603; Cullen, *Non-International Armed Conflict* (2010), p. 130.

[71] *Akayesu*, No. ICTR-96-4-T, para. 603.

[72] Tahzib-Lie and Swaak-Goldman, 'Determining the Threshold', in Lijnzaad, van Sambeck, and Tahzib-Lie, *Voice of Humanity* (2004), pp. 251–2; see Tahzib-Lie and Swaak-Goldman, p. 245, on the extraterritorial application of Common Article 3 if the conflict occurring in a member state has cross-border impact; similar, Queguiner, *IRRC*, 85 (2003), 284.

[73] *Prosecutor v Thomas Lubanga Dyilo*, No. ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute, para. 538 (14 March 2012); concurring, OTP Situation in Colombia—Interim Report, para. 126 (14 November 2012); see also *Haradinaj et al.*, No. IT-04-84*bis*-T, para. 394.

[74] Summarizing, Schmitt, *Tallinn Manual Cyber Warfare* (2013), p. 87 (footnotes omitted). See also *Prosecutor v Mrkšić*, No. IT–95-13/1-T, Trial Chamber Judgment, para. 419 (27 September 2007); *Prosecutor v Hadžihasanović and Kubura*, No. IT-01-47-T, Trial Chamber Judgment, para. 22 (15 March 2006); *Delalić et al.*, No. IT-96-21-T, para. 187; *Milošević*, No. IT-02-54-T, paras. 28–31; *Limaj et al.*, No. IT-03-66-T, paras. 135–67.

Common Article 3 GCs, it has been suggested that a state's resort to extraordinary means, in other words, military force, should be one of the criteria for its application.[75]

(d) Territorial control?

Further, the traditional view held that, pursuant to Article 1(2) AP II, the non-state actors must be able to dominate a sufficient part of the territory so as to maintain sustained and concerted military operations and to be in the position to implement the Protocol.[76] The territorial control criterion has, however, become increasingly doubtful,[77] especially in light of the modern mobile (asymmetric) guerrilla wars where the respective groups intentionally, as a strategy of combat, renounce stable territorial domains and instead prefer 'hit and run' tactics. In fact, in these conflicts far-reaching weaponry and highly mobile military equipment may be more important than stable territorial control.[78] Against this background it is not surprising that the criterion has not been required by the ICTY *Tadić* AC,[79] nor by the ICC *Lubanga* PTC or TC.[80] In any case, while the requirement of territorial control has certainly lost importance in light of the new 'asymmetric' and highly dynamic conflicts[81] within the framework of the so-called 'new wars',[82] it still serves as a useful indicator[83] for the 'ability to carry out military operations for a prolonged period of time'[84] and the existence of an 'organisational policy'.[85] In sum, what is clearly required in terms of internal organization is a centralized military command and a chain of command from top to bottom, that is, a military-like internal hierarchical structure,[86] accompanied by the capacity 'to carry out sustained and concerted military operations' (Article 1(1) AP II).

[75] cf. Gasser and Melzer, *Humanitäres Völkerrecht* (2012), pp. 68–9.

[76] *Musema*, No. ICTR-96-13-T, para. 258.

[77] Lubell and Derejko, *JICJ*, 11 (2013), 69.

[78] cf. Zimmermann, 'Article 8', in Triffterer, *Commentary* (2008), mn. 351; Cottier, 'Article 8', in Cottier, mn. 5; Werle, *Völkerstrafrecht* (2012), mn. 1075; Werle, *Principles* (2009), mn. 982; Tahzib-Lie and Swaak-Goldman, 'Determining the Threshold', in Lijnzaad, van Sambeck, and Tahzib-Lie, *Voice of Humanity* (2004), p. 246; König, *Legitimation* (2003), pp. 380–1; Mettraux, *Crimes* (2005), pp. 36–7; concurring, Olásolo, *Unlawful Attacks* (2008), p. 48; *Lubanga*, No. ICC-01/04-01/06-803-tEN, para. 233; Schabas, *ICC Commentary* (2010), p. 205.

[79] *Tadić*, No. IT-94-1-T, paras. 561–76. Mettraux, *Crimes* (2005), pp. 36–7; Moir, 'Conduct of Hostilities', in Doria, Gasser, and Bassiouni, *The Legal Regime of the ICC* (2009), p. 616.

[80] *Lubanga*, No. ICC-01/04-01/06-803-tEN, para. 233; *Lubanga*, No. ICC-01/04-01/06-2842, para. 536.

[81] Zimmermann, 'Article 8', in Triffterer, *Commentary* (2008), mn. 351; Werle, *JICJ*, 5 (2007), 953; Tahzib-Lie and Swaak-Goldman, 'Determining the Threshold', in Lijnzaad, van Sambeck, and Tahzib-Lie, *Voice of Humanity* (2004), p. 246; König, *Legitimation* (2003), pp. 380 ff.; Mettraux, *Crimes* (2005), pp. 36 ff; Paulus and Vashakmadze, *IRRC*, 91 (2009), 117–19.

[82] See, in particular, Münkler, *The New War* (2005).

[83] Pre-Trial Chamber II, *Situation in the Republic of Kenya*, No. ICC-01/09-19, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, para. 93 (31 March 2010).

[84] cf. *Al Bashir*, No. ICC-02/05-01/09-3, para. 60.

[85] While this requirement is taken from Article 7(2)(a) ICC Statute, it refers back to 'organized armed groups' within the meaning of Article 1(1) AP II for non-international armed conflicts (see Kreß, *LJIL*, 23 (2010), 862) and may, therefore, be applied in our context.

[86] Ipsen, 'Combatants and Non-combatants', in Fleck, *Handbook IHL* (2008), mn. 304. The ICTY requires at least 'the ability to exercise some control over its members', *Prosecutor v Boškoski and Tarčulovski*, No. IT-04-82-T, Trial Chamber Judgment, para. 196 (10 July 2008).

(e) Temporal aspect

As to the temporal framework of an armed conflict, Leslie Green once famously said that the 'law of armed conflicts operates and must be observed until the conflict ends, but, as with the commencement of hostilities, there is controversy in international humanitarian law and practice, as to the date of its end'.[87] There is general agreement that an armed conflict starts with the first use of armed force or—in an international conflict without use of force—with a declaration of war or a (also partial) occupation of territory of a foreign state;[88] it terminates, at the earliest, with the end of the hostilities or—in case of occupation—with the end of the occupation. While this follows from the first half of the first sentence of Article 3(b) AP I,[89] from the second half of this sentence and the second sentence it can at the same time be inferred that IHL remains applicable as long as there still exists a situation which needs to be regulated by this set of rules.[90] This means, so one may argue, that a conflict generally does not end before the previous (peaceful) situation has been re-established.[91] But when is this the case? How can this be exactly determined? The ICTY case law takes the view that an armed conflict can only be terminated by some sort of *formal agreement* between the conflicting parties, such as a peace treaty or the official surrender of one of the parties.[92] The main advantage of such a formal view is its legal certainty with regard to the (exact) termination date of a conflict and thus, the application of IHL. The obvious problem with this view is, however, that it ignores the *actual situation on the ground*, that is, situations where an armed conflict has been terminated as a matter of fact. For this reason, the prevailing view in the doctrine argues that an armed conflict can be terminated *via facti*.[93] Such a factual approach, of course, entails case-by-case decisions on the basis of a detailed analysis of the circumstances of each conflict. The resurgence of an armed conflict considered erroneously terminated *via facti* would then constitute

[87] Green, *Contemporary Law* (2008), p. 104.

[88] Ipsen, 'Bewaffneter Konflikt', in Ipsen and Epping, *Völkerrecht* (2004), § 68 mn. 1 ff.; Werle, *Völkerstrafrecht* (2012), mn. 1078–9; Werle, *Principles* (2009), mn. 985–6.

[89] It reads: '[T]he application of the Conventions and of this Protocol shall cease, in the territory of Parties to the conflict, on the general close of military operations and, in the case of occupied territories, on the termination of the occupation . . . '

[90] This part of the provision reads: '. . . except, in either circumstance, for those persons whose final release, repatriation or reestablishment takes place thereafter. These persons shall continue to benefit from the relevant provisions of the Conventions and of this Protocol until their final release repatriation or re-establishment.'

[91] Ipsen, 'Bewaffneter Konflikt', in Ipsen and Epping, *Völkerrecht* (2004), § 68 mn. 1 ff., mn. 4 ff.; Doehring, *Völkerrecht* (2004), § 11 mn. 646 ff.

[92] cf. *Tadić*, No. IT-94-1-AR72, para. 70 ('International humanitarian law . . . extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved.'); followed by *Kunarac et al.*, No. IT-96-23 & IT-96-23/1-A, para. 57; *Prosecutor v Limaj et al.*, No. IT-03-66-T, para. 84; *Haradinaj et al.*, No. IT-04-84*bis*-T, para. 396; *Prosecutor v Delić*, No. IT-04-83-T, Trial Judgment, para. 40 (15 September 2008); *Milutinović et al.*, No. IT-05-87-T, para. 127.

[93] cf. Greenwood, 'The Scope of Application', in Fleck, *Handbook IHL* (2008), mn. 250; Robinson, 'War Crimes', in Cryer et al., *Introduction ICL* (2010), p. 280; Stein and von Buttlar, *Völkerrecht* (2009), mn. 1222; David, *Principes* (2008), p. 260, mn. 1233; Ipsen, 'Bewaffneter Konflikt', in Ipsen, *Völkerrecht* (2004), § 68 II mn. 5; critical for reasons of certainty, Queguiner, *IRRC*, 85 (2003), 282–3. See also Wallensteen and Sollenberg, *JPR*, 34 (1997), 342 identifying three forms of termination (formal peace agreement; victory of one party or surrender of the other party; other forms of *factual termination*, including by way of a ceasefire).

a new armed conflict[94] when, in fact, it is only the continuation of an old conflict. To avoid this unfortunate consequence one would have to refine the criteria that determine the existence of the armed conflict threshold.[95]

(f) Geographical aspect

As to the geographical extension of the hostilities, international criminal tribunals traditionally hold that it is sufficient to establish the existence of the conflict in one part of a territory with effect for the whole territory.[96] Thus, once the existence of an armed conflict for a certain part of the territory has been established, IHL is applicable in all parts of this territory, whether actual combat takes place there or not.[97] It is not necessary that the crimes must all be committed in the precise geographical region where an armed conflict is taking place at a given moment;[98] rather, it suffices that the respective crimes (committed elsewhere) are related to the hostilities.[99] These considerations beg the question whether such a flexible determination of the geographical extension of an armed conflict can be transferred to large (federal) states like the USA, Mexico, or Brazil without further qualification. In other words, would an armed conflict in one state of a federation amount to an armed conflict in the whole area of the respective federal state? From a formal sovereignty perspective this seems to be the case: given that state sovereignty is indivisible, an armed conflict in one, albeit small, part of the national territory impacts upon the whole territory, that is, the respective armed conflict exists in the respective state, being a subject of international law, as a whole. This formal approach may however lead to quite surrealistic solutions if the hostilities are only limited to a small part of the respective territory. Take the case of the uprising and subsequent armed conflict in the Mexican State of Chiapas in the 1990s: given that Chiapas only amounts to 3.8 per cent of the whole Mexican territory, it would border on the absurd to classify the whole Mexican Federation as under the scenario of an armed conflict within the meaning of IHL as a result of the existence of hostilities in such a geographically limited area. Or take the more recent conflict in

[94] cf. David, *Principes* (2008), p. 261, mn. 1235 with the example of an operation of US-UK armies to trace Al Qaeda in southeast Afghanistan. For the same conclusion, see Tahzib-Lie and Swaak-Goldman, 'Determining the Threshold', in Lijnzaad, van Sambeck, and Tahzib-Lie, *Voice of Humanity* (2004), pp. 248–9.

[95] cf. Kreutz, *JPR*, 47 (2010), 244, proposing three criteria to assess whether the armed conflict threshold still exists: (1) a stated incompatibility, i.e., the disagreement between at least two parties (to a conflict) with regard to certain resources; (2) the existence of organized groups of which at least one is the government of a state; and (3) armed activity resulting in at least twenty-five deaths per year ('An armed conflict is a contested incompatibility that concerns government and/or territory where the use of armed force between two parties, of which at least one is the government of a state, results in at least 25 battle-related deaths in one calendar year.').

[96] *Blaskić*, No. IT-95-14-T, para. 64; *Hadžihasanović and Kubura*, No. IT-01-47-T, para. 14; *Limaj et al.*, No. IT-03-66-T, para. 84; *Milutinović et al.*, No. IT-05-87-T, para. 127; *Prosecutor v Gotovina et al.*, No. IT-06-90-T, Trial Chamber Judgment, Volume II, para. 1676 (15 April 2011); *Perišić*, No. IT-04-81-T, para. 72.

[97] *Tadić*, No. IT-94-1-AR72, para 70; *Blaskić*, No. IT-95-14-T, para. 64; *Haradinaj et al.*, No. IT-04-84*bis*-T, para. 396.

[98] *Blaskić*, No. IT-95-14-T, para. 69.

[99] *Tadić*, No. IT-94-1-AR72, para. 70; *Blaskić*, No. IT-95-14-T, para. 69; *Prosecutor v Kordić and Čerkez*, No. IT-95-14/2-A, Appeal Chamber Judgment, para. 319 (17 December 2004).

Syria where the hostilities were confined to certain areas without extending to the whole territory.[100] Thus, from a more practical or realistic perspective (and deviating from the *Tadić* case law), the application of IHL would basically be limited to the actual 'hot combat zone', that is, where the actual hostilities take place.[101] Application beyond this zone would require a nexus to the actual hostilities.[102] In this regard, with respect to activities outside the combat zone, geographical distance is not the decisive criterion, but rather direct participation in the (related) hostilities.[103] The hard issue is, of course, to precisely determine the relevant criteria of 'combat zone', 'nexus to hostilities', 'direct participation', and, more generally, the degree of geographical extension of combat which turns the whole national territory into a zone of armed conflict within the meaning of IHL.

(4) International, non-international, and internationalized armed conflict

In the preceding section, we have already referred to the distinction between an international and a non-international conflict without, however, explicitly defining the underlying concepts. This must be done here first, before taking a closer look at different forms of non-international conflicts (especially in terms of their duration) and some special regimes which may be relevant to the application of Article 8 ICC Statute.

(a) Basic concepts

Traditionally, the concept of 'international armed conflict' has been understood as a conflict between two or more states, and the concept of a 'non-international conflict' as one between a state and an armed group of the same nationality within the territory of that state.[104] The ICC Statute also recognizes a conflict between non-state actors on the

[100] Nebehay, 'Some Syria violence amounts to civil war: Red Cross', Reuters (2012).

[101] cf. Lubell and Derejko, *JICJ*, 11 (2013), 71–2 (pointing out that an overly broad application of IHL would also facilitate abuse, e.g. 'to legitimize the otherwise unlawful uses of lethal force against individuals or during situations that are not directly related to the prevailing armed conflict', p. 71). This notion also played a role in the drafting of AP II, cf. ICRC, *Conference of Government Experts*, i (1972), p. 68, mn. 2.59. Apparently in favour of a broad application of IHL, see Cullen, *Non-International Armed Conflict* (2010), pp. 140–2.

[102] Lubell and Derejko, *JICJ*, 11 (2013), 73–6. Such an extended reach of IHL may be necessary in order to protect the fundamental guarantees of individuals that are relocated away from the combat zone and to delimit ordinary crimes from war crimes, which may occur even away from the combat zone as long as the respective conduct possesses a nexus to the hostilities (cf. *Tadić*, No. IT-94-1-AR72, para. 70; *Kunarac et al.*, No. IT-96-23-T & IT-96-23/1-T, para. 402). The necessary nexus is to be determined on a case-by-case basis considering several factors, for example the link between the target and the armed conflict. In favour of the nexus requirement with regard to drone strikes, see also Casey-Maslen, *IRRC*, 94 (2012), 614.

[103] Lubell and Derejko, *JICJ*, 11 (2013), 84–6 (arguing that this is especially important in so-called extraterritorial non-international armed conflicts or with regard to drone strikes taking place outside combat zones). With IHL applicable, legitimate targets can be determined by their 'belligerent nexus', i.e., they have to be closely related to the on-going hostilities and their action 'must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another' (Melzer, *Interpretive Guidance* (2009), p. 46). On the lack of any geographical limits in 'cyberwar', see Droege, *IRRC*, 94 (2012), 565–6.

[104] cf. Cottier, 'Article 8', in Triffterer, *Commentary* (2008), mn. 5; La Haye, 'Internal Armed Conflict', in Cassese, *Companion* (2009), p. 379; Vierucci, 'International Armed Conflict', in Vierucci, p. 383.

territory of a (failed) state (Article 8(2)(f): 'between such groups'); such a conflict is, as a rule, seen as non-international unless one of the groups is acting on behalf of another state (see subsection (b)(iii)). Finally, a conflict between a state and an armed group may occur in the territory of another state. In this situation the international or non-international nature of this conflict is controversial.[105] One view adheres to a literal interpretation of Common Article 3 GCs, focusing on the 'geographical' element ('in the territory') and thus considers such a situation to be an international armed conflict. Another view regards it as a non-international conflict, arguing that the term 'one' in Common Article 3 refers to any Contracting Party, but not necessarily to the state involved in the conflict. Accordingly, the crucial criterion in determining the nature of a conflict remains the status of the parties, not the geographical location of the conflict.[106]

(b) Different forms of non-international armed conflicts

Conflicts of a different (legal) nature may take place at the same time in a single territory.[107] In such a situation of *mixed* (simultaneous or parallel) armed conflicts it must be clarified to which conflict the accused's alleged criminal conduct belongs and how this conflict is to be qualified.[108] In the case of a non-international armed conflict, the kind of armed violence is further qualified in a temporal sense, that is, it must be '*protracted*' ('*de manière prolongée*', '*prolongado*').[109] Article 1(1) AP II requires, to this end, the ability to carry out 'sustained and concerted military operations'. The ICC Statute adopted this requirement regarding non-international conflicts for 'serious violations of the laws and customs applicable in armed conflicts' (Article 8(2)(e) ICC Statute), that is, such conflicts must be 'protracted' (Article 8(2)(f)). Thus, Article 8 distinguishes between 'normal' and 'protracted' non-international conflicts (Article 8(2)(d) vs. Article 8(2)(f)). In the latter case, both serious violations of Common Article 3 GCs and serious violations of the laws and customs of war qualify as war crimes. In

[105] cf. Zimmermann, 'Article 8', in Triffterer, Commentary (2008), mn. 267; see also Schmitt, *Tallinn Manual Cyber Warfare* (2013), p. 85.

[106] Lubell and Derejko, *JICJ*, 11 (2013), 67; in this vein, see also Werle, *Principles* (2009), mn. 998.

[107] cf. *Lubanga*, No. ICC-01/04-01/06-2842, para. 540 with further references in nn. 1643 and 1644 (in particular invoking the *Tadić* Interlocutory Appeal Decision, paras. 72–7 and the ICJ, *Nicaragua v United States of America*, Case concerning Military and Paramilitary Activities in and against Nicaragua, Judgment, 27 June 1986, para. 219). This is also recognized in scholarly writings, see Palomo Suárez, *Kindersoldaten* (2009), pp. 128–9; Ambos, *Nociones* (2011), p. 83; Ambos, *ICLR*, 12 (2012), 129 (both with further references). See also Milanovic and Hadzi-Vidanovic, 'A Taxonomy of Armed Conflict', *SSRN* (2012) (arguing that 'the fact a conflict erupts in an occupied territory between the occupying state and a non-state actor does not mean that this prima facie NIAC becomes internationalized. . . . As with cases of mixed or parallel armed conflicts, IHL can allow for the possibility of the simultaneous existence of occupation and of a NIAC in occupied territory').

[108] *Lubanga*, No. ICC-01/04-01/06-2842, paras. 551 ff.; Palomo Suárez, *Kindersoldaten* (2009), p. 129; Werle, *Völkerstrafrecht* (2012), mn. 1091; Ambos, *Nociones* (2011), p. 83; Ambos, *ICLR*, 12 (2012), 129.

[109] *Tadić*, No. IT-94-1-AR72, para. 70; concurring, *Delalić et al*., No. IT-96-21-T, para. 183; *Furundzija*, No. IT-95-17/1-T, para. 59; *Milutinović et al*., No. IT-05-87-T, para. 126; *Lukić and Lukić*, No. IT-98-32/1-T, para. 868; *Lubanga*, No. ICC-01/04-01/06-803-tEN, para. 234. See also Cullen, *Non-International Armed Conflict* (2010), pp. 127–8 (arguing that while outbreaks of violence do not have to occur continuously, in cases of only rare outbreaks of violence one cannot reasonably speak of an 'armed conflict').

contrast, in 'normal' non-international conflicts serious violations of the laws and customs of war are not considered to be war crimes.

The criterion of *duration*, implicit in the term 'protracted', is of course controversial. On the one hand, it should be applied to Article 8(2)(d) and (f) equally, and hence a uniform definition of non-international armed conflicts is to be assumed.[110] On the other hand, it is more radically argued that this criterion finds no basis in international treaties and has no priority or even autonomous value alongside the other criteria such as intensity of the conflict and degree of organization of the parties.[111] This view is convincing in that situations are indeed conceivable where the limited duration of a conflict is compensated for by other criteria, in particular the intensity and seriousness of IHL violations.[112] Thus, in any case, the criterion of duration should be interpreted restrictively. It cannot reasonably mean that military operations must continue uninterrupted for an overly long period but only, in the sense of the French and Spanish versions of Article 8(2)(f) ICC Statute ('*de manière prolongée*', '*prolongado*'), for a certain time.[113] This is also in line with implementing legislation which defines the temporal element more precisely. Thus, the German VStGB requires for all kinds of non-international conflicts 'hostilities . . . of a certain duration'.[114] A broader interpretation, implying a higher threshold for non-international conflict crimes, would indeed be 'a patent absurdity',[115] for it cannot be plausibly explained why assaults to sanitary units, mass rapes, deportation, or intentional mutilation should only amount to war crimes if the underlying non-international conflict is not just a 'normal' but a 'protracted' one. In fact, the distinction recalls bad memories of the classical two-box approach, exempting crimes committed in non-international conflicts from criminal responsibility. It deserves the same criticism for being arbitrary and contravening the *raison d'être* of IHL and ICL, that is, the protection of all persons who do not actively take part in hostilities.

In any case, the modern, more flexible, and less static (non-international) armed conflicts already discussed[116] give room for a further differentiation—going beyond the mere temporal distinction—between three types of non-international conflicts with a decreasing threshold of application: the classic civil war in terms of Article 1 AP II, the 'protracted' conflict between a state and insurgents, or between groups of the latter in

[110] Kreß, *IsYbHR*, 30 (2000), 118; Dahm, Delbrück, and Wolfrum, *Völkerrecht*, i/3 (2002), p. 1069; Werle, *Völkerstrafrecht* (2012), mn. 1076; Werle, *Principles* (2009), mn. 983; also Olásolo, *Unlawful Attacks* (2008), pp. 31–2. For a further analysis, see Cullen, *Non-International Armed Conflict* (2010), pp. 174–9 (illustrating the drafting history of Article 8(2)(f)) and pp. 180–5 (applying the findings and conclusions from the analysis of the drafting history of Article 8(2)(c) and (e)).

[111] Queguiner, *IRRC*, 85 (2003), 278 ff.

[112] In this way, the Inter-American Commission on Human Rights considered a two-day long attack on the Argentine military barrack *La Tablada* with approximately fifty persons as an (non-international) armed conflict because the occurrence exceeded mere riots within the meaning of Article 1(2) AP II given the 'concerted nature of the hostile acts undertaken by the attackers, the direct involvement of government armed forces, and the nature and level of the violence . . .' (Report no. 55/97, case no. 11.137 Argentina, paras. 155–6, available at <http://www.cidh.oas.org/annualrep/97span/Argentina11.137.htm> accessed 28 January 2013); see also Queguiner, *IRRC*, 85 (2003), 279.

[113] cf. Zimmermann, 'Article 8', in Triffterer, *Commentary* (2008), mn. 334.

[114] cf. the legislative motives, reprinted in Lüder, *Materialien* (2002), p. 43.

[115] Condorelli, 'War Crimes', in Politi and Nesi, *Rome Statute* (2002), p. 113.

[116] Note 78 and main text.

terms of Article 8(2)(f) ICC Statute, and—last but not least—conflicts (without the required territorial control under AP II) in terms of Common Article 3 GCs (Article 8(2)(d) ICC Statute).[117]

(c) Special regimes

(i) War of liberation

In a so-called war of liberation, 'peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination' (Article 1(4) AP I). Such a conflict, albeit normally limited to a national territory, is considered, at least for the States Parties to AP I, as an international conflict by way of the reference in Article 1(4) AP I to Article 2 GC (*via* Article 1(3) AP I).[118] It is also considered an international conflict since it is based on the right to self-determination which is a right under *international* law.[119] Of course, the whole issue is of little practical importance given that national wars of liberation in the sense of Article 1(4) AP I rarely take place today.[120]

(ii) War of secession/disintegration

In case of disintegration or secession of a state, the question arises as to at what point in time a new state comes into existence and, thus, an originally non-international conflict turns into an international one. A good example is the conflict in the Former Yugoslavia: at the latest, with the international recognition[121] of the new republics of Slovenia (15 January 1992), Croatia (15 January 1992), and Bosnia-Herzegovina (7 April 1992) by the EU and their admission into the UN on 22 May 1992,[122] the formerly non-international conflict had turned into an international one between these states and the (remaining) Federal Republic of Yugoslavia (Serbia and Montenegro)

[117] See also David, *Principes* (2008), pp. 128–9, mn. 1.75; Queguiner, *IRRC*, 85 (2003), 208. About the classic distinction between the common Article 3 GCs and the AP II conflict, see Kolb, 'Droit international pénal', in Kolb, *Droit international pénal* (2008), pp. 132–3; Olásolo, *Unlawful Attacks* (2008), pp. 30 ff.; however, for an equal treatment of the threshold of Article 8(2)(f) and Common Article 3 GCs, Cullen, *JCSL*, 12 (2008), 423 ff. In respect of the downwards delimitation, especially regarding terrorist groups, see Olásolo, *Unlawful Attacks* (2008), pp. 38 ff.

[118] Ipsen, 'Bewaffneter Konflikt', in Ipsen and Epping, *Völkerrecht* (2004), § 66 mn. 15 ff.; Zimmermann, 'Article 8', in Triffterer, *Commentary* (2008), mn. 249–50; David, *Principes* (2008), pp. 184 ff., mn. 1.135 ff.; see also Bassiouni, *JCL&Crim*, 98 (2008), 743 ff.

[119] cf. Doehring, *Völkerrecht* (2004), § 11 mn. 587; Dahm, Delbrück, and Wolfrum, *Völkerrecht*, i/2 (2002), pp. 311–12; see also La Haye, *War Crimes* (2008), p. 14; critically, König, *Legitimation* (2003), pp. 357–8.

[120] Ipsen, 'Bewaffneter Konflikt', in Ipsen and Epping, *Völkerrecht* (2004), § 66 mn. 3 and 19.

[121] The mere (one-sided) declaration of independence is—contrary to the decision of the BayObLG of 23 May 1997 (3St RR 20/96, reprinted in *NJW*, 51 (1998), 393)—not sufficient (cf. Meron, *AJIL*, 88 (1994), 81); Rothewell, 'International Legal Personality', in Rothwell et al., *International Law* (2011), pp. 235–6. A more recent example is Kosovo's declaration of independence. After the declaration of independence, the statehood of Kosovo has been fiercely debated; the ICJ separated the question of the legality of such a declaration from its consequence (i.e., the recognition of statehood), and only affirmed the former (ICJ, Advisory Opinion of 22 July 2010, paras. 51, 56; see also von Glahn and Taulbee, *Law Among Nations* (2012), pp. 149–50; Fierstein, *BUILJ*, 26 (2008), 430–1). In any case, recognition by other states is necessary, see Ryngaert and Sobrie, *LJIL*, 24 (2011), 479.

[122] De Hoogh, *BYbIL*, 72(1) (2001), 258–9.

(FRY).[123] Thus, an originally non-international conflict becomes an international one with the recognition of the new state.[124]

(iii) Foreign intervention

It is less clear whether and how a foreign intervention or participation in a conflict taking place in one territory may 'internationalize' this conflict. The issue came up in the conflict in the Former Yugoslavia, in particular with respect to the Muslim-Serbian conflict in Bosnia-Herzegovina and the political support of the Serb entity ('Republika Srpska') through the FRY, and the military support of the (newly founded) Bosnian-Serbian Army (VRS) through the Yugoslav Army (JNA).[125]

While a foreign intervention may internationalize a conflict, it does not necessarily turn a non-international conflict between various non-state actors into an international one. The situation in the Ituri region of the Democratic Republic of the Congo (DRC), as discussed in the *Lubanga* case, is a case in point.[126] While the PTC I considered the conflict as international as long as Uganda had been an occupying force in the Ituri region, the Trial Chamber, albeit recognizing the 'direct intervention' of Uganda,[127] did not consider this fact relevant for the qualification of the conflict in which Lubanga's armed group, the UPC/FPLC, took part. In the Trial Chamber's view, Uganda's 'intervention would only have internationalised the conflict between the two states concerned (viz. the DRC and Uganda)'.[128] In contrast, 'the conflict to which the UPC/FPLC was a party was not "a difference arising between two states" but rather protracted violence carried out by multiple non-state armed groups' and thus, 'it remained a non-international conflict notwithstanding any concurrent international armed conflict between Uganda and the DRC'.[129] The Chamber further clarifies that 'the existence of a possible conflict that was "international in character" between the DRC and Uganda does not affect the legal characterisation of the UPC/FPLC's concurrent non-international armed conflict with the APC and FRPI militias, which formed part of the internal armed conflict between the rebel groups'.[130]

In general terms, one can speak of an internationalization of a conflict if the acts of one of the parties to the conflict can be attributed to a foreign state, that is, if the individuals or groups taking part in the conflict are *de facto* organs of this state[131] or if their conduct can be imputed to this state by other criteria (indirect intervention).[132]

[123] cf. *BGH*, No. 3 StR 215/98, *BGHSt* 45, 73–4, reprinted in *NStZ*, 19 (1999), 399–400 (30 April 1999); BayObLG, No. 3St RR 20/96, *NJW*, 51 (1998), 394 (23 May 1997). On the jurisprudence of the ICTY, cf. Mettraux, *Crimes* (2005), p. 58.

[124] David, *Principes* (2008), pp. 198 ff., mn. 1.159 ff.

[125] cf. Robinson, 'War Crimes', in Cryer et al., *Introduction ICL* (2010), p. 282; Ambos, *NStZ*, 19 (1999), 227–8.

[126] cf. Ambos, *ICLR*, 12 (2012), 128 ff. (critical of the Trial Chamber's approach).

[127] *Lubanga*, No. ICC-01/04-01/06-2842, para. 563.

[128] *Lubanga*, No. ICC-01/04-01/06-2842, para. 563.

[129] *Lubanga*, No. ICC-01/04-01/06-2842, para. 563.

[130] *Lubanga*, No. ICC-01/04-01/06-2842, para. 565.

[131] *Prosecutor v Tadić*, No. IT-94-1-A, Appeals Chamber Judgment, para. 104 (15 July 1999).

[132] Regarding the distinction between direct/indirect intervention, see *Tadić*, No. IT-94-1-A, para. 84.

These criteria are highly disputed, though, and we will limit our analysis to the different positions discussed at the level of ICL, especially with regard to the ICTY's position.[133]

The *Tadić* TC followed the *effective control* test as developed by the ICJ in the *Nicaragua* case,[134] requiring that the foreign state exercises effective control over a military or paramilitary group with respect to the specific operations of this group by issuing specific instructions.[135] This test was rejected by the *Delalić* TC and the *Tadić* AC since, *inter alia*, it was considered not appropriate for the question at hand, that is, the question of individual (criminal)—not state—responsibility.[136] Instead, a distinction was made between the persons or groups which were object of the control of the foreign state. In the case of military or paramilitary groups, the foreign state need not only equip and finance the group, but also coordinate or help in the general planning of its military activity, that is, an *overall control* is necessary but also suffices. In particular, the foreign state need not issue specific instructions to the head or members of the group.[137] In the case of individuals or non-militarily organized groups, the foreign state must issue specific instructions or directives aimed at the commission of specific acts or publicly approve the commission of such acts.[138] In addition, it may also happen that certain individuals assimilate to organs of a foreign state 'on account of their actual behaviour within the structure of [that] State (and regardless of any possible requirement of State instructions)'[139] and, as a consequence, their behaviour may be attributed to this state.[140] In other words, according to the 'effective control test', the other state has to be in effective control of a military or paramilitary group, and this control must be exercised with respect to operations contrary to humanitarian law;[141] in contrast, 'overall control' is broader since it does not require that the other state issues instructions or directives for the commission of specific acts.[142] While the ICJ adheres to the 'effective control' test,[143] the ICC—for now—has adopted the 'overall control' test.[144] These different approaches make clear that there is a distinction between collective attribution according to the law of state responsibility, on the one hand, and individual criminal law attribution according to ICL, on the other; also, these different approaches

[133] For a profound analysis, see de Hoogh, *BYbIL*, 72 (2001), 255, arguing at 264 ff. (275–6) that the Bosnian Serb Army (VRS) and the Republika Srpska were *de facto* organs of the FRY since 'they operated within the organic structure of the FRY'. He further examines (at 277 ff.) the question in light of Article 8 of the ILC's 2001 Draft Articles of State Responsibility showing that the ILC does not follow the *Tadić* AC. See also Kreß, *RGDIP*, 150 (2001), 93.

[134] ICJ, *Nicaragua v USA*, Judgment (1986), paras. 14, 349.

[135] ICJ, *Nicaragua v USA*, Judgment (1986), para. 115; *Tadić*, No. IT-94-1-T, para. 585.

[136] *Delalić et al.*, No. IT-96-21-T, paras. 262–3; *Tadić*, No. IT-94-1-A, para. 103.

[137] *Tadić*, No. IT-94-1-A, paras. 131, 137.

[138] *Tadić*, No. IT-94-1-A, paras. 132, 137.

[139] *Tadić*, No. IT-94-1-A, para. 141 (emphasis omitted).

[140] *Tadić*, No. IT-94-1-A, paras. 141–4.

[141] ICJ, *Nicaragua v USA*, Judgment (1986), para. 115. Recently confirmed in ICJ, *Congo v Uganda*, Judgment (2005), para. 150.

[142] *Tadić*, No. IT-94-1-A, para. 131; Robinson, 'War Crimes', in Cryer et al., *Introduction ICL* (2010), pp. 235–6.

[143] ICJ, *Congo v Uganda*, Judgment (2005), para. 160, *obiter* referring to the relevant sections of the Nicaragua Judgment (1986). Concurring, Goldstone and Hamilton, *LJIL*, 21 (2008), 97 ff. (discussing the dissenting opinions of the ICTY AC); critically, Chenevier, *CLJ*, 65 (2006), 264 ('By this manoeuvre it [the Court] bypassed any discussion of the controversial "effective control" standard').

[144] *Lubanga*, No. ICC-01/04-01/06-803-tEN, para. 210; *Lubanga*, No. ICC-01/04-01/06-2842, para. 541.

reflect the different perspectives of traditional public international law and international criminal tribunals.

The situation is, in any case, different for interventions based on a *UN mandate* (under Chapter VII of the Charter)[145] and/or with the *consent of the territorial state*.[146] If full operational control remains in the hands of the territorial state and it consented to the intervention, the character of the conflict remains unchanged.[147] In other words, the mere presence of peacekeeping or multinational troops in a foreign territory without any operational command[148] cannot change the character of the conflict. In particular, a non-international conflict—like the one in Afghanistan between the Karzai government and the Taliban—does not turn into an international one by the intervention of foreign troops—like the NATO-led International Security Assistance Force (ISAF)—'on invitation' to support the formal government.[149] The situation may change, however, if the respective foreign armed forces remain under national command and—in the case of a UN operation—the UN is merely given the power to delegate without operational control. In such a case one can speak of a true internationalization since the employment and use of force by the foreign troops is attributable to the respective sending states. Even if national armed forces are incorporated into the UN's command structure, the conflict is still internationalized by the UN's participation since it is a subject of international law and thereby also subject to the customary law of armed conflict.[150] Last but not least, terrorist attacks on a state may amount to an international conflict if the terrorist acts can be attributed to a foreign state (like the 9/11 Al Qaeda attacks attributable to the former Afghan Taliban government).[151]

(iv) Spillover effects

While an armed conflict may entail 'spillover effects' such as those caused by the retreat of one of the parties to the conflict into the territory of a neighbouring state,[152] the extraterritorial reach of such a conflict always reverts to that of the original territory,

[145] See Robinson, 'War Crimes', in Cryer et al., *Introduction ICL* (2010), p. 281; Paulus and Vashakmadze, *IRRC*, 91 (2009), 101 (arguing that a conflict may only be internationalized when foreign intervention launches military action against an effective government in support of rebel groups, that is, in a situation like that of the NATO intervention in Lybia against the former Gaddafi government).

[146] The consent of the territorial state is not treated consistently in international documents; for a detailed discussion see Nolte, *Eingreifen auf Einladung* (1999), pp. 133–40.

[147] Nolte, *Eingreifen auf Einladung* (1999), pp. 210–11, (arguing, with reference to UN intervention in the DRC, that the UN troops were not authorized to use force against the government but only to use force to prevent a civil war; the government itself consented to the intervention which therefore did not constitute an imposed sanction under Chapter VII of the UN Charter); Paulus and Vashakmadze, *IRRC*, 91 (2009), 101 (intervention in support of the effective government fighting against rebels, for example, ISAF intervention in Afghanistan against the Taliban, does not internationalize a conflict).

[148] In this case, the peacekeeping troops would be subsidiary organs of the General Assembly (Article 22 UN Charter) or of the Security Council (Article 29 UN Charter), cf. David, *Principes* (2008), pp. 177 ff., mn. 1.127 ff.

[149] cf. Ambos, *NJW*, 24 (2010), 1726; differentiating Ambos and Alkatout, *IsLR*, 45 (2012), 350–1; Safferling and Kirsch, *JA*, 42 (2010), 83; see also *Prosecutor v Callixte Mbarushimana*, No. ICC-01/04-01/10-465-Red, Decision on the Confirmation of Charges, para. 101 (16 December 2011).

[150] Ipsen, 'Bewaffneter Konflikt', in Ipsen, *Völkerrecht* (2004), § 66 mn. 20–1, § 67 mn. 5; Bothe, 'Friedenssicherung und Kriegsrecht', in Vitzthum, *Völkerrecht* (2010), pp. 737–8 mn. 127; David, *Principes* (2008), pp. 225 ff., mn. 1.191 ff.; Palomo Suárez, *Kindersoldaten* (2009), p. 126.

[151] cf. David, *Principes* (2008), pp. 125 ff., mn. 1.58; about the characterization of these attacks as war crimes, David, *Principes* (2008), pp. 804–5, mn. 4.200; Knoops, *ICLR*, 8 (2008), 143.

[152] Paulus and Vashakmadze, *IRRC*, 91 (2009), 119; Lubell and Derejko, *JICJ*, 11 (2013), 77–81.

that is, a 'spillover conflict' cannot exist independently.[153] Take, for example, the conflict between the USA and Al Qaeda in Pakistan: arguably, the conflict between the USA and the Taliban/Al Qaeda in Afghanistan has 'spilled over' to Pakistan, in other words, the USA has carried its fight into neighbouring Pakistan.[154] Under such an assumption, the original place of the conflict would be Afghanistan, and one may speak of a spillover effect. Alternatively, one may not argue with a simple extension of the Afghan conflict, but instead adopt the US claim of a worldwide 'war' against Al Qaeda, irrespective of any territorial link whatsoever.[155] Of course, this view breaks with any territorial link and thus, can justify combat operations against Al Qaeda and other terrorists far away from Afghanistan.[156]

(v) Military occupation

According to Article 42 of the Regulations to the 1907 Hague Convention (IV)[157] (hereinafter 'the Hague Regulations') a 'Territory is considered occupied when it is actually placed under the authority of the hostile army'. Thus, *authority* is the key concept. Indeed, so the provision continues, 'the occupation extends only to the territory where such authority has been established and can be exercised'. Subsequently, the concept of occupation was extended to territory where the 'occupation meets with no armed resistance' (Common Article 2(2) GCs) and the rules governing occupation have been further developed (cf. Part III Section III GC IV), but the original concept, resting on authority, has never been abandoned. In fact, Article 154 GC IV explicitly indicates that the GC IV is supplementary to the Hague Law, from which it follows that a military occupation should be mainly determined by the 1907 Hague

[153] In this vein, denying an armed conflict between a state and an international terror network because of the impossibility to determine the conflict's territorial spread, see Machon, *Targeted Killing* (2006), p. 52. See generally for the geographic dimension of an armed conflict: Tribunal Militaire d'Appel Suisse, Fulguence Niyonteze, Jugement d'appel, 1A, B, III, ch 3, B <http://www.vbs.admin.ch/internet/vbs/de/home/documentation/oa009/oa009n.parsys.0004.downloadList.00041.DownloadFile.tmp/entscheid021.pdf> accessed 28 January 2013; *Akayesu*, No. ICTR-96-4-T, paras. 635–6.

[154] In this sense, in particular in favour of a qualification of the military operations in Afghanistan and in Pakistan's tribal lands as one single non-international armed conflict in Afghanistan, see Dinstein, 'Terrorism and Afghanistan', in Schmitt, *The War in Afghanistan* (2009), p. 52; similarly stressing that the USA views Afghanistan and Pakistan militarily 'as a single theatre of operations', see Fair and Jones, *Survival*, 51, Nr. 6 (2009), 161.

[155] In this sense, see, for example, Corn, 'Making the Case', in Schmitt, *The War in Afghanistan* (2009), pp. 190 ff. For a discussion with further references, see Ambos and Alkatout, *IsLR*, 45 (2012), 346 ff (arguing, *inter alia*, that Al Qaeda does not constitute an armed organized group under IHL); for the same view, see Paust, *JTransnat'lLPol'y*, 19 (2009–10), 260 ('some non-state actors, such as al Qaeda, do not meet the test for insurgent status'); Lubell, *Extraterritorial Use of Force* (2010), p. 118 ('As for Al-Qaeda it is hard to conclude that it currently possesses the characteristics of a party to a conflict'); Heller, *JICJ*, 11 (2013), 109–11; Cunningham, *HuV*-I, 26 (2013), 58; contra, however, Solis, *Naval War College Review*, 60 (2007), 205, who states that Al Qaeda—without further argument—constitutes an organized armed group; Ohlin, *JICJ*, 11 (2013), 31–2. See also Chesney, *YbIHL*, 13 (2010), 38, who claims that if the USA is in an armed conflict with Al Qaeda, IHL is applicable wherever its members can be found.

[156] cf. Dinstein, 'Terrorism and Afghanistan', in Schmitt, *The War in Afghanistan* (2009), pp. 53–4 ('Actions taken by the United States and numerous other countries against al Qaeda and diverse groups of terrorists in far-flung parts of the globe, beyond the borders of Afghanistan and its environs, do not constitute an integral part of the inter-state war raging in Afghanistan').

[157] See on the multiple sources of the Hague Law, Volume I of this treatise, pp. 11–12.

Regulations.[158] From this applicable law it also follows that military occupation only exists against the background of an international armed conflict.[159]

Article 43 of the Hague Regulations obliges the occupying power to 'take all the measures in his power to restore, and ensure, as far as possible, public order and safety'. Thus, it is clear that military occupation is predicated not only on authority but also on (effective) *control*.[160] In other words, the original authority is later substituted or superseded—in an ideal situation of occupation—by the effective control of the occupying power.[161] Of course, given the multiple forms of occupation, the evaluation of an effective control may be problematic.[162] In any case, as indicated by Common Article 2(2) GCs quoted earlier, the existence of armed groups does not necessarily exclude the legal regime of occupation, nor does a selective lack of control in limited areas, or a temporary dispossession of territory.[163] On the other hand, the presence of a foreign armed force does not automatically amount to an occupation in the legal sense.[164]

Another issue refers to the application of HRL during occupation. The ICJ has generally recognized that both IHL and HRL apply in times of armed conflict, with IHL operating as a kind of *lex specialis*.[165] Later the ICJ has confirmed that human rights protection 'does not cease in case of armed conflict'[166] and that there are three possible scenarios of (parallel) application: 'some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of HRL; yet others may be matters of both these branches of international law'.[167] Thus, only in the last scenario of a parallel application of IHL and HRL does a possible conflict arise. In this situation, IHL is *lex specialis* for the core issues of armed conflict while HRL operates as a gap-filler for the (human rights) lacuna left by IHL.[168] The interaction of these two legal regimes becomes particularly relevant in the context of the occupying power's obligation to maintain public order (cf. Article 43 Hague Regulations) for this often implies the use of force against the occupied population.[169]

[158] *Naletilić and Martinović*, No. IT-98-34-T, paras. 215–6; ICJ, *Congo v Uganda*, Judgment (2005), paras. 172–7; ICJ, Legal Consequence of the Construction of Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, para. 78; see also Ferraro, *IRRC*, 94 (2012), 136–7; Gasser, 'Protection of the Civilian Population', in Fleck, *Handbook IHL* (2008), mn. 526.

[159] Watkin, *IRRC*, 885 (2012), 291; Gasser and Melzer, *Humanitäres Völkerrecht* (2012), p. 140.

[160] Ferraro, *IRRC*, 94 (2012), 139–55 (listing and discussing elements of effective control at 142–55, see esp. 142: '[T]he unconsented-to presence of foreign forces, the foreign forces' ability to exercise authority over the territory concerned in lieu of the local sovereign, and the related inability of the latter to exert its authority over the territory.'); Dinstein, *Belligerent Occupation* (2009), pp. 42–3; Vite, *IRRC*, 90 (2008), 73.

[161] *Naletilić and Martinović*, No. IT-98-34-T, para. 217; Vite, *IRRC*, 90 (2008), 73.

[162] Dinstein, *Belligerent Occupation* (2009), pp. 43–4.

[163] Watkin, *IRRC*, 94 (2012), 299–300.

[164] Watkin, *IRRC*, 94 (2012), 300.

[165] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, para. 25.

[166] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, para. 106.

[167] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, para. 106.

[168] Ohlin, *JICJ*, 11 (2013), 33, 35; Frau, *HuV-I*, 26 (2013), 17; similarly, see Dill, *LJIL*, 26 (2013), 268–9; for an autonomous or additional protection by HRL, see Milanovic, *EJILTalk*, 6 May 2011, <http://www.ejiltalk.org/when-to-kill-and-when-to-capture/>; concurring, Casey-Maslen, *IRRC*, 94 (2012), 622–3; on the different visions of military and humanitarian lawyers in this regard, see Luban, *LJIL*, 26 (2013), 327–8, 332–3.

[169] For a detailed discussion, see Watkin, *IRRC*, 94 (2012), 276 ff.; Gasser and Melzer, *Humanitäres Völkerrecht* (2012), p. 141.

Notwithstanding all these practical problems[170] there is general agreement that the *determination* of occupation should be made objectively, that is, based on the factual authority and control of the foreign armed forces.[171] Neither the motive nor the justification of the occupation is relevant.[172] While the occupying power may have set up an effective administration of the occupied territories, the decisive question is whether it is actually in a position to effectively administer the respective territory, that is, exercise the required control.[173] This also determines the beginning of the occupation, as an invasion turns into military occupation once the occupying power exercises authority and control through effectively administering the occupied territory.[174] As this may be well after the moment when the inhabitants of the occupied territory fall into 'the hands of the occupying power',[175] individual rights may be affected during this intermediate phase between the invasion and the actual occupation. Therefore, the rights enshrined in GC IV already apply at this moment, that is, before an actual regime of occupation has been established.[176] While such a broad temporal approach certainly conforms to the humanitarian purpose of the Geneva Law with respect to the effective protection of protected persons (*in casu* the inhabitants of an occupied territory), it entails two distinct legal tests: on the one hand, with regard to the application of the law of occupation vis-à-vis individuals (protected persons) or property and, on the other hand, vis-à-vis other matters.[177]

(5) Relationship between armed conflict and individual crimes, in particular mental requirements

(a) The nexus requirement

As to the relationship between the individual crimes and the context element, (i.e. the armed conflict), the case law quite unanimously requires that there must be an '*evident nexus*' between them.[178] The function of this nexus is to distinguish war crimes, on the

[170] Perhaps the most important 'laboratory' of the law of occupation has been for decades Israel's occupation of the West Bank, cf. Kretzmer, *IRRC*, 94 (2012), 215.

[171] Ferraro, *IRRC*, 94 (2012), 135.

[172] Gasser and Melzer, *Humanitäres Völkerrecht* (2012), p. 138.

[173] Zwanenburg, Bothe, and Sassòli, *IRRC*, 94 (2012), 39; Watkin, *IRRC*, 94 (2012), 272.

[174] Green, *Contemporary Law of Armed Conflict* (2008), p. 285; ICJ, *Congo v Uganda*, Judgment (2005), para. 173; Ferraro, *IRRC*, 94 (2012), 137, n. 14.

[175] Pictet et al., *Commentary on the Geneva Conventions of 12 August 1949*, iv (1958/1995), Article 6, p. 60.

[176] Pictet et al., *Commentary on the Geneva Conventions of 12 August 1949*, iv (1958/1995), Article 6, p. 60 ('In all cases of occupation . . . the Convention becomes applicable to individuals . . . as they fall into the hands of the occupying power.' Thus, insofar 'there is no intermediate period between what might be termed the invasion phase and the inauguration of a stable regime of occupation. Even a patrol which penetrates into enemy territory without any intention of staying there must respect the Conventions in its dealings with the civilians it meets'); concurring, *Naletilić and Martinović*, No. IT-98-34-T, paras. 219–21 and Sassòli, *IRRC*, 94 (2012), 42 ff.; critical of this so-called 'Pictet theory', see Zwanenburg, *IRRC*, 94 (2012), 32 ff. and Bothe, 94 (2012), 37 ff. (both distinguishing between invasion and occupation).

[177] cf. *Naletilić and Martinović*, No. IT-98-34-T, para. 222; see also Watkin, *IRRC*, 94 (2012), 272–3.

[178] *Blaskić*, No. IT-95-14-T, para. 69; *Limaj et al.*, No. IT-03-66-T, para. 83; *Semanza*, No. ICTR-97-20-T, para. 517, confirmed by *Prosecutor v Semanza*, No. ICTR-97-20-A, Appeals Chamber Judgment, para. 369 (20 May 2005); *Prosecutor v Renzaho*, No. ICTR-97-31-T, Trial Chamber Judgment, para. 798 (14 July

one hand, from other international crimes[179] and, on the other, from ordinary national offences committed in an isolated form or merely on occasion of—but not in connection with—an armed conflict.[180] The existence of the nexus also expresses an increase in the wrongfulness of the respective conduct and the culpability of the perpetrator.

A closer look at the jurisprudence demonstrates that it calls—in line with its humanitarian understanding of the law of armed conflict—for a *broad interpretation* of the nexus requirement.[181] The nexus exists if the 'crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict'.[182] It is not necessary that the alleged crimes occur in the midst of battle or that the 'armed conflict was occurring at the exact time and place of the proscribed acts'.[183] Rather, it suffices that a *functional relationship* between the respective acts and the conflict can be established,[184] that is, that these are supported or at least considerably influenced by the conflict[185] and not just committed on the occasion of it, taking advantage of the resulting chaos. A nexus also exists when certain offences are committed in the aftermath of the fighting, by means of taking advantage of the situation created by the fighting and under the guise of the armed conflict.[186] The following factors are considered to be relevant in establishing the nexus: 'the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed

2009); *Prosecutor v Nyiramasuhuko et al.*, No. ICTR-98-42-T, Trial Chamber Judgment and Sentence, para. 6153 (24 June 2011); *Prosecutor v Setako*, No. ICTR-04-81-A, Appeals Chamber Judgment, para. 249 (28 September 2011); *Prosecutor v Bagosora et al.*, No. ICTR-98-41-T, Trial Chamber Judgment, para. 2231 (18 December 2008), confirmed by *Prosecutor v Bagosora and Nsengiyumva*, No. ICTR-98-41-A, Appeals Chamber Judgment, para. 406, (14 December 2011); *Karemera and Ngirumpatse*, No. ICTR-98-44-T, para. 1696; *Prosecutor v Nizeyimana*, No. ICTR-2000-55C-T, Trial Chamber Judgment and Sentence, para. 1571 (19 June 2012).

[179] Van der Wilt, *JICJ*, 10 (2012), 1116–17.

[180] cf. *Kunarac et al.*, No. IT-96-23 & IT-96-23/1-A, para. 57; *Prosecutor v Rutaganda*, No. ICTR-96-3-A, Appeals Chamber Judgment, para. 570 (26 May 2003); *Haradinaj et al.*, No. IT-04-84*bis*-T, para. 397; Mettraux, *Crimes* (2005), pp. 38–9; van der Wilt, *JICJ*, 10 (2012), 1116.

[181] cf. Mettraux, *Crimes* (2005), pp. 47–8; Cassese, *JICJ*, 10 (2012), 1405 ff.

[182] *Tadić*, No. IT-94-1-AR72, para. 70; see also *Tadić*, No. IT-94-1-T, paras. 572–3; *Tadić*, No. IT-94-1-A, paras. 249, 252; *Delalić et al.*, No. IT-96-21-T, paras. 193, 195; *Furundzija*, No. IT-95-17/1-T, para. 60; *Blaskić*, No. IT-95-14-T, para. 68; *Hadžihasanović and Kubura*, No. IT-01-47-T, para. 15; *Milutinović et al.*, No. IT-05-87-T, para. 127; *Lukić and Lukić*, No. IT-98-32/1-T, para. 868; *Perišić*, No. IT-04-81-T, para. 73; *Prosecutor v Tolimir*, No. IT-05-88/2-T, Trial Chamber Judgment, para. 683 (12 December 2012); *Stanišić and Župljanin*, No. IT-08-91-T, para. 34; *Gotovina et al.*, No. IT-06-90-T, para. 1677; *Rutaganda*, No. ICTR-96-3-A, paras. 569–71; *Semanza*, No. ICTR-97-20-A, para. 369; *Renzaho*, No. ICTR-97-31-T, para. 798; *Prosecutor v Bizimungu*, No. ICTR-00-56-T, Trial Chamber Judgment and Sentence, para. 2132 (17 May 2011); *Nyiramasuhuko et al.*, No. ICTR-98-42-T, para. 6154; *Karemera and Ngirumpatse*, No. ICTR-98-44-T, para. 1696; *Nizeyimana*, No. ICTR-2000-55C-T, para. 1571; *Sesay, Kallon and Gbao*, SCSL-04-15-T, para. 100.

[183] *Tadić*, No. IT-94-1-T, para. 573.

[184] *Tadić*, No. IT-94-1-AR72, para. 69, referring to the crime of deprivation of liberty.

[185] On the respective 'furtherance' and 'substantial influence test', see Kolb, 'Droit international pénal', in Kolb, *Droit international pénal* (2008), p. 138.

[186] *Prosecutor v Kunarac et al.*, No. IT-96-23-T & IT-96-23/1-T, Trial Chamber Judgment, para. 568 (22 February 2001); *Kunarac et al.*, No. IT-96-23 & IT-96-23/1-A, para. 58 ('the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict').

as part of or in the context of the perpetrator's official duties'.[187] These criteria have also been adopted by the SCSL[188] and the ICC.[189] The ICC Elements of Crimes require that the conduct 'took place in the context of and was associated with' an armed conflict.[190]

Of course, the problem with an overly broad interpretation of the nexus requirement is that it undermines its delimitating function vis-à-vis ordinary crimes. If one accepted, for example, that the commission of a crime while 'taking advantage of' or 'under the guise of armed conflict' suffices to meet the nexus, crimes without any particular military feature and committed merely on the occasion of the chaotic, dysfunctional situation of armed conflict would amount to war crimes. This is a result we have already rejected for its incompatibility with the nexus' function.[191] Similarly, the criteria of the ICTY AC which only require that the perpetrator or victim have a certain status go too far. If this were sufficient, a killing by a combatant or of a protected person merely to settle old debts, independent of the armed conflict (a classical 'opportunistic' crime), would fall under the war crimes definition.[192] The result would even be more absurd in the following case: if a group of rioting young football hooligans destroys several automobiles, this damage to property can not reasonably become a war crime of destruction of property according to Article 8(2)(a)(iv) ICC Statute simply because it occurs objectively during an armed conflict. Similarly, a rape punishable under ordinary criminal law in peacetime does not become a war crime of rape according to Article 8(2)(b)(xxii)-1 ICC Statute simply because war has broken out overnight. The perpetrator in all these cases only turns into a 'war criminal' if the required *functional relationship* between his conduct and the armed conflict exists. More concretely speaking, it should be required that the perpetrator acts in pursuit of, or at least in accordance with, the respective military campaign.[193] The perpetrator

[187] *Kunarac et al.*, No. IT-96-23 & IT-96-23/1-A, para. 59. See also *Haradinaj et al.*, No. IT-04-84*bis*-T, para. 397; *Sesay, Kallon and Gbao*, No. SCSL-04-15-T, para. 101. With regard to the combatant capacity of the perpetrator see also Werle, *Völkerstrafrecht* (2012), mn. 1098 (arguing that the nexus may also be derived from the relation of the perpetrator to one of the conflicting parties). See also *Boškoski and Tarčulovski*, No. IT-04-82-T, para. 239; *Đorđević*, No. IT-05-87/1-T, para. 1527; *Nyiramasuhuko et al.*, No. ICTR-98-42-T, para. 6156; however, for the ICTR *Akayesu* TC this relationship is not an indispensable condition (*Akayesu*, No. ICTR-96-4-A, para. 444).

[188] *Prosecutor v Taylor*, No. SCSL-03-01-T, Trial Chamber Judgment, para. 567 (18 May 2012).

[189] *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges, para. 382 (30 September 2008); see also Mettraux, *Crimes* (2005), p. 46; Robinson, 'War Crimes', in Cryer et al., *Introduction ICL* (2010), pp. 285–6.

[190] cf. Elements, Article 8, Introduction and penultimate element of each war crime.

[191] Note 180 and main text. See also legislative motives VStGB, reprinted in Lüder, *Materialien* (2002), p. 42; Kreß, *IsYbHR*, 30 (2000), 122–3; Gropengießer, 'Die völkerstrafrechtlichen Verbrechen', in Eser and Kreicker, *Nationale Strafverfolgung*, i (2003), p. 158; Satzger (2012), § 14, mn. 63; Křivánek, *Weapons Provisions* (2010), p. 178; Darge, *Kriegsverbrechen* (2010), p. 321; for a restrictive approach, see also van der Wilt, *JICJ*, 10 (2012), 1127 (analysing the Dutch jurisprudence in the *Mpambara* case at 1120–4).

[192] Correctly contra, Bothe, 'War Crimes', in Cassese et al., *Rome Statute*, i (2002), p. 388 (calling this a 'strictly private interpersonal conflict'); Cassese, *JICJ*, 10 (2012), 1413–14.

[193] See also Cassese, *JICJ*, 10 (2012), 1397 ('contributing to attain the ultimate goals of a military campaign or, at a minimum, in unison with the military campaign'), 1416 ('pursuant to the aims of the military campaign').

must 'be part of—or be closely related to—the military power apparatus that has been established to fight an international or internal enemy' and 'have access, and be able, to employ the methods and means of warfare'.[194] The respective offence could not have been committed in peacetime in the same way, and the situation of armed conflict facilitated the commission and worsened the situation of the victim.[195] If this is the case, the functional relationship to the armed conflict exists and personal motives of the perpetrator—such as killing of a prisoner of war out of jealousy—may be considered irrelevant: the victim (the prisoner of war) is in a worse situation than in peace time, the special situation of armed conflict creates a special risk for him and an increased chance for the perpetrator to injure the victim.[196] While the armed conflict must facilitate the commission of the war crime, the crime itself need not contribute to nor have a tangible effect on the war as a whole.[197] Also, a causal link between the armed conflict and the crime is not required.[198]

(b) Legal nature of the context element

A much more complex question, which has not yet been addressed here, is how the context element must be legally qualified and what consequences this entails for possible mental requirements. If one understands the context element—pursuant to the so-called objective approach—as a purely objective, jurisdictional element, it need not be covered by the perpetrator's intent. If, however, one conceives—pursuant to the so-called subjective approach—the context element as a 'circumstance' within the meaning of Article 30(3) ICC Statute, the perpetrator must be aware of its existence.[199] This eminently practical question has already been discussed in the first Volume of this treatise where it was argued that the subjective approach is more convincing, especially with regard to the principle of culpability.[200] As a result, the perpetrator must be aware of the *factual* circumstances—not normative elements!—regarding the existence of an (international or non-international) armed conflict.

[194] Van der Wilt, *JICJ*, 10 (2012), 1127.

[195] *Haradinaj et al*., No. IT-04-84*bis*-T, para. 397; Cassese, *JICJ*, 10 (2012), 1414 ('The armed conflict must also have created the "situation"').

[196] Werle, *Völkerstrafrecht* (2012), mn. 1100; Mettraux, *Crimes* (2005), pp. 44–5; Safferling, *Internationales Strafrecht* (2011), § 6 mn. 143; Melzer, in Third Expert Meeting on the Notion of Direct Participation in Hostilities—Summary Report October 2005, 26–7, available at <http://www.icrc.org/eng/assets/files/other/2005-09-report-dph-2005-icrc.pdf> accessed 14 January 2013; contra Moir, 'Conduct of Hostilities', in Doria, Gasser, and Bassiouni, *Legal Regime of the ICC* (2009), p. 618 (no link if 'offences committed for purely personal reasons'); Cassese, *JICJ*, 10 (2012), 1414.

[197] Van der Wilt, *JICJ*, 10 (2012), 1128.

[198] *Hadžihasanović and Kubura*, No. IT-01-47-T, para. 16; *Limaj et al*., No. IT-03-66-T, para. 91; *Boškoski and Tarčulovski*, No. IT-04-82-T, para. 293; *Lukić and Lukić*, No. IT-98-32/1-T, para. 868; *Popović*, No. IT-05-88-T, para. 741; *Đorđević*, No. IT-05-87/1-T, para. 1527; *Perišić*, No. IT-04-81-T, para. 73; *Haradinaj et al*., No. IT-04-84*bis*-T, para. 397; *Tolimir*, No. IT-05-88/2-T, para. 683; *Setako*, No. ICTR-04-81-A, para. 249; *Bizimungu*, No. ICTR-00-56-T, para. 2132; *Nyiramasuhuko et al*., No. ICTR-98-42-T, para. 6153; *Karemera* and *Ngirumpatse*, No. ICTR-98-44-T, 1696; *Nizeyimana*, No. ICTR-2000-55C-T, para. 1571; *Sesay, Kallon and Gbao*, SCSL-04-15-T, para. 100.

[199] For a discussion of Article 30(3), see Volume I of this treatise, pp. 271 ff., 276.

[200] cf. Volume I of this treatise, pp. 283–8.

This interpretation is in line with the ICC Elements of War Crimes[201] and the case law of the ad hoc tribunals.[202] While the tribunals have, traditionally, viewed the requirement of armed conflict only as a 'jurisdictional element',[203] it has been acknowledged at least since the *Kordić* Appeal Judgment that the accused must be 'aware of the *factual* circumstances', that is, the existence of an armed conflict including its attendant factual circumstances (for example the involvement of a foreign power).[204] Apart from that, the jurisprudence normally discusses the issue within the framework of the jurisdiction of the respective tribunal,[205] only stating the undisputed factor, namely that the incriminating conduct must take place in the context of an armed conflict. In any case, in prosecution practice, the subjective approach will hardly be distinguishable from the objective approach since the intent is anyway derived from objectively determined facts and circumstances on the basis of circumstantial evidence.[206]

(6) Perpetrators, protected persons, and protected objects

Article 8 is quite specific in defining its scope of protection. On the one hand, it generally refers to the well-known categories of the Geneva Law: 'persons or property protected' under the GCs (Article 8(2)(a)) and 'persons taking no active part in hostilities, including members of the armed forces who have laid down their arms and those placed hors de combat . . . ' (Article 8(2)(c)). On the other hand, the protected persons and objects are included in the individual war crimes, for example, 'intentionally directing attacks against the civilian population' (Article 8(2)(b)(i) and (e)(i)), or against 'civilian objects' (Article 8(2)(b)(ii) and (e)(ii)), or, even, more specifically, against humanitarian assistance missions (Article 8(2)(b)(iii) and (e)(iii)), or 'buildings

[201] The introduction to the Elements of War Crimes reads: 'There is only a requirement for the awareness of the factual circumstances that established the existence of an armed conflict that is implicit in the terms "took place in the context of and was associated with".' In contrast, the Elements do not require intent with respect to the *nature of the conflict* as international or non-international: 'In that context there is no requirement for awareness by the perpetrator of the facts that established the character of the conflict as international or non-international' (Elements of Crimes, Article 8, Introduction; in favour of its inclusion, however, Decoeur, *ICLR*, 13 (2013), 483–4). As to *protected persons or objects* the respective Elements require similarly only that the perpetrator be aware of the 'factual circumstances that establish this status (as a protected person or protected object)' (cf. e.g. Element 3 of Article 8(2)(a)(i) ICC Statute; similarly e.g. also Element 5 of Article 8(2)(a)(iv) ICC Statute regarding protected property).

[202] I take here a slightly more nuanced approach than in Volume I of this treatise, p. 287.

[203] See *Lukić and Lukić*, No. IT-98-32/1-T, para. 871 ('the armed conflict requirement is jurisdictional, which means that it is satisfied by proof that there was an armed conflict and that the acts of the accused are objectively linked geographically as well as temporally with the armed conflict').

[204] *Kordić and Čerkez*, No. IT-45-19/2-A, para. 311 (emphasis in the original); similarly *Naletilić*, No. IT-98-34-A, paras. 116–20.

[205] See, for example, *Tadić*, No. IT-94-1-T, para. 572 ('For a crime to fall within the jurisdiction of the International Tribunal . . . '); *Đorđević*, No. IT-05-87/1-T, para. 1521; *Tolimir*, No. IT-05-88/2-T, para. 682; *Stanišić and Župljanin*, No. IT-08-91-T, para. 31; *Prosecutor v Ntagerura et al.*, No. ICTR-99-46-A, Appeals Chamber Judgment, paras. 766–7 (7 July 2006); *Bagosora*, No. ICTR-98-41-T, para. 2229; *Renzaho*, No. ICTR-97-31-T, para. 796; *Bizimungu*, No. ICTR-00-56-T, para. 2129; *Karemera and Ngirumpatse*, No. ICTR-98-44-T, para. 1694.

[206] On the practice insofar see Volume I of this treatise, p. 287 with n. 177. This judicial practice has also influenced the Elements of Crimes, where the general introduction reads: 'Existence of intent and knowledge can be inferred from relevant facts and circumstances' (cf. Elements of Crimes, General Introduction, para. 3).

dedicated to religion, education' etc. (Article 8(2)(b)(ix) and (e)(iv)). Of course, the underlying distinction between unprotected and protected persons/objects rests on the most fundamental 'basic rule' of Article 48 AP I—the *principle of distinction*.[207] In contrast, Article 8 is silent on the persons who actually commit war crimes (i.e. the 'perpetrators'). We must therefore look at this group of persons before going on to deal with the protected persons and objects.

(a) Perpetrators

Anyone can be a perpetrator of a war crime,[208] not only soldiers and other persons in official duties, but also civilians.[209] This already follows from the wording of the Common Articles 49/50/129/146 GC I-IV, according to which the member states are

[207] Article 48 AP I reads: 'In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.' The principle is 'part of customary international law applicable in both international and non-international armed conflicts' (*ICRC Study I* (2005), p. 25; see also *ICRC Study I* (2005), Rule 1-10 with pp. 3 ff.). It also applies to drones (cf. Casey-Maslen, *IRRC*, 94 (2012), 608–12) and cyber attacks as defined note 50 with main text (Rule 31 Tallinn Manual, in Schmitt, *Tallinn Manual Cyber Warfare* (2013), p. 110). However, as to the latter, it offers little, if any, real protection given the interconnectivity between military and civilian computer systems and the mostly dual-use of cyber infrastructure (cf. Geiß and Lahmann, *IsLR*, 45 (2012), 381, 383, 384–90 convincingly arguing that the distinction is 'largely impossible' 'because of the interconnectedness of civilian and military cyber infrastructure'; in the same vein, see Droege, *IRRC*, 94 (2012), 539, 541, 562–6; on the dual-use problem, see note 247). The principle of distinction could insofar only play a greater role if civil and military objects could be more clearly separated, for example by the creation of 'digital safe havens' by drawing an analogy to demilitarized zones in the sense of Article 60 AP I (for a critical discussion of this and other possibilities, see Geiß and Lahmann, *IsLR*, 45 (2012), 381, 383, 390–5). Generally, the full automatization of (these) weapon systems generates particular problems with regard to both the principle of distinction and proportionality (see note 232) since they operate, being fully autonomous, without human control (see e.g. Asaro, *IRRC*, 94 (2012), 687 ff. discussing the respective ethical and social concerns and advocating an international prohibition on the basis of IHL and HRL, in particular a state duty not to delegate the use of lethal force to a machine). According to Article 36 AP I states are under an obligation to determine the applicable IHL rules for these weapons (cf Droege. *IRRC*, 94 (2012), 540–1). Pursuant to a revisionist critique of IHL, the logic of distinction must be replaced by a *logic of liability*, that is, the loss of protection from attack cannot merely be based on the qualification of combatancy but can only be morally justified if the targeted person is liable to being attacked and, ultimately, killed (cf. Dill, *LJIL*, 26 [2013], 255–62 with further references, especially in n. 9). While this is not in line with current IHL it has strong moral reasons for it, *inter alia*, the principle of culpability (cf. Volume I of this treatise, pp. 93–5).

[208] Ambos, 'Vorb. §§ 8 ff. VStGB', in Joecks and Miebach, *Münchener Kommentar*, viii (2013), mn. 37 with further references; Zimmermann and Geiß, '§ 8 VStGB', in Joecks and Miebach, *Münchener Kommentar*, viii (2013), mn. 59; Dörmann, '§ 11 VStGB', in Joecks and Miebach, *Münchener Kommentar*, viii (2013), mn. 19; Olásolo, *Unlawful Attacks* (2008), p. 52; for a different opinion, see Zimmermann, *GA*, 157 (2010), 518 ff. (arguing that because of the special offence character of war crimes only [*de facto*] combatants can be perpetrators).

[209] Werle, *Völkerstrafrecht* (2012), mn. 1099; David, *Principes* (2008), pp. 721 ff., mn. 4.64 ff.; Kittischaisaree, *ICL* (2001), pp. 133–4, 136–7; Cassese et al., *ICL* (2013), p. 67; Gropengießer, 'Die völkerstrafrechtlichen Verbrechen', in Eser and Kreicker, *Nationale Strafverfolgung*, i (2003), p. 159; Robinson, 'War Crimes', in Cryer et al., *Introduction ICL* (2010), pp. 286–7; Dörmann, *Elements of War Crimes* (2003), pp. 34 ff.; Schaller, *SWP-Studien* (2005), p. 15; Heinsch, *Weiterentwicklung* (2007), p. 127; Olásolo, *Unlawful Attacks* (2008), p. 52; Kolb and Hyde, *Introduction* (2008), p. 87; Palomo Suárez, *Kindersoldaten* (2009), p. 133; about the relevant jurisprudence of the ad hoc tribunals, see Schabas, *ICC Commentary* (2010), pp. 207 ff.; see also *Prosecutor v Vasiljević*, No. IT-98-32-T, Trial Chamber Judgment, para. 57 (29 November 2002).

obliged to impose penal sanction upon 'persons' who commit grave breaches. It is a different matter that the *right* to take part in hostilities is, in international armed conflict, limited to '*combatants*' (cf. Article 43(2) AP I),[210] that is, members of the armed forces (cf. Article 4 GC III and Article 43(1) AP I).[211] This does, however, not exclude the possibility that a civilian commits or participates in a war crime for which he may then be criminally liable according to both national criminal law[212] and the law of war crimes.[213] The combatant's right to take part in hostilities grants him immunity from criminal prosecution for acts in accordance with IHL, but also makes him—which is the other side of the coin—a legitimate military target of the adversary party.[214] In any case, this immunity does, from a state perspective, not extend to insurgent groups in non-international armed conflicts,[215] that is, their acts of 'combat' fall under national criminal law.[216]

(b) Protected persons

As to the *primary Geneva norms*, one must, first of all, distinguish between international and non-international armed conflicts. With regard to the former, protected persons[217] are the wounded and sick on land (Article 13 GC I), the wounded and sick at sea and the shipwrecked (Article 12 GC II), prisoners of war (Article 4 GC III), and

[210] Rodriguez-Villasante, 'Terrorist Acts', in Fernández Sánchez, *New Challenges* (2005), p. 28; Schmitt, 'Direct Participation in Hostilities', in Fischer, *Crisis Management* (2004), p. 506; Wieczorek, *Unrechtmäßige Kombattanten* (2005), p. 29; Werle, *Völkerstrafrecht* (2012), mn. 919; Schaller, *SWP-Studien* (2005), p. 9; Dörmann, *IRRC*, 85 (2003), 45; Meiertöns, *HuV-I*, 21 (2008), 134; Pejic, 'Unlawful/Enemy Combatants', in Schmitt and Pejic, *International Law* (2007), p. 336.

[211] cf. Ipsen, 'Combatants and Non-combatants', in Fleck, *Handbook IHL* (2008), mn. 304 ff.; Ipsen, 'Bewaffneter Konflikt', in Ipsen, *Völkerrecht* (2004), § 68 mn. 33 ff.; Sassòli and Bouvier, *How does Law Protect in War?*, i (2006–2011), pp. 149 ff.; Zechmeister, *Erosion des humVR* (2007), pp. 89 ff.; Watkin, *HPCR* (2005), p. 16.

[212] Schmitt, *ChicJIL*, 5 (2005), 520; Ipsen, 'Combatants and Non-combatants', in Fleck, *Handbook IHL* (2008), mn. 302; Schaller, *SWP-Studien* (2005), p. 16; Schaller, *SWP-Studie* (2007), p. 18.

[213] cf. Heintze, 'Fortentwicklung', in Heintze and Ipsen, *Heutige bewaffnete Konflikte* (2011), p. 165; Schmitt, *ChicJIL*, 5 (2005), 521 (discussing whether a civilian's participation in hostility constitutes war crime).

[214] Dinstein, 'Status Groups', in Heintschel von Heinegg and Epping, *International Humanitarian Law* (2007), p. 148; Olásolo, *Unlawful Attacks* (2008), p. 105; Pejic, 'Unlawful/Enemy Combatants', in Schmitt and Pejic eds., *Exploring the Faultlines* (2007), p. 336. For a principled criticism against the 'killing in war', see Eser, 'Rechtmäßige Tötung', in Dölling, *Verbrechen* (2010), pp. 461 ff. (focusing on the lack of an explicit permission which entails problems of legitimacy); in a similar vein focusing on the 'collateral' killing of civilians, see Merkel, *JZ*, 67 (2012), 1137 ff. (arguing that there is—notwithstanding Article 51(5)(b) AP I—no convincing ethical or moral justification for killing in war and therefore invoking Rawls' 'nonideal theory' as an 'impure' necessity-like justification, at 1143–4). In essence, such a principled approach is driven by the same moral unease with 'killing in war' as the liability argument advocated by the revisionist critique of IHL, cf. note 207.

[215] Kälin and Künzli, *Universeller Menschenrechtsschutz* (2008), p. 162; Sassòli and Bouvier, *How does Law Protect in War?* (2006–2011), pp. 268–9; Heintze, 'Fortentwicklung' in Heintze and Ipsen, *Heutige bewaffnete Konflikte* (2011), p. 149; Schaller, *SWP-Studie* (2007), p. 13.

[216] Schmitt, 'Direct Participation in Hostilities', in Fischer, *Crisis Management* (2004), p. 510.

[217] cf. Werle, *Völkerstrafrecht* (2012), mn. 1109 ff, 1119–20; Werle, *Principles* (2009), mn. 1016 ff., 1026–7; Ipsen, 'Bewaffneter Konflikt', in Ipsen, *Völkerrecht* (2004), § 69; critically, Gropengießer, 'Die völkerstrafrechtlichen Verbrechen', in Eser and Kreicker, *Nationale Strafverfolgung*, i (2003), pp. 159 ff.; Zahar and Sluiter, *International Criminal Law* (2007), pp. 119, 152; Darge, *Kriegsverbrechen* (2010), pp. 325 ff. Regarding international customary law, *ICRC Study I* (2005), pp. 79 ff.; Olásolo, *Unlawful Attacks* (2008), pp. 61 ff.

civilians (Article 4 GC IV, Article 48 ff. AP I). Article 85(2)–(4) AP I extends the protection to persons who took part in hostilities and fell into the hand of the enemy (Article 11, 45), the wounded, sick, and shipwrecked of the adversary party (Article 10), medical and religious personnel (Article 12, 15, 16), refugees and stateless persons (Article 73), as well as persons who are *hors de combat* (Article 41).[218] In a *non-international* conflict, no distinction is made between combatants and civilians; non-state actors (insurgents) do not enjoy a combatant status[219] and, thus, no immunity from prosecution.[220] Common Article 3 GCs extends the protection to '[p]ersons taking no active part in the hostilities' (cf. also Article 4(1) AP II), thus, also to members of the parties to the conflict who have laid down their arms and are within the power of the adversary party, as well as all the persons staying out of fight due to sickness, injury, or other reasons.[221]

Irrespective of the type of conflict, the *civilian population* also ranks among the protected persons.[222] The prohibition of use of weapons against the civilian population codified in Article 51 AP I is considered a general principle of international law[223] and is accepted as customary law.[224] As for AP II, in non-international conflict the civilian population as such and objects and facilities indispensable to their survival are protected. Members of humanitarian or peacekeeping missions of the UN (in international conflict) are also counted among civilian people, as long as they are not involved in the conflict on one party's side and do not possess combatant status (Article 50 AP I in conjunction with Article 4(A)(1), (2), (3), and (6) GC III, Article 43 AP I, Article 8(2)(b)(iii)

[218] Egorov, 'International Legal Protections', in Doria, Gasser, and Bassiouni, *Legal Regime of the International Criminal Court* (2009), pp. 561 ff.

[219] Gasser, 'Protection of the Civilian Population', in Fleck, *Handbook IHL* (2008), mn. 501; Fleck, 'Non-International Armed Conflicts', in Fleck, *Handbook IHL* (2008), mn. 1214–5; Dörmann, *IRRC*, 85 (2003), 47; Wieczorek, *Unrechtmäßige Kombattanten* (2005), p. 44; Schaller, *SWP-Studie* (2007), p. 13; Sayapin, *HuV-I*, 21 (2008), 131–2; Pejic, 'Unlawful/Enemy Combatants', in Schmitt and Pejic, *Exploring the Faultlines* (2007), p. 336; Gasser and Melzer, *Humanitäres Völkerrecht* (2012), p. 87.

[220] cf. Fleck, 'Non-International Armed Conflicts', in Fleck, *Handbook IHL* (2008), mn. 1215; Oeter, *Die Friedens-Warte*, 76 (2001), 20.

[221] cf., more detailed, Zimmermann, 'Article 8', in Triffterer, *Commentary* (2008), mn. 278 ff.

[222] In detail, see Gasser, 'Protection of the Civilian Population', in Fleck, *Handbook IHL* (2008), mn. 502 ff.; Bothe, 'Friedenssicherung und Kriegsrecht', in Vitzthum, *Völkerrecht* (2010), pp. 647–8, 655–6; Poretschkin, *HuV-I*, 23 (2010), 83; also *Prosecutor v Setako*, No. ICTR-04-81-T, Trial Chamber Judgment and Sentence, para. 488 (25 February 2010); *Renzaho*, No. ICTR-97-31-T, paras. 796, 802; *Lukić and Lukić*, No. IT-98-32/1-T, para. 870; more restrictively, see Zimmermann and Geiß, '§ 8 VStGB', in Joecks and Miebach, *Münchener Kommentar*, viii (2013), mn. 80 (only when in the power of the other party to the conflict in the sense of Article 4(1) GC IV; about this controversial criterion, see Ambos, 'Vorb. §§ 8 ff. VStGB', in Joecks and Miebach, *Münchener Kommentar*, viii (2013), mn. 43); on the concept of 'civilian people' according to the jurisprudence, see Olásolo, *Unlawful Attacks* (2008), pp. 119 ff.

[223] Ipsen, 'Bewaffneter Konflikt', in Ipsen, *Völkerrecht* (2004), § 69 mn. 3; König, *Legitimation* (2003), p. 304; Müssig and Meyer, 'Bundeswehrsoldaten', in Paeffgen, *FS Puppe* (2011), pp. 1517 ff.; *Prosecutor v Milošević*, No. IT-98-2971-T, Trial Chamber Judgment, para. 941 (12 December 2007).

[224] Ipsen, 'Bewaffneter Konflikt', in Ipsen and Epping, *Völkerrecht* (2004), § 69 mn. 3; *ICRC Study I* (2005), Rule 6, pp. 20 ff.; Fenrick, *JICJ*, 5 (2007), 335; Müssig and Meyer, 'Bundeswehrsoldaten', in Paeffgen eds., *FS Puppe* (2011), pp. 1517 ff.; Israel Supreme Court, sitting as the High Court of Justice, HCJ 769/02, *Public Committee against torture in Israel et al. v Government of Israel et al.*, Judgment, (13 December 2006), para. 32; Dörmann, *IRRC*, 85 (2003), 46. On the historic development, yet without explicit reference to Article 51 AP I, see Krieger, *AVR*, 44 (2006), 166 ff.

and (e)(iii) ICC Statute).[225] Likewise, so-called *francs-tireurs*, spies, mercenaries, members of (unorganized) insurgent groups,[226] and terrorists[227] are deemed to be civilians as long as they are not considered as members of the armed forces of a party to the conflict (Article 4(A)(1), (2), (3), (6) GC III, Article 43(2) AP I). The same applies to employees of private military companies (PMC), despite their proximity to the hostilities, as long as they are not incorporated into the armed forces.[228] Last but not least, judges, government officials, and blue-collar workers are not (*de facto*) combatants.[229]

The protection of civilians suffers, however, from a twofold *limitation*. On the one hand, so-called collateral damage is admissible, that is, the 'incidental loss of civilian life, injury to civilians, damage to civilian objects' as a consequence of an attack on military objectives, as long as it is not 'excessive' in relation to the concrete and direct military advantage anticipated (Article 51(5)(b), 57(2)(a)(iii) AP I).[230] While the highly ambiguous term 'excessive' is used,[231] the underlying test is one of a balancing of the

[225] cf. Cottier, 'Article 8', in Triffterer, *Commentary* (2008), mn. 305–6; Gropengießer, 'Die völkerstrafrechtlichen Verbrechen', in Eser and Kreicker, *Nationale Strafverfolgung*, i (2003), p. 161; Olásolo, *Unlawful Attacks* (2008), pp. 105–6; Bangura, *LJIL*, 23 (2010), 173 ff.; Moir, 'Conduct of Hostilities', in Doria, Gasser, and Bassiouni, *Legal Regime of the ICC* (2009), pp. 497 ff.; *Prosecutor v Abdallah Banda Abakaer Nourain and Sale Mohammed Jerbo Jamus*, No. ICC-02/05-03/09-121-Corr-Red, Decision on the Confirmation of Charges, paras. 62–3 (7 March 2011).

[226] Doehring, *Völkerrecht* (2004), § 11 mn. 588 ff.; Werle, *Völkerstrafrecht* (2012), mn. 1114; Werle, *Principles* (2009), mn. 1020 (about *franc-tireurs*); Ipsen, 'Bewaffneter Konflikt', in Ipsen, *Völkerrecht* (2004), § 68 mn. 40; Schaller, *SWP-Studie* (2007), p. 9; Wieczorek, *Unrechtmäßige Kombattanten* (2005), p. 111; ICRC, *IRRC*, 89 (2007), 26–7 (on mercenaries); David, *Principes* (2008), pp. 446 ff., mn. 2268; Ipsen, 'Bewaffneter Konflikt', in Ipsen, *Völkerrecht* (2004), § 68 mn. 39; Ipsen, 'Combatants and Non-combatants', in Fleck, *Handbook IHL* (2008), mn. 322 (on spies).

[227] Israel Supreme Court, *Targeted Killings* (2006), para. 26 ('unlawful combatant' as 'civilian'); Eichensehr, *YaleLJ*, 116 (2007), 1875; cf. also Kretzmer, *EJIL*, 16 (2005), 171 ff.; Keller and Forowicz, *LJIL*, 21 (2008), 185 ff.; Schondorf, *JICJ*, 5 (2007), 301–9; Cohen and Shany, *JICJ*, 5 (2007), 310–21; Ben-Naftali, *JICJ*, 5 (2007), 322–31; Fenrick, *JICJ*, 5 (2007), 332–8; Cassese, *JICJ*, 5 (2007), 339–45.

[228] Gillard, *IRRC*, 88 (2006), 539; Krieger, *AVR*, 44 (2006), 159; Schaller, *SWP-Studien* (2005), p. 10; Cameron, *IRRC*, 88 (2006), 587 ff.; ICRC, *IRRC*, 89 (2007), 25–6; Ipsen, 'Combatants and Non-combatants', in Fleck, *Handbook IHL* (2008), mn. 320. Especially regarding Iraq, see Elsea, *Private Security Contractors* (2007), p. 11; Kees, *GoJIL*, 3 (2011), 203; Roeder, *HuV-I*, 23 (2010), 174–6. For an amplification of the definition of combatant in the case of PMC, see Saage-Maaß and Weber, *HuV-I*, 20 (2007), 174; Zechmeister, *Erosion des humVR* (2007), pp. 189–90. About the impunity of employees of PMC, see Elsea, *Private Security Contractors* (2007), pp. 7 ff.; Wayde Pittman and McCarthy, *HuV-I*, 23 (2010), 164; on state responsibility for IHL violations by PMC employees, see Henn, *Jura*, 8 (2011), 572; Krieger, *AVR*, 44 (2006), 177–8; Cameron, *IRRC*, 88 (2006), 587 ff.; ICRC, *IRRC*, 89 (2007), 25–6; Schaller, *SWP-Studie* (2007), pp. 5 ff. (about private security and military companies); Zimmermann and Geiß, '§ 8 VStGB', in Joecks and Miebach, *Münchener Kommentar*, viii (2013), mn. 74–5, 83 (concerning spies, mercenaries, and *franc-tireurs*). For a separate combatant concept regarding PMC, see Saag-Maass and Weber, *HuV-I*, 20 (2007), 172 ff.; Gasser and Melzer, *Humanitäres Völkerrecht* (2012), p. 84; Schmitt, *Tallinn Manual Cyber Warfare* (2013), p. 117.

[229] Ipsen, 'Combatants and Non-combatants', in Fleck, *Handbook IHL* (2008), mn. 314.

[230] Gasser, 'Protection of the Civilian Population', in Fleck, *Handbook IHL* (2008), mn. 509; Dörmann, '§ 11 VStGB', in Joecks and Miebach, *Münchener Kommentar*, viii (2013), mn. 76 ff.; Doehring, *Völkerrecht* (2004), § 11 mn. 603; Cohen and Shany, *JICJ*, 5 (2007), 312; Melzer, *Targeted Killing* (2008), p. 303; critically, Cryer, *Prosecuting International Crimes* (2005), pp. 277–8; Poretschkin, *HuV-I*, 23 (2010), 85; Weingärtner, *HuV-I*, 23 (2010), 144.

[231] See for an attempt to clarify this concept, Wright, *IRRC*, 94 (2012), 823–5, 834–7, 848 ff. (proposing a 'subjective-objective standard', that is, combining the subjective perspective of the commander with a reasonableness standard (850–1), along with a very useful seven-step targeting methodology based on USA targeting directives in non-international counterinsurgency warfare (853–7)). Such a procedural approach

interests involved—military advantage *versus* civilian life—based on the *principle of proportionality*.[232] On the other hand, the protection only extends to civilians who are 'in the hands of a Party to the conflict or occupying power of which they are not nationals' (Article 4(1) GC IV),[233] leaving unaffected the protection granted by Article 48 ff. AP I (cf. Article 49(2) AP I). Thus, the protection extends to civilians of the adversary or foreigners who are kept in the sovereign or *de facto* controlled territory of the other conflict party.[234] If this party, for example, attacked by an air raid other civilians who were not in its hands, criminal liability would not arise from the regulations protecting persons, but only from those concerning the conduct of hostilities.[235] In any case, it is to be borne in mind that Article 4(1) GC IV should be interpreted broadly.[236] If the second half of the provision ('of which they are not nationals') were to be understood in a strict sense of nationality, victims who belonged to an ethnic, religious etc. group different from that of the perpetrator but who possessed the same nationality—Bosnian/Yugoslavian Muslims versus Bosnian/Yugoslavian Serbs—would be excluded from the protection. Contrary to such an overly formalistic approach, as taken by the *Tadić* TC,[237] a normative, valued-based approach, informed by the Geneva Law's humanitarian purpose of protection, should be applied. Accordingly, the scope of Article 4(1) GC IV should be extended to those persons who are actually caught between the fronts and find themselves in the hands of an adverse party to the conflict, regardless of the merely formal relationship between the perpetrator and the victim in terms of nationality law (the so-called allegiance test).[238]

is to be welcomed since 'excessive' cannot be defined in the abstract (in the same vein see 825, 857) but only be qualitatively (normatively) assessed on a case-by-case basis following a differentiated procedure.

[232] The principle is part of customary international law in both international and non-international armed conflict (*ICRC Study I* (2005), Rule 14 with pp. 46–50). See also in this context, Olásolo, *Unlawful Attacks* (2008), pp. 155 ff., 226 ff., 256 ff.; Hankel, 'Überlegungen zum Kombattantenstatus', in Hankel, *Die Macht und das Recht*, (2008), p. 442; Keller and Forowicz, *LJIL*, 21 (2008), 213 ff.; Moir, 'Conduct of Hostilities', in Doria, Gasser, and Bassiouni, *Legal Regime of the ICC* (2009), p. 490; Hankel, *Tötungsverbot* (2011), pp. 22 ff.; Wright, *IRRC*, 94 (2012), 838 ff. (focusing especially on the ambiguous term 'excessive'); see with regard to drones, Vogel, *DenvJIL&Pol'y*, 39 (2010), 101 ff.; Casey-Maslen, *IRRC*, 94 (2012), 612–13; with regard to cyber operations, see Geiß and Lahmann, *IsLR*, 45 (2012), 395–8, 398–9 (arguing that this principle offers, for the time being, a better protection than the less flexible principle of distinction, for example by allowing for a dynamic interpretation of the concept 'damage to civilian objects' encompassing also the loss of functionality); Droege, *IRRC*, 94 (2012), 571–3; Schmitt, *Tallinn Manual Cyber Warfare* (2013), pp. 159 ff.; on the USA understanding of proportionality as a balancing test, see Wright, *IRRC*, 94 (2012), 833–4, 840.

[233] Dinstein, 'Status Groups', in Heintschel von Heinegg and Epping, *New Challenges* (2007), p. 149; for a detailed overview over the jurisprudence, see Mettraux, *Crimes* (2005), pp. 67 ff.

[234] Ipsen, 'Bewaffneter Konflikt', in Ipsen, *Völkerrecht* (2004), § 69 mn. 11.

[235] Gropengießer, 'Die völkerstrafrechtlichen Verbrechen', in Eser and Kreicker, *Nationale Strafverfolgung*, i (2003), p. 161.

[236] cf. Ambos, *NStZ*, 19 (1999), 228; Ambos, 'Bestrafung von Verbrechen', in Haase, Müller, and Schneider, *Humanitäres Völkerrecht* (2001), pp. 336–7; Werle, *Völkerstrafrecht* (2012), mn. 1116 ff.

[237] *Tadić*, No. IT-94-1-T, paras. 118–9, 595 and *passim*; dissenting opinion of Judge McDonald. On the development of the case law, see Heinsch, *Weiterentwicklung* (2007), pp. 113 ff.

[238] *Tadić*, No. IT-94-1-A, paras. 163 ff.; cf. also *Prosecutor v Aleksovski*, No. IT-95-14/1-A, Appeals Chamber Judgment, paras. 151–2 (24 March 2000); *Prosecutor v Delalić et al.*, No. IT-96-21-A, Appeal Chamber Judgment, paras. 56 ff. (20 February 2001); *Prosecutor v Blaskić*, No. IT-95-14-A, Appeal Chamber Judgment, paras. 180 ff. (29 July 2004); *Naletilić and Martinović*, No. IT-98-34-T, paras. 204 ff.; *Kordić and Čerkez*, No. IT-95-14/2-A, paras. 328 ff.; critically, Queguiner, *IRRC*, 85 (2003), 3023 (considering the ICTY's position respectable and courageous, but warning against negative consequences, especially criticizing the uncertainty of the 'allegiance' criterion).

(c) Protected objects

Article 8(2)(b)(ii) Rome Statute follows the negative definition of Article 52(1) AP I in referring to 'civilian objects' as 'not military objectives' and, thus, reverts back to the second limb of the already mentioned principle of distinction (Article 48 AP I).[239] For the definition of 'civilian objects' this means that one must first define the term 'military objectives'. To this end two elements, contained in Article 52(2) AP I, are required: (1) the object makes an 'effective contribution to military action' by its 'nature, location, purpose, or use' (cf.); (2) its 'destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage'. Both elements must be met cumulatively.[240] This follows from the conjunction 'and' in Article 52(2) AP I and the humanitarian purpose of AP I calling for a broad protection and thus a restrictive interpretation of 'military objects'.[241]

With respect to the first element, an *'effective' contribution* can be either direct or indirect[242] and must be based on more than mere hypothesis or possibility.[243] The evaluation of the 'effective' contribution should be decided on account of its nature, location, purpose, or use,[244] that is, it should be context-related. For example, if combat takes place in a per se civilian area but civilian buildings like schools and hospitals are taken as cover by combatants or insurgents, those buildings turn into military objects.[245] However, such a re-qualification should not be done lightly given that '[i]n case of doubt' objects 'normally dedicated to civilian purposes' are to be considered as such (Article 52(3) AP I). Apart from that, a civilian object turned military regains its civilian status once the military use is definitely—not only temporarily—discontinued.[246] As to so-called '*dual-use*' *objects* (i.e. objects which serve both civilian and military purposes), it is controversial whether the civilian or the military use determines their qualification as civilian or military objectives.[247]

[239] Note 207.

[240] Pilloud and Pictet, 'Article 52 Protocol I', in Sandoz, Swinarski, and Zimmermann, *Commentary* (1987), mn. 2018; Oeter, 'Methods and Means of Combat', in Fleck, *Handbook IHL* (2008), mn. 442; Dörmann, 'Article 8', in Triffterer, *Commentary* (2008), mn. 36; Dörmann, '§ 11 VStGB', in Joecks and Miebach, *Münchener Kommentar*, viii (2013), mn. 50; Werle, *Principles* (2009), mn. 1184; Wright, *IRRC*, 94 (2012), 826.

[241] cf. Schmitt, *Tallinn Manual Cyber Warfare* (2013), p. 130; Pilloud and Pictet, 'Article 52 Protocol I', in Sandoz, Swinarski, and Zimmermann, *Commentary* (1987), mn. 2015 (arguing that 'this definition will prove useful for the population itself, for it is in the latter's interests to know whether or not it should avoid certain points that the adversary could legitimately attack'). See also Oeter, 'Methods and Means of Combat', in Fleck, *Handbook IHL* (2008), mn. 442 (arguing that 'the legitimate interest of states to preserve strategic and tactical maneuvering space can be taken into account only by interpreting and applying the inherent definition of "military objectives", not by abandoning any limitations of lawful military objectives').

[242] Dörmann, '§ 11 VStGB', in Joecks and Miebach, *Münchener Kommentar*, viii (2013), mn. 53.

[243] Kolb and Hyde, *International Law of Armed Conflicts* (2008), p. 131.

[244] Oeter, 'Methods and Means of Combat', in Fleck, *Handbook IHL* (2008), mn. 442 ('The formula used constitutes a general criterion the existence of which can be judged *in abstracto*').

[245] Dörmann, '§ 11 VStGB', in Joecks and Miebach, *Münchener Kommentar*, viii (2013), mn. 54; in the same vein in the context of cyber warfare if a party to the conflict uses the information systems of a hospital to launch cyber attacks Lin, *IRRC*, 94 (2012), 526; on definitions, see note 50.

[246] cf. Dörmann, 'Article 8', in Triffterer, *Commentary* (2008), mn. 36; Schmitt, *Tallinn Manual Cyber Warfare* (2013), p. 129.

[247] Generally speaking, dual-use objects are considered to be military objectives as soon as they effectively contribute to military purposes; however, Article 56 AP I exempts certain objects of this nature

The contribution of the object need not only be 'effective' but also directed towards '*military action*'. Here again one can pursue a restrictive or extensive interpretation. The former would exclude objects that have only a 'war-sustaining' effect, for example facilitating political or economic support, given that the connection between these supportive acts and the hostilities would be too remote.[248]

As for the second element, the *military advantage* anticipated from the destruction, capture, or neutralization must be concrete and definite[249] (i.e. 'substantial and relatively close').[250] A military advantage can be achieved by both an isolated attack or from the operation as a whole.[251] However, the advantage need not be assessed in relation to the entire war, but only to specific operations[252] and 'in the circumstances ruling at the time' (i.e. context-related).[253] While terrorizing the civilian population is not a legitimate goal of a military attack,[254] a decline of civilian morale can well be the result of an attack on a military objective.[255]

from attack because of the severe humanitarian consequences such an attack would entail; in addition, special attention has to be paid to the principle of proportionality, cf. Schmitt, *Tallinn Manual Cyber Warfare* (2013), Rule 39 and pp. 134–5 ('As a matter of law, status as a civilian object and military object cannot coexist; an object is either one or the other. This principle confirms that all dual-use objects and facilities are military objectives, without qualification. An attack on a military objective that is also used in part for civilian purposes is subject to the principle of proportionality and the requirement to take precautions in attack'); in the same vein, see Droege, *IRRC*, 94 (2012), 562–3; for a more nuanced view, see Geiß and Lahmann, *IsLR*, 45 (2012), 389 (arguing that, in the physical world, most civilian objects have no significant military potential and therefore cannot be used in a militarily conducive way); Steiger, 'Civilian Objects', in Wolfrum, *MPEPIL* (2008 ff.), mn. 12 ('In the majority of cases, dual-use objects have to be considered military objectives. However, this is only true as long as the object makes an effective contribution to military action by its nature, location, purpose and use and if its destruction offers a definite military advantage in the circumstances ruling at the time'); *ICRC Study I* (2005), p. 32 ('As far as dual-use facilities are concerned . . . practice considers that the classification of these objects depends, in the final analysis, on the application of the definition of military objective'); Fenrick, *EJIL*, 12 (2001), 494 ('[It] is situation dependent . . . [Dual-use] objects may become military objectives in certain conflicts depending on various factors, including the strategic objectives of the parties to the conflict and the degree to which the conflict approaches total war'). See also the *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, mn. 75–6 ('NATO intentionally bombed the Radio and TV station . . . The question [is]: was the station a legitimate military objective . . . ? . . . [T]he attack appears to have been justified by NATO as part of a more general attack aimed at disrupting the FRY Command, Control and Communications network, the nerve centre and apparatus that keeps Milosević in power, and also as an attempt to dismantle the FRY propaganda machinery. Insofar as the attack actually was aimed at disrupting the communications network, it was legally acceptable. If, however, the attack was made because equal time was not provided for Western news broadcasts, that is, because the station was part of the propaganda machinery, the legal basis was more debatable'). See with regard to cyber operations and technology companies or social networks (e.g. Facebook) that contribute to military operations, Geiß and Lahmann, *IsLR*, 45 (2012), 383, 389, 396 (with an interesting example of dual-use proportionality); Droege, *IRRC*, 94 (2012), 563–9; Schmitt, *Tallinn Manual Cyber Warfare* (2013), pp. 135–7.

[248] Schmitt, *Tallinn Manual Cyber Warfare* (2013), p. 131. For further references, see Oeter, 'Methods and Means of Combat', in Fleck, *Handbook IHL* (2008), mn. 443.8.

[249] Olásolo, *Unlawful Attacks* (2008), p. 124; Dörmann, '§ 11 VStGB', in Joecks and Miebach, *Münchener Kommentar*, viii (2013), mn. 55; Wright, *IRRC*, 94 (2012), 827.

[250] Pilloud and Pictet, 'Article 57 Protocol I', in Sandoz, Swinarski, and Zimmermann, *Commentary on the Additional Protocols* (1987), mn. 2209.

[251] Oeter, 'Methods and Means of Combat', in Fleck, *Handbook IHL* (2008), mn. 444.

[252] Schmitt, *Tallinn Manual Cyber Warfare* (2013), p. 131.

[253] Dörmann, '§ 11 VStGB', in Joecks and Miebach, *Münchener Kommentar*, viii (2013), mn. 57.

[254] Dörmann, '§ 11 VStGB', in Joecks and Miebach, *Münchener Kommentar*, viii (2013), mn. 55.

[255] Schmitt, *Tallinn Manual Cyber Warfare* (2013), p. 133.

In addition to these general IHL principles, the ICC Statute explicitly lists several *protected objects*. While buildings dedicated to religion, education, art, science, or charitable purposes, historic monuments, hospitals, and medical gathering places are protected both in international and non-international armed conflicts (Article 8(2)(b)(ix) and (e)(iv) ICC Statute), undefended towns, villages, dwellings, or building are to be spared only in an international context (Article 8(2)(b)(v)). Of course, these objects are only protected if they are not turned into military objects according to the general rules set out earlier. Last but not least and going beyond the text of the ICC Statute, objects 'indispensable to the survival of the civilian population' are also protected according to Article 54(2) AP I.[256] This protection is offered not only to civilian objects, but also to military ones provided that they are of vital importance[257] and, of course, the exceptions of Article 54(3) and (5) AP I do not apply.[258]

(7) *De facto* combatants, membership approach, and direct participation in hostilities

So-called *de facto or quasi-combatants* (i.e., persons who, without possessing a formal combatant status, directly and covertly participate in hostilities) normally do not identify themselves plainly as (actual) combatants, for example, by carrying weapons or wearing a uniform,[259] and so disregard, indirectly, the *principle of distinction* (Article 48 AP I).[260] This turns the corresponding armed conflict into an asymmetric one, precisely characterized by the lack of organization and visibility of these 'fighting civilians'.[261] In any case, these fighters lose, despite their primary status as civilians

[256] According to Article 54(2) AP I 'it is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population…'. In contrast, Article 54(1) prohibits the '[s]tarvation of civilians as a method of warfare'.

[257] Dörmann, *Völkerrechtliche Probleme* (2003), p. 324, n. 1139; see also Bothe, Partsch, and Solf, *New Rules* (1982), pp. 340–1; Blix, 'Means and Methods of Combat', in UNESCO, *International Dimensions of Humanitarian Law*, i (1988), p. 143.

[258] Accordingly, the prohibition in Article 54(2) AP I (not the one in para. 1, note 256), 'shall not apply to such of the objects… used by an adverse Party: (a) as sustenance solely for the members of its armed forces; or (b) if not as sustenance, then in direct support of military action, provided, however, that in no event shall actions against these objects be taken which may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement' (Article 54(3)). Further, a derogation from para. 2 (again, not from para. 1!) is possible '[i]n recognition of the vital requirements of any Party to the conflict in the defence of its national territory against invasion… where required by imperative military necessity' (Article 54(5)). See also Pilloud and Pictet, 'Article 54 Protocol I', in Sandoz, Swinarski, and Zimmerman, *Commentary* (1987), p. 656 mn. 2105.

[259] cf. regarding required identification as combatant (in international conflict), Article 4(A)(2) GC III as well as Ipsen, 'Combatants and Non-combatants', in Fleck, *Handbook IHL* (2008), mn. 308; Bothe, 'Friedenssicherung', in Vitzthum, *Völkerrecht* (2010), pp. 657–8.

[260] cf. Gasser, 'Protection of the Civilian Population', in Fleck, *Handbook IHL* (2008), mn. 501; Fleck, 'Non-International Armed', in Fleck, *Handbook IHL* (2008), mn. 1203; Olásolo, *Unlawful Attacks* (2008), pp. 13 ff.; Olásolo, *Corte penal internacional* (2003), pp. 13 ff., 104, 256 ff.; Hankel, 'Überlegungen zum Kombattantenstatus', in Hankel, *Die Macht und das Recht*, (2008), p. 449.

[261] cf. Herdegen, *Völkerrecht* (2012), § 56 mn. 21; Zimmermann, *GA*, 157 (2010), 520; Weingärtner, *HuV-I*, 23 (2010), 144; Hobe, 'Der asymmetrische Krieg', in Heintze and Ipsen, *Heutige bewaffnete Konflikte* (2011), pp. 71 ff.

under IHL,[262] their immunity from attack (Article 51(1) and (2) AP I; Article 13(1) and (2) AP II) and hence become legitimate military targets[263] if 'they take a direct part in hostilities' (Article 13(3) AP II).[264] When this exactly happens is highly controversial, as we will see in subsection (b). A different treatment is warranted if these 'civilian fighters' act in an organized form similar to an ordinary organized group within the meaning of IHL.

(a) Loss of immunity from attack and membership approach

De facto combatants may belong to *organized armed groups* within the meaning of IHL.[265] One may then derive their (*de facto*) combatant status from the rationale of Article 50(1) AP I which defines 'civilian' negatively, that is, in opposition to (formal) combatants belonging to formal military organizations within the framework of an international conflict. The rationale of this provision lies in the relevance of the organization for assigning combatant status. It also applies, for reasons of logic and consistency, to a non-international conflict.[266] Thus, (*de facto*) combatant status can be based on membership in an armed organized group within the meaning of IHL. Such groups take, by definition, a direct part in hostilities; in contrast, other groups, being less organized associations of individuals, do not take part in hostilities per their status as (armed organized) group. As a consequence, while in the former case of an organized armed group, the group members lose their immunity from attack automatically on the ground of their group membership, in the latter case this has to be decided for each individual member on a case-by-case basis depending on their concrete participation in hostilities. The underlying *membership approach*[267] implies that all members of an organized armed group within the meaning of IHL are not protected by civilian immunity and thus constitute legitimate military targets.[268]

It is controversial, however, whether the membership approach entails the same consequences in an international and non-international armed conflict as far as the *duration and permanence of the loss of immunity* from attack is concerned. One—status-based[269]—view adopts this strict position, focusing only on the membership of

[262] Wieczorek, *Unrechtmäßige Kombattanten* (2005), pp. 104 ff.; Heintze, 'Do Non-State Actors Challenge IHL?', in Heintschel von Heinegg and Epping, *New Challenges* (2007), p. 167; Werle, *Völkerstrafrecht* (2012), mn. 1114; Werle, *Principles* (2009), mn. 1020; Zechmeister, *Erosion des humVR* (2007), p. 116; Spies, *HuV-I*, 22 (2009), 142; Cassese, *Expert Opinion*, mn. 26.

[263] cf. Olásolo, *Unlawful Attacks* (2008), pp. 107–8.

[264] In detail, see Gasser, 'Protection of the Civilian Population', in Fleck, *Handbook IHL* (2008), mn. 519; cf. also ICRC, *IRRC*, 89 (2007), 10; Werle, *Völkerstrafrecht* (2012), mn. 1114; Sassòli, *HPCR* (2006), 18; Dörmann, *IRRC*, 85 (2003), 46; Olásolo, *Unlawful Attacks* (2008), pp. 107–8; Pejic, 'Unlawful/Enemy Combatants', in Schmitt and Pejic, *Exploring the Faultlines* (2007), p. 338; about terrorists (Al Qaeda) in this respect, see Schaller, *SWP-Studie* (2007), p. 18.

[265] For the definition of such a group, see n. 280 and main text.

[266] However, according to the *ICRC Study I* (2005), Rule 5, pp. 19, state practice is unclear in this regard.

[267] Ambos and Alkatout, *IsLR*, 45 (2012), 347–8.

[268] Watkin, *NYUJIL&Pol'y*, 42 (2010), 691; for a more restrictive view see, for example, Melzer, *NYUJIL&Pol'y*, 42 (2010), 846 (arguing that only the 'military wing' of a group loses immunity permanently).

[269] May, *JICJ*, 11 (2013), 48–51.

the respective civilians in an armed group,[270] and argues that the loss of immunity is permanent, going beyond the actual participation in hostilities,[271] and thus it also extends to 'off duty' situations, for example when sleeping or taking part in recreational activities with their comrades.[272] In contrast, another—conduct-based[273]—view holds that only the exercise of a so-called 'continuous combat function'[274] results in the loss of immunity for the duration of the conflict.[275] While the former view can be justified by the equal treatment of group members and states' combatants,[276] the latter view may better accommodate the structural difference between a state and a non-state actor. To put on an equal footing soldiers of regular armed forces with civilians who are part of irregular, non-state armed groups—at least with regard to the loss of immunity from attacks[277]—requires something more than mere membership, namely continuous preparation, execution, or command of 'acts or operations amounting to direct participation in hostilities'.[278]

In any case, given the far-reaching consequences associated with the loss of (civilian) immunity from military attack, the requirements to convert a group of terrorist criminals into a party to a conflict governed by IHL (i.e. an organized armed group), should be strict.[279] Thus, the respective group's features ought to resemble those of a state as the paradigmatic party to a conflict. The group must demonstrate a minimum degree of collectivity and central organization,[280] be organized in a hierarchic

[270] cf. Watkin, *NYUJIL&Pol'y*, 42 (2010), 690 ff; Jensen, 'Targeting Persons and Property', in Corn, *War on Terror* (2009), p. 49.

[271] Dinstein, *Belligerent Occupation* (2009), p. 103; Dinstein, *Conduct of Hostilities* (2010), p. 146; see also Akande, *ICLQ*, 59 (2010), 190 ff.

[272] Richter, *HuV-I*, 24 (2011), 110. This also counts true for members of organized armed groups who forfeit their combatant status by disrespecting IHL, see Jensen, 'Targeting Persons and Property', in Corn, *War on Terror* (2009), p. 49.

[273] May, *JICJ*, 11 (2013), 51–2.

[274] The term was coined during discussion of the expert groups in the ICRC clarification process on the notion of direct participation in hostilities: see Watkin, *NYUJIL&Pol'y*, 42 (2010), 655. According to Melzer, *Interpretive Guidance* (2009), p. 33 'under IHL, the decisive criterion for individual membership in an organized armed group is whether a person assumes a continuous function for the group involving his or her direct participation in hostilities (hereafter: "continuous combat function")'.

[275] For this view, see Melzer, *Interpretive Guidance* (2009), p. 33; Melzer, *NYUJIL&Pol'y*, 42 (2010), 890–1. Questioning whether *de facto* combatants can be permanently targeted as such, see also Bothe, 'Töten und getötet werden', in Klaus and Tietje, *Weltinnenrecht* (2005), p. 71.

[276] Ohlin, *JICJ*, 11 (2013), 37–8 ('While regular combatants of a state army could be targeted at any time by virtue of their status, civilian fighters of a non-state military force cold only be targeted at the moment when they were directly participating in hostilities . . . Once the continuous combat function standard is applied, though, non-state fighters and traditional army soldiers are placed on a level playing field').

[277] Akande, *ICLQ*, 5 (2010), 186.

[278] Melzer, *NYUJIL&Pol'y*, 42 (2010), 34; Ohlin, *JICJ*, 11 (2013), 38; similarly, Schmitt, *Tallinn Manual Cyber Warfare* (2013), p. 116.

[279] For a broader approach with a view to a wide application of IHL, apparently, see Sassòli, *International Humanitarian Legal Studies*, 1 (2010), 14, arguing that 'the only limitation is that such a group must be a genuine armed group engaged in a genuine armed conflict'. It is not clear, however, what exactly the genuine element means in this context. It could also entail a restrictive interpretation of 'armed group' and 'armed conflict'.

[280] Rudolf and Schaller, *SWP-Studien*, S1 (2012), p. 16. The ICTY lists 'the existence of a command structure and . . . headquarters' amongst its 'indicative factors', see *Prosecutor v Haradinaj et al.*, No. IT-04-84-T, Trial Chamber Judgment, para. 60 (3 April 2008). For a minimum degree of organization, see Paulus and Vashakmadze, *IRRC*, 91 (2009), 117. Lubell, *Extraterritorial Use of Force* (2010), p. 110 ('it appears unquestionable that a minimum level of organization must exist'); Heller, *JICJ*, 11 (2013), 110–11.

manner,[281] and—as required by Article 1(1) AP II—it should have the capacity 'to carry out sustained and concerted military operations'. If a group is composed of different wings of a military, political, and/or social nature, only the military one qualifies as an organized armed group.[282] It has even been suggested that a hybrid model should be applied to terrorist groups, and thus they should be qualified as targetable only if in addition to their membership in an organized armed group their conduct also constitutes a (culpable) participation in hostilities.[283] While this may be welcomed from a human rights perspective, it draws the membership approach back into the area of legal insecurity of the direct participation approach.

In any case, even if a 'civilian fighter' loses the protection from attack based on the membership approach, the postulates of humanity[284] and military necessity[285] call for the primacy of an arrest before lethal force is used.[286] While killing is not explicitly prohibited by the applicable law, it is not explicitly authorized either[287] and the

[281] Article 4(A)(2)(a). See also Wieczorek, *Unrechtmäßige Kombattanten* (2005), pp. 75 ff.; Schaller, *SWP-Studie* (2007), p. 20 (hierarchy of command and the capability of the group to coordinate military actions with certain firepower); regarding the hierarchy of command see also *Haradinaj et al.*, No. IT-04-84-T, para. 60; Paulus and Vashakmadze, *IRRC*, 91 (2009), 117; Lubell, *Extraterritorial Use of Force* (2010), p. 110. The mere hostile character of a group does not suffice, cf. Watkin, *NYUJIL&Pol'y*, 42 (2010), 691 and Article 43(1)(2) AP I; Bothe, 'Töten und getötet werden', in Klaus and Tietje, *Weltinnenrecht* (2005), p. 71.

[282] Schmitt, *Tallinn Manual Cyber Warfare* (2013), p. 117.

[283] May, *JICJ*, 11 (2013), 55, 48 (arguing that '. . . the war on terrorism might require a kind of response on hybrid status-plus-conduct terms'; 'the named target may be identified on the basis of his or her role in a particular organization . . . or on the basis of his or her alleged behaviour, such as being responsible for setting of a bomb . . . a hybrid model . . . identifies the target in terms of both behaviour and status').

[284] As referred to in Article 1(2) AP I ('. . . . civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the *principles of humanity* and from the dictates of *public conscience*'; emphasis added). See also ICJ, *Nuclear Weapons Case* (1996), para. 78.

[285] Article 57(3) AP I reads as follows: 'When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the *least danger* to civilian lives and to civilian objects' (emphasis added). For a detailed comparison of the concept of military necessity in HRL to that in IHL, see Ohlin, *MinLR*, 97 (2013), 1295–324; from these two perspectives, see also Luban, *LJIL*, 26 (2013), 322–3, 339 ff.; generally, Volume I of this treatise, pp. 388–90.

[286] cf. Israel Supreme Court, *Targeted Killings* (2006), para. 60 ('Harming such civilians, even if the result is death, is permitted, on the condition that there is no other less harmful means'). See also Melzer, *NYUJIL&Pol'y*, 42 (2010), 81; Melzer, *YbIHL*, 9 (2006), *passim*; Solis, *Naval War College Review*, 60 (2007), 542 (deriving this from international HRL and advocating its application also during armed conflict); in a similar vein Ohlin, *JICJ*, 11 (2013), 33–4; Ohlin, *MinLR*, 97 (2013), 1306. This has also been recognized by the Obama administration, see Brennan, 'The Ethics and Efficacy of the President's Counterterrorism Strategy' <http://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy> accessed 5 May 2013 ('. . . our unqualified preference is to only undertake lethal force when we believe that capturing the individual is not feasible. I have heard it suggested that the Obama Administration somehow prefers killing al-Qaida members rather than capturing them. Nothing could be further from the truth. It is our preference to capture suspected terrorists whenever and wherever feasible'). *Contra*, see Rudolf and Schaller, *SWP-Studien*, S1 (2012) considering that there is no obligation in armed conflict to use the least harmful means (p. 21), such as arrest (p. 26). In a similar vein, see van Schaack, *YbIHL*, 14 (2011), 24 ('IHL countenances the use of deadly force against the adversary as a first resort as compared with peacetime law enforcement scenarios'). Also critical, Park, *NYUJIL&Pol'y*, 42 (2010), 801–2 (arguing that that one should be aware of the difference between IHL and law enforcement with regard to the 'capture rather than kill' thesis).

[287] For the need of such a positive authorization to kill by international (humanitarian) law, see Eser, 'Tötung im Krieg', in Appel, Hermes, and Schönberger, *FS Wahl* (2011), pp. 665 ff.; see also Hankel, *Tötungsverbot* (2011), pp. 43 ff.

principles mentioned leave, in any case, room for a more humanist interpretation. If a *de facto* combatant falls into the hands of the enemy, the minimum standard of Common Article 3 and Article 4–6 AP II is applicable, independent of his participation in hostilities.[288] From a human rights perspective, the principle of proportionality requires reasonable certainty regarding the threat posed by the targeted individual and the inevitable necessity to use lethal force.[289]

(b) Direct participation in hostilities and revolving door

If the membership approach does not apply, be it for the lack of an organized armed group within the meaning of IHL or for more principled reasons, *de facto* combatants are, as a rule, protected as civilians, both in international and non-international conflict, 'unless and for such time as they take a direct part in hostilities' (Article 51(3) AP I, 13(3) AP II). It is, however, far from clear when, in what way and until which point of time a person 'directly' participates in hostilities.[290] The ICRC suggested, after an intensive consultation process,[291] some general criteria—'(1) a threshold regarding the harm likely to result from the act, (2) a relationship of direct causation between the act and the expected harm, and (3) a belligerent nexus between the act and the hostilities conducted between the parties to an armed conflict'[292]—but these have met considerable criticism.[293]

Consensus only exists insofar that while the respective acts do not have to cause the death of victims, injuries or damages themselves they must, at least, 'adversely affect the

[288] cf. Dörmann, *IRRC*, 85 (2003), 48; *ICRC Study I* (2005), Rule 87, pp. 306–7.

[289] May, *JICJ*, 11 (2013), 56–9.

[290] See Fenrick, *JICJ*, 5 (2007), 335 ff.; Israel Supreme Court, *Targeted Killings* (2006), paras. 33 ff.; Cassese, *Expert Opinion*, mn. 12 ff.; Schmitt, *ChicJIL*, 2 (2005), 511; Hankel, 'Überlegungen zum Kombattantenstatus', in Hankel, *Die Macht und das Recht* (2008), pp. 450–1; Olásolo, *Unlawful Attacks* (2008), pp. 108 ff.; Keller and Forowicz, *LJIL*, 21 (2008), 203 ff., 219; Dörmann, '§ 11 VStGB', in Joecks and Miebach, *Münchener Kommentar*, viii (2013), mn. 39–40; Gasser and Melzer, *Humanitäres Völkerrecht* (2012), pp. 161–2.

[291] This consultation process resulted in 2008 in its 'Interpretive Guidance' providing for a more concrete definition of 'direct participation in hostilities' (ICRC, *Contemporary Armed Conflicts* (2007), pp. 16–17). See also *ICRC Study I* (2005), Rule 6, pp. 22 ff. as well as the summary of the Third Expert Meeting on the Notion of Direct Participation in Hostilities—Summary Report October 2005, available at <http://www.icrc.org/eng/assets/files/other/2005-09-report-dph-2005-icrc.pdf> accessed 14 January 2013.

[292] Melzer, *Interpretive Guidance* (2009), p. 46.

[293] cf. Boothby, *NYUJIL&Pol'y*, 42 (2010), 768 (arguing that the approach is too restrictive); Parks, *NYUJIL&Pol'y*, 42 (2010), 828–30 (focusing on the construction of the guidance 'from faulty sources against the strongest advice of experts' and its impracticality); Schmitt, *NYUJIL&Pol'y*, 42 (2010), 738–9 (arguing that 'the three constitutive elements reflect factors that undoubtedly must play into such an analysis. Their deficiencies lie at the margins, typically faults of under-inclusiveness'); Watkin, *NYUJIL&Pol'y*, 42 (2010), 693–4 (criticizing that the guidance does not re-state existing law but rather introduces many new terms and concepts and is thus difficult and unlikely to be applied; states are disadvantaged in relation to non-state actors and the proposal is generally too restrictive); concurring, Wright, *IRRC*, 94 (2012), 828 (referring to the US Army law of war manual); for a comparison with the broader approach of the *Tallinn Manual of Cyber Warfare*, see Lülf, *HuV-I*, 26 (2013), 80–2 (concluding that while the *Tallinn Manual* is based on the ICRC Interpretive Guidance it is broader with regard to the threshold of harm and the belligerent nexus); on the impossibility to delegate such complex, interpretative rules to fully autonomous weapon systems, see Asaro, *IRRC*, 94 (2012), 698–703.

military operations or military capacity of a party to an armed conflict',[294] that is, they are likely to cause harm[295] to military personnel or equipment of the adversary.[296] While the mere contribution to a 'general war effort', such as the production of weapons, is considered only an indirect participation,[297] preparatory actions leading up to the hostilities are generally categorized as direct participation.[298] Attacking or trying to capture members or weapons of the enemy armed forces, laying mines, planting or detonating bombs, or sabotaging military lines of communication are also all well-known examples of direct participation.[299] The deployment to, or retreat from, places where the mentioned activities are carried out are also included in the definition of direct participation.[300] Also, if harm is otherwise caused (to non-military targets), by killing civilians for example, direct participation still exists[301] as long as the violence is linked to the conflict (belligerent nexus).[302] Clearly, the broader one interprets the 'direct' participation requirement, the closer one comes to a position once echoed by the Israeli High Court of the obligation of civilians 'to stay away from hostilities to the extent possible'.[303] A broader reading would also include those who plan or coordinate combat operations in the concept of direct participation.[304] The same rules apply to CIA agents operating drones and executing lethal drone strikes since they are not regular military personnel but civilians directly participating in hostilities and thus legally targetable any time and any where until they regain civilian protection.[305]

Another related problem is the use of *human shields*. While the coercive utilization of civilians as human shields is a clear-cut case of a war crime according to Article 8(2)(b)(xxiii) ICC Statute,[306] how the situation where civilians make themselves

[294] Melzer, *Interpretive Guidance* (2009), p. 46; see also Schmitt, 'Direct Participation in Hostilities', in Fischer, *Crisis Management* (2004), pp. 536 ff.; Schmitt, *ChicJIL*, 2 (2005), 511; Schmitt, *NYUJIL&Pol'y*, 42 (2010), 716–17; Rodriguez-Villasante, 'Terrorist Acts', in Fernández Sánchez, *New Challenges* (2005), pp. 40 ff.; Bothe, 'Töten und getötet werden', in Klaus and Tietje, *Weltinnenrecht* (2005), p. 71.

[295] Quéguiner, *Le principe de distinction* (2006), pp. 326–7 ('une menace directe et immédiate pour le belligérant adverse').

[296] *Bagilishema*, No. ICTR-95-1A-T, para. 104; David, *Principes* (2008), p. 286, mn. 2.25.

[297] Melzer, *Interpretive Guidance* (2009), pp. 52–3.

[298] Melzer, *Interpretive Guidance* (2009), p. 17; Rogers, *Battlefield* (2004), pp. 11–12; Boothby, *NYU-JIL&Pol'y*, 42 (2010), 746 ff.; see also Israel Supreme Court, *Targeted Killings* (2006), para. 34.

[299] Wearing a uniform, a distinctive sign, and using weapons is sufficient according to Römer, *Killing* (2010), p. 50. For further examples, see *Prosecutor v Strugar*, No. IT-01-42-A, Appeals Chamber Judgment, para. 177 (17 July 2008).

[300] Rogers, *Battlefield* (2004), pp. 11–12; Israel Supreme Court, *Targeted Killings* (2006), para. 34.

[301] Römer, *Killing* (2010), p. 55; Kretzmer, 'Civilian Immunity', in Primoratz, *Civilian Immunity* (2007), p. 91; Schmitt, *HarvNSJ*, 1 (2010), 28; Schmitt, *Tallinn Manual Cyber Warfare* (2013), p. 119.

[302] For a detailed analysis of the belligerent nexus, see Legernæs, *Incompetent Resistance?* (2009), p. 26, available at <https://www.duo.uio.no/bitstream/handle/123456789/22072/90970.pdf?sequence=1> accessed 14 January 2013; see also Lubell and Derejko, *JICJ*, 11 (2013), 84 (suggesting that this nexus is stricter than the one required for war crimes).

[303] Israel Supreme Court, *Targeted Killings* (2006), para. 34.

[304] Israel Supreme Court, *Targeted Killings* (2006), para. 37; Schmitt, *ChicJIL*, 5 (2005), 529.

[305] cf. Ohlin, *JICJ*, 11 (2013), 42, 45; in a similar vein regarding civilians involved in cyber attacks, see Lin, *IRRC*, 94 (2012), 526–7; Lülf, *HuV-I*, 26 (2013), 79.

[306] For the primary IHL provisions see Article 23 GC III, Article 28 GC IV and Article 51(7) AP I. The underlying moral obligation for the parties to a conflict is 'not to deliberately put civilians in harm's way for military advantage' (Walzer, *EJIL*, 24 (2013), 437).

voluntarily available for this purpose should be treated is controversial. If this were to be considered a direct participation in hostilities, these civilians could be attacked. Thus, the question arises whether in the circumstances of a concrete case this activity comes close to a militarily adverse one in the sense mentioned earlier.[307] Otherwise, such a human shield would pose a significant moral and legal obstacle for the adverse party since it cannot without further ado attack civilians. Ultimately, the legality of the attack does not so much depend on the violation of the principle of distinction but on the principle of proportionality,[308] that is, a balancing of the military necessity of the attack in terms of the military advantage obtained and the harm caused to probably innocent civilians.[309]

With regard to the concrete 'civilian fighter', the concept of the '*revolving door*'[310] expresses the situation by which a person works as a civilian during daytime and, passing through a 'revolving door', turns into a fighter by night ('farmers by day, fighters by night').[311] The effect of the revolving door scenario would be that the (night) fighter, once back at his daily work, regains civilian protection leaving no chance for the adverse party to treat him as a military target. While this may be the exact purpose of the revolving door from a humanitarian perspective,[312] it leads to the asymmetric situation that the official armed forces are permanently legitimate military objectives but cannot fight back to their adversary, the fighting civilians, in the same manner.[313] This cannot be correct and, indeed, the law does not provide for a privileged treatment of civilian fighters vis-à-vis ordinary combatants;[314] on the contrary, the principles of fairness and reciprocity enshrined in IHL call for equal rights and obligations of all parties to a conflict.[315] Apart from that, the fighting civilian's lack of clear identification as a (*de facto*) combatant constitutes, as already mentioned at the beginning of this section, a plain violation of the principle of distinction (Article 48 AP I).[316] This

[307] Melzer, *NYUJIL&Pol'y*, 42 (2010), 57, for example, does not consider intentional and voluntary 'human shields' as direct participation, as long as no physical military damage to other party occurs; for a different view, see Schmitt, *NYUJIL&Pol'y*, 42 (2010), 732 ff.

[308] Note 232.

[309] See also Gasser and Melzer, *Humanitäres Völkerrecht* (2012), p. 163 (arguing that this needs to be understood narrowly, differentiating between preventable and unpreventable civilian damages. In any case, it is hard to develop objective standards and the final assessment depends on the concrete circumstances of the particular case).

[310] The term goes back to Parks, *Air Force LR*, 32 (1990), 118; see also Shany, 'Israeli Counter-Terrorism Measures', in Merron, *Terrorism and International Law* (2002), p. 104, <http://www.iihl.org/iihl/Documents/Terrorism%20and%20IHL.pdf> accessed 14 January 2013; Schmitt, 'Direct Participation in Hostilities', in Fischer, *Crisis Management* (2004), p. 510; Schmitt, *ChicJIL*, 5 (2005), 59 ff.; Olásolo, *Unlawful Attacks* (2008), pp. 114–15.

[311] ICRC, *IRRC*, 89 (2007), 15; Olásolo, *Unlawful Attacks* (2008), p. 114; Otto, *Targeted Killing* (2012), pp. 219 ff.

[312] Melzer, *Interpretive Guidance* (2009), pp. 70–1 (revolving door as 'an integral part, not a malfunction, of IHL'); Bothe, 'Töten und getötet werden', in Klaus and Tietje, *Weltinnenrecht* (2005), p. 71.

[313] cf. Fenrick, *JICJ*, 5 (2007), 338. This 'specific acts approach' (i.e., that direct participation in hostilities—turning civilians into legitimate military objectives—is limited to the immediate execution phase of a specific military operation) is criticized by Watkin, *NYUJIL&Pol'y*, 42 (2010), 685.

[314] Schmitt, Garraway, and Dinstein, *Manual* (2006), p. 5; Schmitt, *ChicJIL*, 5 (2005), 511; Kretzmer, *EJIL*, 16 (2005), 198–9; on the underlying issues of just war and fairness see Walzer, *EJIL*, 24 (2013), 433 ff.

[315] Schmitt, Garraway, and Dinstein, *Manual* (2006), p. 5; Schmitt, 'Direct Participation in Hostilities', in Fischer, *Crisis Management* (2004), p. 510; also Kretzmer, *IsLR*, 42 (2009), 34 ff.

[316] Note 260 and main text.

assessment is also reflected in ICL: the treacherous killing or wounding of an adverse combatant, that is, by way of a concealed and insidious attack, is punishable in both international and non-international conflicts (Article 8(2)(b)(xi) and (e)(ix) ICC Statute; Article 37(1) AP I).

For all these reasons a civilian who directly participates in hostilities can not regain civilian protection by a mere temporary abandonment of his participation in hostilities. Instead, he should be treated as a (*de facto*) combatant until he definitely and clearly withdraws from participating in the hostilities,[317] for example by handing over his weapons,[318] or by a long period of non-participation.[319] The risk that this definitive withdrawal is not recognized by the adverse party immediately must be borne by the fighting civilian since he took the decision to participate in the hostilities in the first place.[320] Admittedly, such a strict approach may limit the scope of protection of IHL with regard to civilians. In any case, the distinction between (civilian) members of organized armed groups who can be attacked on grounds of their membership (membership approach) and loosely organized civilian fighters who can only be targeted in line with Article 51(3) AP I and Article 13(3) AP II remains intact.

It should be clear from these considerations, demonstrating that civilians may lose their immunity from attack and become legitimate military targets by directly participating in the hostilities, that the resort to a third category of '*unlawful combatants*',[321] in addition to civilians and (*de facto*) combatants, is plainly superfluous.[322] In fact, this third category aims to convert the respective individuals into non-persons without rights,[323] a kind of modern *hostes humani generis*.[324] But, as shown elsewhere,[325] these persons enjoy certain minimum rights at all times: in times of armed conflict, they are

[317] Schmitt, *ChicJIL*, 5 (2005), 536; Schmitt, *NYUJIL&Pol'y*, 42 (2010), 317, calls this the 'door after exit' approach. See also Schaller, *SWP-Studie* (2007), p. 18, n. 49; Israel Supreme Court, *Targeted Killings* (2006), para. 39; Stewart, *JICJ*, 7 (2009), 873, n. 75.

[318] Olásolo, *Unlawful Attacks* (2008), p. 115.

[319] In detail, see Schmitt, 'Targeting and International Humanitarian Law in Afghanistan', in Schmitt, *War in Afghanistan* (2009), p. 317. Critically, see Boothby, *NYUJIL&Pol'y*, 42 (2010), 759 (considering the 'continuous non-participation for long time', as suggested by Schmitt, as insufficient for this purpose).

[320] Schmitt, *ChicJIL*, 5 (2005), 536; Olásolo, *Unlawful Attacks* (2008), pp. 105–6.

[321] The term 'unlawful combatant' was originally introduced to describe concealed German saboteurs in the USA, see US Supreme Court, *Ex parte Quirin*, US Reports 317 (1942), 1 (4, 31). For a recent definition see Printer, *UCLA JIL & ForAff*, 8 (2003), at 369 ('person, who takes up arms, without authority, in defiance of the laws of war').

[322] In the same vein, see Cunningham, *HuV-I*, 26 (2013), 59–60. However, in favour of this category, for example, Dinstein, 'Status Groups', in Heintschel von Heinegg and Epping, *New Challenges* (2007), p. 151; Dinstein, *War* (2005), p. 29; Baxter, *BYbIL*, 28 (1951), 328; Detter, *Law of War* (2000), p. 148; apparently also Zimmermann, *GA*, 157 (2010), 520–1; cf. also Response of the USA dated 21 October 2005 to the inquiry of the UNCHR Special Rapporteurs dated 8 August 2005 pertaining to detainees at Guantanamo Bay, p. 5 available at <http://www.asil.org/pdfs/ilib0603211.pdf> accessed 5 November 2012.

[323] Critically, see also Sassòli, *HPCR* (2006), p. 16; Wieczorek, *Unrechtmäßige Kombattanten* (2005), p. 1112; Heintze, 'Do Non-State Actors Challenge IHL?', in Heintschel von Heinegg and Epping, *New Challenges* (2007), p. 167; Werle, *Völkerstrafrecht* (2012), mn. 1114; Werle, *Principles* (2009), mn. 1020; Hobe and Kimminich, *Völkerrecht* (2008), pp. 582–4; Zechmeister, *Erosion des humVR* (2007), p. 116; Rodriguez-Villasante, 'Terrorist Acts', in Fernández Sánchez, *New Challenges* (2005), p. 41; Abril-Stoffels, 'From Bagdad to Guantanamo', in Fernández Sánchez, *New Challenges* (2005), p. 204; ICRC, *IRRC*, 89 (2007), 8–9; Cassese, *Expert Opinion*, mn. 26; Dörmann, *IRRC*, 85 (2003), 66; Ipsen, 'Combatants and Non-combatants', in Fleck, *Handbook IHL* (2008), mn. 302.2.

[324] See with regard to criminals against humanity, Chapter II, A. (2).

[325] cf. Ambos and Poschadel, *ULR*, 9 (2013), pp. 109 ff.

protected by the fundamental 'laws of humanity' in the sense of the *Martens Clause* and Common Article 3 GCs, including the 'judicial guarantees which are recognized as indispensable by civilized peoples' (Common Article 3(1)(d) GCs); in times of peace, the non-derogable rights of the international human rights instruments, including minimum fair trial rights, apply.

Against this background, the rise of a new type of targeting over the last couple of years in the form of the so-called '*signature strikes*' employed by the USA in its 'war on terror' gives rise to concern. Signature strikes are—in contrast to '*personality strikes*'—not directed at individually identified, alleged terrorists, included in a 'kill list', but at groups of persons whose identities are unknown but who have a specific lifestyle or participate in certain activities which indicate their involvement in terrorist activities—'certain signatures, or defining characteristics associated with terrorist activity'.[326] In order to identify a potential terrorist the USA apparently relies on fourteen different signatures that it considers as lawful indicators of legitimate targets.[327] As these signatures also include such vague and imprecise criteria as 'military-age male in area of known terrorist activity'[328] there is a great likelihood that some of them violate the principle of distinction and might as such lead to war crimes according to Article 8(2)(c)(i) and 8(2)(e)(i)xxx.[329]

B. Individual War Crimes

(1) General

Article 8 ICC Statute contains fifty-one individual offences which are all based on the prohibitions of the Hague and Geneva Laws.[330] As a consequence, they must be interpreted in the light of these primary rules.[331] These provide in particular for some *fundamental principles* regarding the conduct of hostilities, in part already mentioned in the previous section, namely the principles of distinction,[332] proportionality,[333] and precaution.[334] The dependence of Article 8 ICC Statute on the primary rules entails that there can be no war crimes with respect to forms of conduct which are not prohibited by the primary rules; the criminal responsibility is insofar accessory.[335]

[326] Klaidman, *Kill or Capture* (2012), p. 41; see also Heller, *JICJ*, 11 (2013), 90.

[327] For a list of these signatures, see Heller, *JICJ*, 11 (2013), 94–103 (considering five of them to be lawful, four clearly in breach of IHL, and the remaining five lawful/unlawful depending on their interpretation).

[328] Heller, *JICJ*, 11 (2013), 97, with further references.

[329] Heller, *JICJ*, 11 (2013), 106–9 (admitting, however, that proof of the necessary *mens rea* might be difficult).

[330] cf. Volume I of this treatise, pp. 11 ff.

[331] On primary and secondary rules (prohibitions and crimes) in this context, see Bothe, 'War Crimes', in Cassese et al., *Rome Statute*, i (2002), p. 381.

[332] Note 207. [333] Note 232.

[334] The principle has two limbs, that is, it refers to precautions in attack (Article 57 AP I) and precautions against the effects of attacks (Article 58 AP I); see on its customary law status *ICRC Study I* (2005), Rules 15–24 with pp. 51 ff. See from a US perspective, Wright, *IRRC*, 94 (2012), 830–2; with regard to drone attacks, Casey-Maslen, *IRRC*, 94 (2012), 606–8; with regard to cyber warfare, Geiß and Lahmann, *IsLR*, 45 (2012), 392–5 (discussing precautionary obligations flowing from Article 58(a) and (c) AP I); Droege, *IRRC*, 94 (2012), 573–6; Schmitt, *Tallinn Manual Cyber Warfare* (2013), pp. 164 ff.

[335] Similarly, Satzger (2012), § 14 mn. 53; cf. also Kolb, 'Droit international pénal', in Kolb, *Droit international pénal* (2008), p. 122 (ICL as '*bras d'exécution*' of IHL). On the unlawfulness of the attack according to IHL as prerequisite of the existence (of other) international crimes, cf. Olásolo, *Unlawful*

On the other hand, not all primary prohibitions may be converted or transformed into secondary criminalizations; that is, not all prohibitions are actual crimes.[336] This is a consequence of the—already mentioned—closed system of Article 8 ICC Statute: while Article 3 ICTYS refers to the 'laws or customs of war' and thereby criminalizes all primary rules which are the object of this reference, Article 8 ICC Statute provides for an exhaustive enumeration which is more restrictive than the open list of Article 3 ICTYS. Article 8 ICC Statute does not, for example, criminalize the use of nuclear or biological weapons explicitly but makes their criminalization dependent on a 'comprehensive prohibition' which must be included in an annex to the Statute (Article 8(2)(b)(xx) ICC Statute). Apart from that, the use of these weapons could be covered by subparas. 2(b)(i), (ii) or (iv) of Article 8.[337] Most notably, in non-international conflict, criminal responsibility falls partially short of international customary law. We will now turn to the concrete distinction.

(2) Crimes in international versus non-international conflict

As we have already seen, Article 8 ICC Statute maintains the classical two-box approach, in that it distinguishes between crimes of international and non-international armed conflict (paras. (a) and (b) *versus* (c) and (e)). A mere superficial look at the text of Article 8 shows that there are more acts punishable in international armed conflict than in a non-international one.[338] Yet, one must be careful in comparing subparas. (a) and (b) with subparas. (c) and (e) on a purely literal basis. While there may be many divergences in the plain wording of the individual acts, in substance there is considerable similarity, if not identity. Thus, for example, Article 8(2)(b)(ii) ICC Statute punishes intentional attacks against 'civilian objects' and these very objects are enumerated in subparas. (e)(ii) and (iv), that is, the same acts are punishable in a non-international armed conflict. Taking this substantive consideration into account, the following can be identified as crimes which are only punishable in international armed conflict:[339]

- Launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term, and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated (Article 8(2)(b)(iv)).
- Attacking or bombarding, by whatever means, towns, villages, dwellings, or buildings which are undefended and which are not military objectives.

Attacks (2008), pp. 11–12, 256; in this sense, also concerning deportation as war crime and crime against humanity, see Akhavan, *JICJ*, 6 (2008), 22–3, 27 ff.

[336] cf. Bothe, 'War Crimes', in Cassese et al., *Rome Statute*, i (2002), p. 387.

[337] See Bothe, 'War Crimes', in Cassese et al., *Rome Statute*, i (2002), pp. 396–7, 406–7.

[338] See for more details, Condorelli, 'War Crimes and Internal Conflicts', in Politi and Nesi, *Rome Statute* (2002), pp. 112–13; La Haye, 'Elements of War Crimes', in Lee, *The ICC* (2001), pp. 109–10, especially p. 217.

[339] For a comparative chart from the perspective of the non-international conflict crimes of subpara. (2)(e), see La Haye, 'Elements of War Crimes', in Lee, *The ICC* (2001), p. 217.

- Killing or wounding a combatant who, having laid down his arms or no longer having a means of defence, has surrendered at discretion (Article 8(2)(b)(vi)).
- Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury (Article 8(2)(b)(vii)).
- The transfer, directly or indirectly, by the occupying power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory (Article 8(2)(b)(viii)).
- Declaring abolished, suspended, or inadmissible in a court of law, the rights and actions of the nationals of the hostile party (Article 8(2)(b)(xiv)).
- Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war (Article 8(2)(b)(xv)).
- Employing weapons, projectiles, and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles, and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to the ICC Statute (Article 8(2)(b)(xx)).
- Committing outrages upon personal dignity, in particular humiliating and degrading treatment (Article 8(2)(b)(xxi)).
- Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations (Article 8(2)(b)(xxiii)).
- Using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions (Article 8(2)(b)(xxv)).

This list makes impressively clear that there exists a series of *lacunae* of criminal responsibility in non-international armed conflict when compared to an international one.[340] To be fair, though, one must admit that in the *Kampala* Review Conference, states remedied the complete impunity regarding the use of inhuman weapons in non-international armed conflict by extending Article 8(2)(b)(xvii)–(xix) to non-international conflicts (Article 8(2)(e)(xiii)–(xv)).[341] This means that the use of poisoned weapons and gases, as well as expansive bullets, has now been criminalized for any armed conflict. Of course, this is still far away from a complete criminalization of any inhumane weapon, since this would require an explicit listing in an annex to the Statute (Article 8(2)(b)(xx)). However, utilizing the presence of a civilian for military purpose

[340] cf. Kolb, 'Droit international pénal', in Kolb, *Droit international pénal* (2008), pp. 164 ff.; critically, see also Robinson, 'War Crimes', in Cryer et al., *Introduction ICL* (2010), p. 278; generally about the punishable acts in non-international conflict, see König, *Legitimation* (2003), pp. 359 ff.; on the basis of the jurisprudence, see Mettraux, *Crimes* (2005), pp. 132 ff.

[341] See Volume I of this treatise, p. 35.

is only punishable in an international conflict,[342] and 'starvation of civilians as a method of combat',[343] which is prohibited under Article 14 AP II, is not included in Article 8(2)(e) ICC Statute.[344] Other examples that have not been incorporated regarding non-international armed conflict are 'collective punishments', 'acts of terrorism', and 'slavery and slave trade',[345] which are all prohibited under Article 4(2) AP II.[346] Finally, Article 8(2)(e) ICC Statute does not include attacks which cause disproportionate incidental civilian damage in the definition of a war crime committed in a non-international armed conflict.[347]

A *lacuna* of criminal responsibility may also occur if the gist of the conduct is punishable in both conflicts but the offence elements do not completely accord with each other. Take for example the punishable conduct regarding child soldiers (Article 8(2)(b)(xxvi) and (e)(vii)) which were at the heart of the *Lubanga* proceedings. While both provisions cover the same conduct ('conscripting', 'enlisting', 'using them to participate actively in hostilities'), they differ with regard to the forces of recruitment in that non-state actors ('groups') are only included in subpara. (e)(vii).[348] Thus, contrary to the normal situation, here the scope of punishability in non-international conflict goes beyond that of an international one.

The non-criminalization of these acts in a non-international armed conflict is partly due to the fact that some states have argued that the criminalization of these does not find—equal to the respective prohibitions of AP II—support under customary international law.[349] Further, some states tend to see any limitation of their exclusive competence in this field as a threat to their sovereignty.[350] This is also a reason why Article 8 ICC Statute does not provide for an open list of offences.

[342] Even if one considered this at the same time a humiliating treatment in the sense of Article 8(2)(b)(xxi) (Zimmermann and Geiß, '§ 8 VStGB', in Joecks and Miebach, *Münchener Kommentar*, viii (2013), mn. 203), criminal responsibility would still only exist in international conflict. In contrast, the German VStGB declares it punishable in any conflict (§ 11(1)(4) VStGB, cf. Dörmann, '§ 11 VStGB', in Joecks and Miebach, *Münchener Kommentar*, viii (2013), mn. 98–109, 155).

[343] Boot, *Nullum Crimen* (2002), mn. 593, recalls that '[i]n 1992, the UN Security Council strongly condemned the practices of starvation during the Somali conflict. Not only was starvation considered contrary to international Humanitarian law, but the Council also affirmed that persons who committed or ordered such practice would be held individually responsible for such acts'. Nevertheless, 'starvation of civilians as a method of combat' has not been included as a war crime committed under non-international armed conflict. See also Bothe, 'War Crimes', in Cassese et al., *Rome Statute*, i (2002), p. 420.

[344] Kreß, *IsYbHR*, 30 (2000), 134.

[345] Kreß, *IsYbHR*, 30 (2000), notes, however, that '[t]o a certain extent these forms of conduct are … covered by … Article 8(2)(c)(ii) to (iv) of the ICC Statute'.

[346] Article 4(2) AP II states that 'the following acts … are and shall remain prohibited at any time and in any place whatsoever: … (b) collective punishments; (c) taking of hostages; (d) acts of terrorism; … (f) slavery and the slave trade in all their forms'.

[347] Kreß, *IsYbHR*, 30 (2000), 135.

[348] cf. *Lubanga*, No. ICC-01/04-01/06-803-tEN, paras. 268 ff.; *Lubanga*, No. ICC-01/04-01/06-2842, para. 568. For this reason, the question of the type of conflict was of importance (*Lubanga*, No. ICC-01/04-01/06-803-tEN, paras. 167 ff.; cf. Ambos, 'Commentary', in Klip and Sluiter, *Annotated Leading Cases*, xxiii (2010), pp. 737 ff.; Ambos, *ICLR*, 12 (2012), 128 ff.). Generally on criminal responsibility regarding child soldiers, cf. Palomo Suárez, *Kindersoldaten* (2009), pp. 140 ff.; Zimmermann and Geiß, '§ 8 VStGB', in Joecks and Miebach, *Münchener Kommentar*, viii (2013), mn. 157–66; Ambos, *ICLR*, 12 (2012), 131 ff.; on the DRC, Steiner, *Boletim IBCCrim*, 179 (2007), 14.

[349] Zimmermann, 'Article 8', in Triffterer, *Commentary* (2008), mn. 237; Kreß, *IsYbHR*, 30 (2000), 134 (customary criminalization under Article 4(2) AP II is not entirely free from doubt).

[350] See also Boot, *Nullum Crimen* (2002), mn. 594.

(3) Individual war crimes

A closer look at the fifty-one individual war crimes contained in Article 8 ICC Statute reveals that not all of them comply with the principle of legality, in particular its requirement of certainty (*nullum crimen sine lege certa*).[351] This can easily be explained by the fact that Article 8 basically copies the primary rules of the Hague and Geneva Laws, whose corresponding prohibitions were not drafted for criminal law purposes.[352] The following considerations do not pretend to offer a detailed treatment of each and every single war crime, which would be the task of a comprehensive commentary and goes beyond a monographic treatment of ICL. Our aim here is more modest, namely to bring some order into the confusing state of war crimes by offering a systematization, and to analyse, selectively, some of these crimes more closely. We will start with some basic offences against protected persons and objects which are punishable as war crimes in both international and non-international conflict, then take a brief look at attacks on civilian population and objects (prohibited methods of warfare) and conclude with other war crimes, including the ones regarding prohibited means of warfare.

(a) Basic offences against protected persons and objects

(i) Murder/wilful killing

While 'wilful killing' constitutes a grave breach of the GCs (cf. Articles 50 GC I, 51 GC II, 130 GC III, 147 GC IV) and is punishable in international conflict according to Article 8(2)(a)(i) ICC Statute, 'murder' is a violation of Common Article 3 of the GCs and criminalized in non-international conflict by Article 8(2)(c)(i). 'Killing' was preferred over 'causing death' for more directly indicating the nature of this crime, but both terms are interchangeable.[353] 'Murder' is also a type of crime against humanity when committed against the civilian population, while murder as a war crime can also be committed against combatants *hors de combat*.[354] Typical acts include the killing of prisoners of war, the killing of civilians in an occupied territory, and the killing of detainees.[355] As for their substance, all these forms of killing presuppose the death of a protected person, so there is no relevant difference between them.[356] Thus, the considerations regarding murder as a crime against humanity apply[357] and we can limit ourselves here to a few (additional) comments.

[351] cf. Volume I of this treatise, pp. 90–2.
[352] cf. Bothe, 'War Crimes', in Cassese et al., *Rome Statute*, i (2002), pp. 392–3.
[353] cf. n. 31 to Article 8(2)(a)(i), Element 1, EOC; Dörmann, 'Article 8', in Triffterer, *Commentary* (2008), mn. 17; Dörmann, *Elements of War Crimes* (2003), p. 39.
[354] Elements of Crimes, War Crimes, Article 8(2)(c)(i)-1; Zimmermann, 'Article 8', in Triffterer, *Commentary* (2008), mn. 286.
[355] Zimmermann and Geiß, '§ 8 VStGB', in Joecks and Miebach, *Münchener Kommentar*, viii (2013), mn. 128.
[356] See also *Delalić et al*., No. IT-96-21-T, para. 422 ('there can be no line drawn between "wilful killing" and "murder" which affects their content').
[357] cf. Chapter II, D. (1).

The dead body does not have to be found; rather, the death can be inferred circumstantially from the evidence.[358] The perpetrator's conduct only needs to be a substantial,[359] not the sole, cause of death; however, a causal link between the death of the victim and the perpetrator's conduct is required[360] which must be the only reasonable inference from the evidence.[361] The act of killing could also be committed by omission, for example by causing starvation of the victims.[362] The subjective element 'wilful' encompasses both 'intent' and 'recklessness'.[363]

(ii) Torture and cruel treatment

Torture is punishable as a war crime in both international and non-international conflict according to Article 8(2)(a)(ii) and (c)(i) ICC Statute. It requires that the perpetrator inflicts severe physical or mental pain or suffering upon one or more persons, thereby pursuing a certain purpose, including obtaining information or a confession, punishment, intimidation, or coercion, or inflicts it for any reason based on discrimination of any kind.[364] The injuries inflicted need not be permanent; they should be assessed according to the circumstances of the individual case, such as 'the nature and context of the infliction of pain, the premeditation and institutionalization of the ill-treatment, the physical condition of the victim, the physical or mental effect of the treatment on the victim, the victim's state of health, and whether the mistreatment occurred over a prolonged period of time'.[365] As for the *mens rea*, in addition to the generally required subjective element within the meaning of Article 30 ICC Statute,[366] the infliction of pain or suffering has to serve at least one of the purposes mentioned; yet, this need not necessarily be the exclusive purpose sought by the act of torture.[367]

Cruel treatment requires, in objective terms, a lower degree of suffering than torture; in subjective terms, cruel treatment does not require an additional purpose.[368] Such

[358] *Lukić and Lukić*, No. IT-98-32/1-T, para. 904; *Milutinović et al.*, No. IT-05-87-T, para. 137; *Đorđević*, No. IT-05-87/1-T, para. 1708; *Perišić*, No. IT-04-81-T, para. 103; *Tolimir*, No. IT-05-88/2-T, para. 715; *Sesay, Kallon and Gbao*, No. SCSL-04-15-T, para. 139.

[359] *Delalić et al.*, No. IT-96-21-T, para. 424; *Kordić and Čerkez*, No. IT-95-14/2-T, para. 229; *Lukić and Lukić*, No. IT-98-32/1-T, para. 903; *Popović*, No. IT-05-88-T, para. 788; *Đorđević*, No. IT-05-87/1-T, para. 1708; *Tolimir*, No. IT-05-88/2-T, para. 715.

[360] *Delalić et al.*, No. IT-96-21-T, para. 424; *Blaskić*, No. IT-95-14-T, para. 153; *Prosecutor v Jelisić*, No. IT-95-10-T, Trial Chamber Judgment, para. 35 (14 December 1999); *Nyiramasuhuko et al.*, No. ICTR-98-42-T, para. 6165; see also *Prosecutor v Krnojelac*, No. IT-97-25-T, Trial Chamber Judgment, para. 329 (15 March 2002) (arguing that causing suicide also qualifies as causing death).

[361] *Milutinović et al.*, No. IT-05-87-T, para. 137; *Popović*, No. IT-05-88-T, para. 789; *Perišić*, No. IT-04-81-T, para. 103; *Haradinaj et al.*, No. IT-04-84*bis*-T, paras. 426–7.

[362] Dörmann, *Elements of War Crimes* (2003), p. 40; Zimmermann and Geiß, '§ 8 VStGB', in Joecks and Miebach, *Münchener Kommentar*, viii (2013), mn. 129.

[363] *Delalić et al.*, No. IT-96-21-T, para. 437; *Akayesu*, No. ICTR-96-4-T, para. 589; Dörmann, *Elements of War Crimes* (2003), p. 43.

[364] cf. Article 8(2)(a)(ii)-1 EOC; *Limaj et al.*, No. IT-03-66-T, paras. 235, 239; *Haradinaj et al.*, No. IT-04-84*bis*-T, para. 416; *Stanišić and Župljanin*, No. IT-08-91-T, paras. 47, 54; *Semanza*, No. ICTR-97-20-T, para. 544 (but mainly referring to crimes against humanity).

[365] *Haradinaj et al.*, No. IT-04-84*bis*-T, para. 417.

[366] cf. Volume I of this treatise, pp. 266 ff.

[367] *Limaj et al.*, No. IT-03-66-T, para. 239; *Haradinaj et al.*, No. IT-04-84*bis*-T, para. 418; *Kunarac et al.*, No. IT-96-23 & IT-96-23/1-A, para. 155.

[368] *Ntagerura et al.*, No. ICTR-99-46-A, para. 765; *Haradinaj et al.*, No. IT-04-84*bis*-T, para. 422; see also *Lukić and Lukić*, No. IT-98-32/1-T, paras. 957–8; *Martić*, No. IT-95-11-T, para. 80.

conduct may also amount to the war crimes of inhuman treatment and outrages upon personal dignity (Article 8(2)(a)(ii), (b)(xxi), and (c)(ii)).[369]

(iii) Causing suffering and serious injury to body and health

Attacks on the bodily integrity falling short of killing and torture/cruel treatment are captured by Article 8(2)(a)(iii) ICC Statute—causing suffering or serious injury—and Article 8(2)(c)(i)—violence to person.

The primary IHL norms of Article 8(2)(a)(iii)—applicable in international conflicts—are Articles 50 GC I, 51 GC II, 130 GC III and 147 GC IV. Suffering or pain may be caused physically or mentally.[370] Unlike torture, no specific purpose is required, and thus acts objectively amounting to torture, but without its specific purpose, may be covered,[371] such as inflicting unnecessary and senseless suffering on prisoners of war.[372] However, the mental or physical injury caused must be 'serious'; otherwise, mere inhuman treatment exists.[373] Of course, the determination of the seriousness threshold is not an easy task. In one of the more convincing approaches, an ICTY TC held that 'serious harm need not cause permanent and irremediable harm, but it must involve harm that goes beyond temporary unhappiness, embarrassment or humiliation. It must be harm that results in a grave and long-term disadvantage to a person's ability to lead a normal and constructive life.'[374]

Article 8(2)(c)(i)—applicable in non-international conflicts—is unfortunately much less precise, only referring to 'violence to person'.[375]

(iv) Taking of hostages and unlawful confinement of civilians

Taking of hostages (of civilians) is prohibited by Article 34 GC IV, Article 75 AP I, and also by Common Article 3 GCs. It constitutes a grave breach according to Article 147

[369] *Ntagerura et al.*, No. ICTR-99-46-A, para. 765; *Haradinaj et al.*, No. IT-04-84*bis*-T, para. 421; see also *Katanga and Chui*, No. ICC-01/04-01/07-717, paras. 355–60 (regarding Article 8(2)(a)(ii)).

[370] Elements of Crimes, War Crimes, Article 8(2)(a)(iii), para. 1; *Naletilić and Martinović*, No. IT-98-34-T, para. 339; *Blaskić*, No. IT-95-14-T, para. 156; *Prosecutor v Kordić and Čerkez*, No. IT-95-14/2-T, Trial Chamber Judgment, para. 245 (26 February 2001).

[371] *Delalić et al.*, No. IT-96-21-T, paras. 442, 508, 511; *Blaskić*, No. IT-95-14-T, para. 156; *Naletilić and Martinović*, No. IT-98-34-T, paras. 340–1. See also Dörmann, 'Article 8', in Triffterer, *Commentary* (2008), mn. 22; Schabas, *ICC Commentary* (2010), p. 218; Werle, *Principles* (2009), mn. 1046; Werle, *Völkerstrafrecht* (2012), mn. 1139.

[372] Kittischaisaree, *ICL* (2001), p. 147.

[373] *Kordić and Čerkez*, No. IT-95-14/2-T, para. 245. The Chamber's further exclusion of acts 'where the resultant harm relates solely to an individual's human dignity' is questionable though, since human dignity violations may attain a considerable severity. Apparently, the Chamber also ignores the importance and complexity of the human dignity concept (cf. Volume I of this treatise, p. 58 with further references in n. 39).

[374] *Prosecutor v Krstić*, No. IT-98-33-T, Trial Chamber Judgment, para. 513 (2 August 2001); but see also less precisely *Krnojelac*, No. IT-97-25-T, para. 131: 'The assessment of the seriousness of an act or omission is, by its very nature, relative. All the factual circumstances must be taken into account, including the nature of the act or omission, the context in which it occurs, its duration and/or repetition, the physical, mental and moral effects of the act on the victim and the personal circumstances of the victim, including age, sex and health. The suffering inflicted by the act upon the victim does not need to be lasting [sic!] so long as it is real and serious.'

[375] The wording of Article 8(2)(c)(i) is directly derived from Common Article 3(1)(a) GCs. cf. Dörmann, 'Article 8', in Triffterer, *Commentary* (2008), mn. 285–9; Dörmann, *Elements of War Crimes* (2003), pp. 394–403.

GC IV. The term 'hostages' refers to 'persons illegally deprived of their liberty', often arbitrarily and sometimes under threat of death.[376] Articles 8(2)(a)(viii) and 8(2)(c)(iii) ICC Statute criminalize this conduct in both international and non-international armed conflicts. This also finds support in customary international law.[377]

The ICC Statute does not provide more detail on the crime, but the Elements of Crimes suggest three elements:

1. The perpetrator seized, detained or otherwise held hostage one or more persons.
2. The perpetrator threatened to kill, injure or continue to detain such person or persons.
3. The perpetrator intended to compel a State, an international organization, a natural or legal person or a group of persons to act or refrain from acting as an explicit or implicit condition for the safety or the release of such person or persons.[378]

While the detention may, in line with the meaning of the term 'hostage' as defined earlier, normally be unlawful, it may be lawful in some circumstances, for example for reasons of security.[379] The decisive element is, therefore, not the lawfulness or unlawfulness of the detention but the perpetrator's motive 'to obtain a concession or gain an advantage'[380] or, as expressed in Element 3 of the Elements of Crimes, 'to compel . . . to act or refrain from acting as an explicit or implicit condition for the safety or the release of such person or persons'.[381]

The offence of taking hostages must not be confused with the unlawful confinement of a civilian according to Article 8(2)(a)(vii) ICC Statute. Such conduct is only punishable in international conflict. The ICTY *Delalić et al.* TC convincingly held that the *actus reus* of the respective crime (Article 2(g) ICTYS) covers two cases,[382] namely the *ab initio* unlawful confinement of civilians (i.e. not justified by security reasons of the detaining power)[383] and the initially lawful (justified) confinement which turns unlawful because of the detaining power's disregard of the basic procedural rights of the detained person.[384] This is in line with the Elements of Crimes first

[376] Pictet et al., *Commentary on the Geneva Conventions of 12 August 1949*, iv (1994), Article 147, pp. 600–1; *Blaskić*, No. IT-95-14-T, para. 158.

[377] *ICRC Study I* (2005), p. 334.

[378] Elements of Crimes, Article 8(2)(a)(viii), Elements 1–3.

[379] cf. Article 27(4) and 42 GC IV; see also *Blaskić*, No. IT-95-14-T, para. 158.

[380] *Blaskić*, No. IT-95-14-T, para. 158; see also Pilloud and Pictet, 'Article 75 Protocol I', in Sandoz, Swinarski, and Zimmermann, *Commentary on the APs to the GCs* (1987), mn. 3051–2; Gasser, 'Protection of the Civilian Population', in Fleck, *Handbook IHL* (2008), mn. 508; Werle, *Principles* (2009), mn. 1118; Werle, *Völkerstrafrecht* (2012), mn. 1213.

[381] This is based on Article 1(1) of 1979 International Convention against the Taking of Hostages ('as an explicit or implicit condition for the release of the hostage').

[382] *Delalić et al.*, No. IT-96-21-T, paras. 563 ff. (583); concurring, *Delalić et al.*, No. IT-96-21-A, paras. 320–2; *Kordić and Čerkez*, No. IT-95-14/2-T, paras. 279–91; *Prosecutor v Prlić et al.*, No. IT-04-74-T, Trial Chamber Judgment, paras. 133–9 (29 May 2013). See also Werle, *Völkerstrafrecht* (2012), mn. 1205.

[383] *Delalić et al.*, No. IT-96-21-T, paras. 566 ff. (referring to Arts. 5, 27, 41, 42 GC IV and concluding that 'internment is only permitted when absolutely necessary', para. 576).

[384] *Delalić et al.*, No. IT-96-21-T, paras. 579 ff. (583: 'An initially lawful internment clearly becomes unlawful if the detaining party does not respect the basic procedural rights of the detained persons and does not establish an appropriate court or administrative board as prescribed in article 43 of Geneva Convention IV').

Element in that the first part ('confined') arguably refers to *ab initio* unlawful confinement, and the second part ('continued to confine') to initially lawful but then turned unlawful confinement.[385]

(v) Sexual offences

Article 8(2)(b)(xxii) and (e)(vi) ICC Statute criminalize rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence constituting a grave breach of the GCs or of Common Article 3 GCs. This is a clear progress given that sexual violence against women for too long appeared to be a matter of course in armed conflict, implicitly or explicitly allowed instead of proper payment of troops, and sometimes even used as strategy to conduct hostilities.[386]

The forms of sexual offences regulated in Articles 7 and 8 are almost identical except for the residual category of 'any other form of sexual violence', where Article 8, referring to 'a grave breach of the Geneva Conventions' (para. (2)(b)(xxii)) and 'a serious violation of Article 3 common to the four Geneva Conventions' (para. (2)(e)(vi)), is more precise than Article 7 which includes any other form of sexual violence 'of comparable gravity'. On a literal interpretation the additional acts encompassed by Article 8 would either have to constitute a grave breach of the GCs, or a serious violation of Common Article 3.[387] This interpretation is, however, not supported by the Elements of Crimes with Element 2 to Article 8(2)(b)(xxii)-6 and Article 8(2)(e)(vi) only requiring a 'conduct … of a gravity comparable' to that of a grave breach or a serious violation of Common Article 3. A literal interpretation would challenge the autonomous character of the sexual violence alternative as a war crime, an effect certainly not desired by the drafters.[388] It is, therefore, more convincing, in line with the will of the drafters as expressed in the Elements of Crimes, to read the respective clauses as establishing a 'minimum threshold of gravity'[389] comparable to a grave breach or serious violation.[390]

The definitions of the other (explicit) individual acts can be found in the discussion of the respective individual crimes of crimes against humanity in the previous chapter.[391] As to 'forced pregnancy', Articles 8(2)(b)(xxii) and (e)(vi) explicitly invoke the definition of Article 7(2)(f) ICC Statute.[392]

[385] Dörmann, 'Article 8', in Triffterer, *Commentary* (2008), mn. 28; Werle, *Völkerstrafrecht* (2012), mn. 1206.

[386] Cottier, 'Article 8', in Triffterer, *Commentary* (2008), mn. 200–1.

[387] In this vein, see Zimmermann, 'Article 8', in Triffterer, *Commentary* (2008), mn. 316–7 (regarding Article 8(2)(e)(vi)).

[388] Cottier, 'Article 8', in Triffterer, *Commentary* (2008), mn. 212 (arguing that by using this formulation the drafters wanted to exclude '"lesser" forms of sexual violence or harassment').

[389] Cottier, 'Article 8', in Triffterer, *Commentary* (2008), mn. 212.

[390] Cottier, 'Article 8', in Triffterer, *Commentary* (2008), mn. 212; Bothe, 'War Crimes', in Cassese et al., *Rome Statute*, i (2002), p. 416; Werle, *Principles* (2009), mn. 1070; Werle, *Völkerstrafrecht* (2012), mn. 1165. cf. also Steains, 'Gender Issues', in Lee, *The ICC* (1999), pp. 363–4 with note 27; Dörmann, *Elements of War Crimes* (2003), p. 332.

[391] cf. Chapter II, D. (7).

[392] As to the war crime of sexual slavery, it has been suggested with regard to the coercion element that one should apply a subjective and gender-conscious analysis, especially 'when the victim is in a combat zone during an armed conflict, whether internal or international in character, and has been identified as a member of the opposing group or faction' (UN Economic and Social Council, Report of the Special Rapporteur,

(vi) Attacks on property and other rights

Attacks on *property* are made punishable by five offences, namely Article 8(2)(a)(iv), (b)(xiii), (b)(xvi), (e)(v), and (e)(xii) ICC Statute. In addition, an attack on *other rights* is covered by Article 8(2)(b)(xiv), criminalizing the action of declaring 'abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party'. We will return to this offence at the end of this section.

The criminalization of the property offences can be traced back to various provisions of the Hague Law[393] and to the grave breaches of Articles 50 GC I, 51 GC II, and 147 GC IV (but not Article 130 GC III).[394] The criminalization applies in an identical way to international and non-international conflicts as far as the *destruction or seizing of property* (Article 8(2)(b)(xiii) versus Article 8(2)(e)(xii)) and *pillaging* (Article 8(2)(b)(xvi) versus Article 8(2)(e)(v)) is concerned. The respective Elements of Crimes are also identical except for the differences following from the different (international or non-international) nature of the armed conflict.[395] With regard to international conflicts, however, the grave breach of the '*extensive destruction and appropriation of property*' (Articles 50 GC I, 51 GC II, and 147 GC IV) is separately criminalized (Article 8(2)(a)(iv) ICC Statute).

The protected '*property*' is property protected by the GCs (Element 4 EOC to Article 8(2)(a)(iv)) or by the international law of armed conflict (Element 3 EOC to Article 8(2)(b)(xiii) and to Article 8(2)(e)(xii)). There is no generally agreed concept of protected property in IHL,[396] but it is clear that, in line with the protective purpose of IHL,[397] only the property of the adverse party is covered[398] and only so long as the

Contemporary Forms of Slavery, 22 June 1998, UN Doc. E/CN.4/Sub.2/1998/13, para. 29, <http://www.unhchr.ch/huridocda/huridoca.nsf/0/3d25270b5fa3ea998025665f0032f220?OpenDocument#Bsl> accessed 5 July 2013).

[393] For example, Article 23(g) 1907 Hague Regulations forbids destruction and seizing of the enemy's property while Articles 28 and 47 prohibit pillage; for a detailed list see Dörmann, *Elements of War Crimes* (2003), pp. 85 ff. On the historical development, especially the 19th century *Rousseau-Portalis* doctrine on the respect for private property in armed conflict and the Nuremberg case law, see Ambos, '§ 9 VStGB', in Joecks and Miebach, *Münchener Kommentar*, viii (2013), mn. 2.

[394] cf. Jia, *LJIL*, 15 (2002), 133.

[395] cf. regarding *destruction or seizing of property*, Elements 2 and 6 to Articles 8(2)(b)(xiii) and 8(2)(e)(xii); regarding *pillaging*, Element 4 to Articles 8(2)(b)(xvi) and 8(2)(e)(v). An arguably more substantial difference concerns the military necessity exception ('justified' *versus* 'required' in Element 5 to Articles 8(2)(b)(xiii) and 8(2)(e)(xii)).

[396] cf. fundamentally Jia, *LJIL*, 15 (2002), 152–3 developing seven principles for the protection of property in armed conflict.

[397] Note 12.

[398] cf. respective Element 2 of the Elements of Crimes to Articles 8(2)(b)(xiii) and 8(2)(e)(xii) ('property of a hostile party' or 'of an adversary'); see also Werle, *Völkerstrafrecht* (2012), mn. 1247; *Katanga and Chui*, No. ICC-01/04-01/07-717, paras. 310, 329.

[399] For example, the prohibition of destruction of property according to Article 53 GC IV only applies to the Occupying Power with regard to the occupied territory. The respective offences of Article 8 ICC Statute do not, however, limit the protection to objects under the power of the perpetrator's party as provided for by § 9(1) VStGB and advocated by Zimmermann, 'Article 8', in Triffterer, *Commentary* (2008), mn. 140 ff. to avoid overlaps with the offences regarding prohibited methods of conduct of hostilities (especially Article 8(2)(b)(ii) and (iv)). Such overlaps should be resolved by the rules of concours (see Chapter VI, A.) instead of creating gaps of punishability *contra legem* (critical regarding Article 8(2)(e)(xii), see also Werle, *Völkerstrafrecht* (2012), mn. 1256).

protection accords to the applicable primary rule.[399] The focus lies on the private property of natural or legal persons.[400] Indeed, the protection of private property can be traced back to the 1907 Hague Regulations[401] and has been extended by GC IV with regard to the civilian population.[402] In contrast, all movable public (state) property,[403] to be used for military operations, can be confiscated by an army of occupation and has traditionally been considered war booty,[404] while immovable property (buildings, forests, etc.) may only be administered and must be returned after the end of occupation.[405] Despite this distinction between private and public property in IHL, the ICL case law has several times noted that such a distinction is not drawn in the respective ICL instruments[406] and therefore applied the respective offences to public property as well.[407] Be that as it may, it is clear that objects generally protected by IHL[408] are covered, which in international armed conflict will include in particular hospitals, medical ships, and aircraft as well as the other materials necessary for medical service, and in non-international armed conflict the objects indispensable to the survival of the

[400] Regarding legal persons, the nationality is determined by the 'control test', that is, by the nationality of the controlling shareholders, leading members, and other possible participants, cf. Zimmermann, 'Article 8', in Triffterer, *Commentary* (2008), mn. 147.

[401] See, in particular, Article 46 1907 Hague Regulations (calling for respect for private property which 'cannot be confiscated') and Article 47 (explicitly forbidding pillage); cf. Jia, *LJIL*, 15 (2002), 144.

[402] cf. Articles 33(2) (prohibiting pillage), 53 (prohibiting destruction) and 97–8 GC IV.

[403] This includes co-owned property (i.e., property which a state has significant shares in, or control over); in case of doubt, it is treated as state property, see Zimmermann, 'Article 8', in Triffterer, *Commentary* (2008), mn. 150; von Glahn, *Occupation of Enemy Territory* (1957), p. 179.

[404] cf. Article 53 1907 Hague Regulations; Gasser, 'Protection of the Civilian Population', in Fleck, *Handbook IHL* (2008), mn. 551; Downey, *AJIL*, 44 (1950), 488; von Glahn, *Occupation of Enemy Territory* (1957), pp. 180 ff.; Doehring, *Völkerrecht* (2004), § 11 mn. 609. But note Article 55 GC IV providing for the duty of the Occupying Power to ensure food and medical supplies of the civilian population, that is, these interests of the civilian population must be taken into account when confiscating movable property.

[405] cf. Article 55 1907 Hague Regulations; Gasser, 'Protection of the Civilian Population', in Fleck, *Handbook IHL* (2008), mn. 552.

[406] cf. *Kordić and Čerkez*, No. IT-95-14/2-A, para. 79 ('[s]tatute itself does not draw a difference between public or private property'); in a similar vein, see *Delalić et al.*, No. IT-96-21-T, para. 591 (referring to 'plunder of public and private property'); *Jelisić*, No. IT-95-10-T, para. 48 (plunder as 'fraudulent appropriation of public or private funds'); *Blaskić*, No. IT-95-14-T, para. 234 ('whether it be the property of private individuals or of state or "quasi-state" public collectives'); *Martić*, No. IT-95-11-T, para. 101('[t]here is no difference between public and private property under the Statute'); *Prosecutor v Gotovina et al.*, No. IT-06-90-T, Trial Chamber Judgment, paras. 1777–8 (15 April 2011) ('all forms of seizure of public or private property', 1778). The same view has been taken by the ICC: *Katanga and Chui*, No. ICC-01/04-01/07-717, para. 329 ('whether . . . private or public'); *Bemba Gombo*, No. ICC-01/05-01/08-424, para. 317 ('all types of property, such as public or private'); see also *Prosecutor v Fofana and Kondewa*, No. SCSL-04-14-T-473, Decision on Motions for Judgment of Acquittal pursuant to Rule 98, para. 102 (21 October 2005) and the overview of the (non-uniform) jurisprudence of the SCSL with regard to the definition of pillaging in Meisenberg, *HuV-I*, 21 (2008), 153–4.

[407] cf. *Kordić and Čerkez*, No. IT-95-14/2-A, para. 84 (finding 'that the crime of plunder is committed when private or *public* property is appropriated intentionally and unlawfully'; emphasis added); in a similar vein, see *Delalić et al.*, No. IT-96-21-T, para. 591 and *Jelisić*, No. IT-95-10-T, para. 48.

[408] See Section A. (6)(c).

[409] cf. especially Articles 19, 20, 33–36 GC I, Articles 22–28, 38, 39 GC II, and Articles 18, 21, 22 GC IV, Articles 11, 14 AP II; see also Werle, *Völkerstrafrecht* (2012), mn. 1245; David, *Principes* (2008), pp. 319–25, mn. 2.63–75; Dörmann, *Völkerrechtliche Probleme des Landmineneinsatzes* (2003), pp. 82, 85 ff.; Jia, *LJIL*, 15 (2002), 140–1; *Kordić and Čerkez*, No. IT-95-14/2-T, paras. 335 ff. See also König, *Legitimation* (2003), pp. 379–80.

civilian population in terms of Article 14 AP II.[409] While the personal objects and values of prisoners of war are not protected since Article 130 GC III does not contain the respective reference, such a protection exists for civilian internees in light of the grave breach included in Article 147 GC IV.[410]

The relevant *forms of conduct* are destruction, appropriation, seizure, and pillaging. The ICC Statute no longer uses the term 'plunder', still contained in Article 6(b) IMTS, Article II(1)(b) CCL 10 and Article 3(e) ICTYS. The *Delalić et al.* ICTY TC opined that the term 'plunder' constitutes a kind of umbrella term embracing 'all forms of unlawful appropriation of property in armed conflict', including 'pillage'.[411] While the latter term, however, contains an 'element of violence' not present in the offence of 'plunder',[412] it is disputed whether the crime of pillaging under the ICC Statute also demands this element of violence, especially since it was mentioned neither by the *Katanga and Chui* nor by the *Bemba* PTC.[413] In any case, the terms 'plunder', 'pillage', 'spoliation', 'looting', 'sacking', and 'exploitation' have been used synonymously or at least interchangeably to refer to the appropriation of property during armed conflict.[414] This shows that the essence of the property offences is *appropriation*, that is, '[t]he exercise of control over property; a taking of possession'.[415] Appropriation is often used synonymously with *seizure* (or confiscation) since both essentially entail the taking away of property for a relevant period of time without the consent of the owner.[416] Indeed, seizure is defined as '[t]he act or an instance of taking possession of a person or property by legal right or process'.[417] Accordingly, the only difference remaining with regard to *pillaging* is the additional subjective element, that is, the perpetrator's intent 'to deprive the owner of the property and to appropriate it for private or personal use'.[418] In contrast, *destruction* goes beyond these forms of appropriation in that the respective property must be totally damaged (i.e., fully destroyed).[419] This already follows from the ordinary meaning of the term as 'the ruining of something'.[420]

Under the grave breach offence of Article 8(2)(a), the destruction or appropriation must be *extensive*, where as this qualifier is not required for the 'ordinary' destruction/seizure offences of Article 8(2)(b)(xiii) and (e)(xii). With regard to pillaging, however,

[410] Expressing doubts Werle, *Völkerstrafrecht* (2012), mn. 1246 (apparently overlooking Article 147 GC IV).

[411] *Delalić et al.*, No. IT-96-21-T, para. 591.

[412] *Delalić et al.*, No. IT-96-21-T, para. 591 with further references.

[413] Zimmermann, 'Article 8', in Triffterer, *Commentary* (2008), mn. 169. *Katanga and Chui*, No. ICC-01/04-01/07-717, paras. 327–30; *Bemba Gombo*, No. ICC-01/05-01/08-424, paras. 316–8. Apparently agreeing with the *Delalić et al.* TC, see Werle, *Völkerstrafrecht* (2012), mn. 1244.

[414] cf. Dörmann, *Elements of War Crimes* (2003), pp. 89–92; Zimmermann, 'Article 8', in Triffterer, *Commentary* (2008), mn. 169; see also IG Farben trial (*US v Krauch et al.*), in US GPO, *TWC*, viii (1997), p. 1133; *Delalić et al.*, No. IT-96-21-T, para. 591; *Prosecutor v Simić*, No. IT-95-9-T, Trial Chamber Judgment, para. 98 (17 October 2003); *Sesay, Kallon and Gbao*, No. SCSL-04-15-T, para. 205; Jia, *LJIL*, 15 (2002), 153.

[415] Garner, *Law Dictionary* (2009), p. 117.

[416] cf. Werle, *Völkerstrafrecht* (2012), mn. 1243.

[417] Garner, *Law Dictionary* (2009), p. 1480.

[418] cf. the respective Element 2 of the Elements of Crimes to Article 8(2)(b)(xvii) and (e)(v). See also Werle, *Völkerstrafrecht* (2012), mn. 1244.

[419] A mere (partial) damage is not sufficient, cf. Werle, *Völkerstrafrecht* (2012), mn. 1257.

[420] Garner, *Law Dictionary* (2009), p. 513.

the reference to 'a town or place' (Article 8(2)(b)(xvi) and (e)(v)) also implies that the attack must have a certain scale.[421] In any case, given the general threshold of seriousness or gravity needed to trigger the jurisdiction of the international criminal tribunals, it is always necessary that property of important value be affected and grave consequences for the victim ensue.[422] However, the concrete assessment depends on the 'overall effect' of the attack on the property in the individual circumstances of the case.[423] Thus, at least in the case of the 'ordinary' destruction/seizure offences (Article 8(2)(b)(xiii) and (e)(xii)), the single destruction of an especially important civilian object, for example a hospital, may be sufficient to pass the threshold.[424] In any case, the case law is not always consistent.[425]

The *military necessity exception* only applies, pursuant to the ICC Statute, to the destruction and seizure offences (Article 8(2)(a)(iv), (b)(xiii), and (e)(xii)) with slight differences: merely 'not justified by military necessity' (Article 8(2)(a)(iv)) versus 'imperatively demanded' (Article 8(2)(b)(xiii) and (e)(xii)). Obviously, the latter formulation calls for a more restrictive interpretation.[426] The hard question is whether the military necessity exception also applies to the offence of pillaging, given that a footnote to the respective Element 2 of the Elements of Crimes states that the term 'private or personal use' (regarding the perpetrator's intent to appropriate the property) indicates that 'appropriations justified by military necessity cannot constitute the crime of pillaging'.[427] Is such a deviation from the plain reading of Article 8(2)(b)(xvi) and (e)(v) ICC Statute (lacking any reference to military necessity) still 'consistent' with the Statute in the sense of Article 9(3), or could it even be seen to create an 'irreconcilable contradiction' between it and the Elements?[428] Clearly, such an introduction of the military necessity exception through the back door—not even through the Elements themselves but through a merely interpretative footnote—can hardly be reconciled with the general understanding that this exception only comes into play when expressly

[421] cf. Werle, *Völkerstrafrecht* (2012), mn. 1249.

[422] See also *Delalić et al.*, No. IT-96-21-T, para. 1154; *Kordić and Čerkez*, No. IT-95-14/2-A, paras. 80–4; Zimmermann, 'Article 8', in Triffterer, *Commentary* (2008), mn. 152; Dörmann, *Völkerrechtliche Probleme des Landmineneinsatzes* (2003), p. 83; Mettraux, *Crimes* (2005), p. 98.

[423] *Kordić and Čerkez*, No. IT-95-14/2-A, paras. 82–3; *Simić*, No. IT-95-9-T, para. 101; *Martić*, No. IT-95-11-T, para 103; *Gotovina et al.*, No. IT-06-90-T, paras. 1778; *Fofana and Kondewa*, No. SCSL-04-14-T, para. 160. See also David, *Principes* (2008), p. 783, mn. 4.154–5; Dörmann, 'Article 8', in Triffterer, *Commentary* (2008), mn. 23.

[424] *Blaskić*, No. IT-95-14-T, para. 157; concurring, *Katanga and Chui*, No. ICC-01/04-01/07-717, para. 314. For a more restrictive view Werle, *Völkerstrafrecht* (2012), mn. 1249 (arguing with the general gravity requirement for ICC crimes).

[425] cf. *Delalić et al.*, No. IT-96-21-T, paras. 1147 ff. (appropriation of valuables in form of monies, watches, and jewellery as sufficiently serious) and *Blaskić*, No. IT-95-14-T, para. 424 (more than 2000 DM and jewellery insufficient; plunder as an underlying crime of persecution according to Article 5(h) ICTYS).

[426] Ambos, '§ 9 VStGB', in Joecks and Miebach, *Münchener Kommentar*, viii (2013), mn. 16.

[427] Footnotes 47 and 61 to the respective Element 2 of the Elements of Crimes.

[428] Critical of this 'irreconcilable contradiction' test of the *Al Bashir* PTC, see Volume I of this treatise, p. 74 with n. 177, with further references.

[429] cf. *Katanga and Chui*, No. ICC-01/04-01/07-717, para. 318 (arguing that 'this ground for justification can only be invoked "if the laws of armed conflict provide for it and only to the extent that these laws provide for it."', quoting Boddens Hosang, 'Article 8(2)(b)(xiii)', in Lee, *The ICC* (2001), p. 171). See also Dörmann, *Elements of War Crimes* (2003), pp. 272–3.

included in the relevant prohibition.[429] This is, with regard to the question at hand, confirmed by the fact that pillaging is the object of an absolute prohibition in Article 47 Hague Regulations, and this prohibition would be undermined by a military necessity exception.[430] The case of pillaging also shows that the application of the military necessity exception is predicated on the absence of a special rule which prohibits the respective attack on property in the first place. If such a rule exists, for example, apart from Article 47 Hague Regulations, Articles 19(1) GC I, 53(a) AP I, and 16 AP II, it must be respected absolutely,[431] and there is therefore no room for the military necessity exception.[432]

As to the actual contents of the military necessity exception, it must be interpreted, as argued in Volume I of this treatise,[433] restrictively. For an attack on property to be militarily necessary it must produce at least some (military) advantage with regard to weakening the enemy.[434] The principle of proportionality also calls for restraint, entailing that the military measure must be the ultimate resort.[435] Thus, for example, the destruction of property is unlawful so long as the military purpose can be achieved by less severe means, for example by seizure.[436] Further, acts of war must, as a rule, be limited to military objects and must not cause unnecessary suffering, which may be the case if attacks on property are widespread and arbitrary.[437]

Article 8(2)(b)(xiv) criminalizes the abolition, suspension, or declaration of inadmissibility in a court of law of certain *rights* or *actions* of the nationals of the hostile party. The offence is based on Article 23(h) of the 1907 Hague Regulations, which is recognized as customary law[438] but is only applicable in international conflict. Similar to the offences against property, the offence can only be directed against the nationals of the adverse party.[439] The provision criminalizes the full or partial dissolution or suspension of normal judicial functions in occupied territory.[440] It protects access to the courts and the respective implementation of all rights and actions by way of a

[430] Werle, *Völkerstrafrecht* (2012), mn. 1253.

[431] cf. Greenwood, 'Scope of Application', in Fleck, *Handbook IHL* (2008), mn. 131.

[432] See also Werle, *Völkerstrafrecht* (2012), mn. 1253–4 speaking of a twofold test (first existence of absolute rule, secondly—in the absence of such a rule—possible justification by military necessity).

[433] cf. Volume I of this treatise, pp. 388–90; in a similar vein Dinstein, *Conduct of Hostilities* (2010), pp. 6–8; Cryer, 'Defences', in Cryer et al., *Introduction ICL* (2010), p. 423 ('neither mere expediency nor political necessity is sufficient'); Dörmann, 'Article 8', in Triffterer, *Commentary* (2008), mn. 23; Dörmann, *Elements of War Crimes* (2003), p. 81; see also Greenwood, 'Scope of Application', in Fleck, *Handbook IHL* (2008), mn. 131–3.

[434] *Prosecutor v Galić*, No. IT-98-29-T, Trial Chamber Judgment, para. 76 (5 December 2003); see also *Strugar*, No. IT-01-42-A, para. 330 (demanding a 'definite military advantage'); *Boškoski and Tarčulovski*, No. IT-04-82-T, para. 355; *Martić*, No. IT-95-11-T, paras. 68–9; *Prosecutor v Brđanin*, No. IT-99-36-T, Trial Judgment, paras. 591–3 (1 September 2004); *Prosecutor v Orić*, No. IT-03-68-T, Trial Judgment, paras. 586–8 (30 June 2006); cf. also Zahar and Sluiter, *ICL* (2008), p. 432 ('more than military advantage').

[435] Werle, *Völkerstrafrecht* (2012), mn. 1254; Werle, *Principles* (2009), mn. 1158.

[436] Werle, *Völkerstrafrecht* (2012), mn. 1258.

[437] cf. Greenwood, 'Scope of Application', in Fleck, *Handbook IHL* (2008), mn. 130. See also Jia, *LJIL*, 15 (2002), 136 ff. (referring to the Nuremberg case law).

[438] *ICRC Study I* (2005), p. 583; concurring, Werle, *Völkerstrafrecht* (2012), mn. 1260.

[439] See note 398.

[440] Cottier, 'Article 8', in Triffterer, *Commentary* (2008), mn. 158.

[441] Cottier, 'Article 8', in Triffterer, *Commentary* (2008), mn. 149; Dörmann, *Elements of War Crimes* (2003), p. 264.

judicial remedy.[441] An excessively broad reading may, however, conflict with the occupying power's far-reaching rights to administer justice and enact laws in the occupied territory.[442] Measures in line with these rights would have to be qualified as lawful.[443]

In subjective terms, Article 30 ICC Statute applies to all offences, that is, the perpetrator must act with intent and knowledge with regard to his conduct and the consequences. The term 'wantonly' (Article 8(2)(a)(iv)) does not have a specific subjective meaning, it only expresses that the destruction or appropriation must be arbitrary and not supported by good reasons. Apart from that, it does not imply a deviation from the general intent requirement.[444] However, as already mentioned, pillaging provides for a specific purpose-based intent;[445] similarly, the perpetrator of Article 8(2)(b)(xiv) must intend the abolition etc. to be directed at the nationals of a hostile party.[446]

(b) Attacks on civilian population and objects (prohibited methods of warfare)

(i) Intentional attacks

Intentionally directing attacks against the civilian population and civilian objects constitutes a war crime pursuant to Article 8(2)(b)(i), (ii), (ix), (xxiv), and (e)(i), (ii), and (iv). Yet, as to civilian objects, the non-international conflict crimes of Article 8(2)(e)(ii) and (iv) provide for a list of protected objects (identical to the ones in subpara. (b)(ix) and (xxiv)) and thus, seem to be more restrictive than the international conflict crime of subpara. (b)(ii).[447] In addition, intentionally directing attacks against personnel, installations, material, units, or vehicles involved in a humanitarian assistance or peacekeeping mission is punishable (Article 8(2)(b)(iii) and (e)(iii)).

'Intentionally directing' an attack means that the attack must be aimed at harming civilians or civilian objects. The primary prohibitions can—with regard to an international armed conflict—be found in Articles 51 and 52 AP I which stipulate that the civilian population as well as civilian objects 'shall not be the object of attack'.[448] In contrast to the grave breaches provision of Article 85(3) AP I,[449] it is, however, not

[442] See Article 64 ff. GC IV; see generally on the rights of the occupying power Gasser, 'Protection of the Civilian Population', in Fleck, *Handbook IHL* (2008), mn. 544 ff.

[443] Ambos, '§ 9 VStGB', in Joecks and Miebach, *Münchener Kommentar*, viii (2013), mn. 23.

[444] cf. Volume I of this treatise, pp. 298–9; for a lower standard, however, Werle, *Völkerstrafrecht* (2012), mn. 455, 1251, 1259 referring to ICTY jurisprudence; cf. *Kordić and Čerkez*, No. IT-95-14/2-T, para. 341 ('in reckless disregard of the likelihood of its destruction'), *Brđanin*, No. IT-99-36-T, para. 593 ('in reckless disregard of the likelihood of the destruction or devastation'), *Hadžihasanović and Kubura*, No. IT-01-47-T, para. 50 ('or when the consequences of his actions are foreseeable'), *Martić*, No. IT-95-11-T, para. 104 ('direct or indirect intent'), *Naletilić and Martinović*, No. IT-98-34-T, para. 577 ('or in reckless disregard of the likelihood of its destruction').

[445] Note 418 and main text.

[446] cf. Element 3 of the Elements of Crimes to Article 8(2)(b)(xiv); see also Werle, *Völkerstrafrecht* (2012), mn. 1262.

[447] cf. Zimmermann, 'Article 8', in Triffterer, *Commentary* (2008), mn. 306.

[448] Articles 51(2) and 52(1) AP I.

[449] Article 85(3) AP I qualifies different attacks on civilians and civilian objects as grave breaches and requires that these are 'committed willfully . . . and *causing death or serious injury to body or health* . . .' (emphasis added).

necessary that the attack produces harmful results, in particular death or serious bodily injury. Rather, the provisions constitute conduct crimes which also apply, for example, in cases of weapon failure.[450]

From the general *mens rea* rule of Article 30(2)(a) it follows that the perpetrator needs to have the intent to engage in the conduct of directing an attack. The Elements clarify that this has to be understood as a purpose-based intent, that is, the perpetrator must wilfully or volitionally direct the attack against the civilian population or civilian objects[451] in the sense of *dolus directus of the first degree*.[452] If one follows this purpose-based reading of 'intentionally' in Article 8(2)(b)(i), (ii), (ix), (xxiv), and (e)(i), (ii), and (iv), *indiscriminate attacks* within the meaning of Article 51(4) AP I[453] cannot be subsumed under these provisions since such attacks are not carried out with the specific intent to harm civilians or civilian objects but rather accept the harming of civilian objectives as a necessary consequence of the non-discrimination in violation of the principle of distinction.[454] In fact, such attacks are not explicitly criminalized under the ICC Statute but stand between intentional and disproportionate attacks, to be discussed in the next section.

In contrast, attacks on towns, villages, etc. within the meaning of Article 8(2)(b)(v)[455] do not primarily aim to harm civilians or civilian objects, but the focus here is on the unnecessary use of military force, although the objects of the attack are 'undefended' and thus can be easily occupied.[456] This is also made clear by Element 2 of the Elements of Crimes ('open for unresisted occupation'). Article 59 AP I offers a comprehensive definition of 'undefended localities', listing four conditions to be fulfilled by them.[457]

[450] Dörmann, *Elements of War Crimes* (2003), p. 130. See also *Katanga and Chui*, No. ICC-01/04-01/07-717, para. 270 (regarding Article 8(2)(b)(i)).

[451] Element 3 to Articles 8(2)(b)(i), (ii), (iii), (ix), (e)(i), (iii), (iv) and Element 2 to Article 8(2)(b)(xxiv), (e)(ii) EOC. See on this volitional aspect, Volume I of this treatise, pp. 266 ff., 274.

[452] cf. Werle, *Völkerstrafrecht* (2012), mn. 1275, 1284; *Katanga and Chui*, No. ICC-01/04-01/07-717, para. 271 (concerning Article 8(2)(b)(i): 'This offence therefore, first and foremost, encompasses *dolus directus* of the first degree', emphasis in the original). For a different opinion, see Dörmann, 'Article 8', in Triffterer, *Commentary* (2008), mn. 32 (according to whom Article 30(2)(b) ICC Statute, allowing for both a volitional and cognitive mental element, applies in respect to the object of the attack).

[453] Article 51(4) AP I reads: 'Indiscriminate attacks are prohibited. Indiscriminate attacks are: (a) those which are not directed at a specific military objective; (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.' See also ICRC Study I (2005), Rules 11–13 with pp. 37 ff.; with regard to cyber attacks, see Droege, *IRRC*, 94 (2012), 570–1.

[454] cf. Wright, *IRRC*, 94 (2012), 829 and note 207.

[455] The offence is based on Article 25 of the 1907 Hague Regulations.

[456] Werle, *Völkerstrafrecht* (2012), mn. 1308; cf. also Dörmann, *Elements of War Crimes* (2003), pp. 183–4.

[457] cf. Article 59(2) AP I: '(a) all combatants, as well as mobile weapons and mobile military equipment must have been evacuated; (b) no hostile use shall be made of fixed military installations or establishments; (c) no acts of hostility shall be committed by the authorities or by the population; and (d) no activities in support of military operations shall be undertaken.' See also Werle, *Völkerstrafrecht* (2012), mn.1309; Dörmann, *Elements of War Crimes* (2003), pp. 180–1 (who lists five constituent elements he derives from Article 59 AP I, p. 181); Arnold, 'Article 8', in Triffterer, *Commentary* (2008), mn. 61.

[458] Dinstein, *Conduct of Hostilities* (2010), p. 110; Oeter, 'Methods and Means of Combat', in Fleck, *Handbook IHL* (2008), mn. 459; Werle, *Völkerstrafrecht* (2012), mn. 1310.

Localities which are not close to the combat zone are not considered 'undefended' since they cannot be occupied without further action by the adversary.[458]

It is controversial whether the further requirement that these 'undefended' localities must not be 'military objectives' (i.e. that the attack must not have been 'imperatively demanded by the necessities of the conflict')[459] is indeed necessary. Arguably, an undefended locality cannot be a military objective, otherwise the adversary would not leave it undefended.[460] On the other hand, the fact that a locality is undefended does not exclude the possibility that the presence of military objects make it a military objective.[461] In any case, a locality is not made a military objective by the presence of police forces with the sole purpose of maintaining law and order.[462] The ICC Statute's limitation of this offence to an international conflict is not convincing and falls short of the state of customary law.[463]

(ii) Disproportionate attacks

Article 8(2)(b)(iv) ICC Statute criminalizes the intentional launching of an 'attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated'. The norm combines the grave breaches contained in Article 85(3)(b) and (c) AP I and adds damage to the environment as a specific element, based on a combination of Articles 35(3) and 55(1) AP I.[464] While the criminal punishment of environmental damage may be considered to be progress,[465] the codification as a whole clearly constitutes a setback compared to the primary rules. Apart from that, it applies in international conflict only.

As regards the *actus reus*, criminal responsibility within the meaning of Article 8(2)(b)(iv) ICC Statute presupposes that the military advantage be 'clearly excessive', taking into account its 'overall' impact, that is, referring not only to the 'concrete and direct military advantage anticipated' but 'to the advantage anticipated from the attack considered as a whole'.[466] The provision rests on the—already mentioned[467]—principle of *proportionality* which particularly in these actual cases proves to be a 'highly elastic principle'.[468] In any case, Article 8(2)(b)(iv) changes the delicate balance of interests implicit in the drafting of the primary rules in favour of the military interests protected ('*clearly* excessive'). The military perspective becomes even more important if one takes the view—in accordance with the (former) ICTY Prosecutor's

[459] *ICRC Study I* (2005), p. 601.
[460] cf. Werle, *Völkerstrafrecht* (2012), mn. 1310; Dörmann, *Elements of War Crimes* (2003), p. 183.
[461] In this vein Arnold, 'Article 8', in Triffterer, *Commentary* (2008), mn. 61.
[462] cf. Article 59(3) AP I and footnote 38 to the respective Elements of Crimes.
[463] For this reason the German VStGB extends the offence to non-international conflicts, cf. s. 11(1) no. 2; see also Werle, *Principles* (2009), mn. 1215; Werle, *Völkerstrafrecht* (2012), mn. 1312.
[464] Von Hebel and Robinson, 'Crimes', in Lee, *The ICC* (1999), p. 111.
[465] cf. Bothe, 'War Crimes', in Cassese et al., *Rome Statute*, i (2002), p. 400.
[466] Interpretative Declaration of the UK to AP I, quoted according to Bothe, 'War Crimes', in Cassese et al., *Rome Statute*, i (2002), p. 399.
[467] See note 232. [468] Walzer, *EJIL*, 24 (2013), 435.

Committee to review the NATO bombing campaign against the FR Yugoslavia—that the balancing process itself must be carried out from the perspective of a 'reasonable military commander'.[469] Such considerations also play a role in the grounds exempting responsibility contained in Article 8(2)(a)(iv), (b)(iv), and (e)(xii), that is, military necessity or advantage. They *may* justify, for example, the (reckless) killing of civilians, or the destruction of a fabric used to make cigarettes, which are essential for the military morale of the enemy.

The principle of proportionality would also be the decisive criterion to assess whether an *indiscriminate attack*—as an attack through the employment of a prohibited method or means of combat pursuant to Article 51(4) AP I[470]—may amount to a disproportionate attack. An indiscriminate attack, like a disproportionate one, is usually directed at objectives of a military nature, but either the weapons employed cannot be controlled properly, or the attack is proved to be disproportionate in relation to the—actually legitimate—target.[471] Thus, if such an indiscriminate attack entails a violation of the principle of proportionality, and if the remaining elements of the provision are met, then this attack will amount to the war crime of Article 8(2)(b)(iv).[472]

As to the *mental element*, the question arises as to what consequences an erroneous evaluation of the commander of the proportionality of the military advantage would entail. In this case, the commander would not act with the knowledge required and could invoke the defence of mistake (Article 32 ICC Statute).[473] Thus, first, one must establish whether the rule on mistake of fact or mistake of law applies. The commander would not err on factual circumstances or the so-called descriptive elements of the *actus reus* but with regard to the evaluation or assessment of its normative elements. The decision that the military advantage is excessive and therefore, not proportional with regard to the damages caused is a value judgement. Thus, applying Article 32 ICC Statute, the question arises if this mistake or error 'negates the mental element'. While this is normally not the case for mistakes of law, *in casu* the Elements provide for an exception to the general rule that a value judgement need not be undertaken by a perpetrator and require 'that the perpetrator make the value judgement' described in Article 8(2)(b)(iv) ICC Statute.[474] In other words, if the perpetrator makes an erroneous value judgement this would indeed negate the respective mental element since

[469] See Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (<http://www.icty.org/sid/10052> accessed 9 July 2013), para. 50, quoted in Bothe, 'War Crimes', in Cassese et al., *Rome Statute*, i (2002), p. 399. See on the Report also Quenivet, *IJIL*, 42 (2001), 478.

[470] Note 453.

[471] cf. Article 51(5) AP I ('[a]mong others, the following types of attacks are to be considered as indiscriminate: (a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and (b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated'). See also Solis, *Law of Armed Conflict* (2010), pp. 536–8; Oeter, 'Methods and Means of Combat', in Fleck, *Handbook IHL* (2008), mn. 401, 404.

[472] In a similar vein, Dörmann, 'Article 8', Triffterer, *Commentary* (2008), mn. 32; Werle, *Völkerstrafrecht* (2012), mn. 1275.

[473] For a general analysis cf. Volume I of this treatise, pp. 366 ff.

[474] Elements of Crimes, Element 3 to Article 8(2)(b)(iv), fn. 37.

knowledge in this provision requires that the perpetrator makes a correct value judgement. An interpretation independent of the Elements would qualify the error about the proportionality of the attack as an error about the normative elements of the *actus reus* ('*normativer Tatbestandsirrtum*') and qualify it as an irrelevant error about the (legal) subsumption ('*Subsumtionsirrtum*').[475] While this error, being irrelevant, does not exclude the *actus reus*, it may affect the perpetrator's culpability in that the conduct or result may not be blamed on him since he made the wrong evaluation regarding the proportionality involved. The problem with this approach is that the underlying distinction between mental element or intent (*dolus*) and culpability or blameworthiness, based on the finalistic understanding of a human act, is not taken up in the ICC Statute. Indeed, it is not recognized in ICL in general. As we have already seen in Volume I of this treatise,[476] the ICC Statute is based on the classical canonical distinction between the external and internal side of the commission of a crime—'*actus non facit reum nisi mens sit rea*'[477]—and does not integrate more modern developments in criminal law, in particular the just mentioned finalist concept of a human act, which led to the intent/blameworthiness distinction.[478]

(c) Others

(i) Prohibited means of warfare

The prohibition of the use of certain means of warfare goes back to Article 23(e) Hague Regulations which prohibits the use of 'arms, projectiles, or material calculated to cause unnecessary suffering'. The prohibition has been extended by Article 35(2) AP I to weapons which cause, besides 'unnecessary suffering', also 'superfluous injury'. The ICC Statute takes up this prohibition and criminalizes means of warfare 'of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate . . .' (Article 8(2)(b)(xx)). This concerns, in particular, weapons of mass destruction of a nuclear, chemical, or biological nature. However, this criminalization can only become effective if States Parties agree—pursuant to the complicated amendment procedure of Article 121, 123 ICC Statute—on a comprehensive list of these weapons to be annexed to the Statute (Article 8(2)(b)(xx) *in fine*). As this has not been done so far—and, indeed, is difficult to expect given the different state interests regarding the use of said weapons of mass destruction[479]—the entry into force of

[475] Bothe, 'War Crimes', in Cassese et al., *Rome Statute*, i (2002), p. 400.

[476] Volume I of this treatise, pp. 99 ff.

[477] See Gao, 'Rechtfertigung und Entschuldigung im Fall des Irtums', in Eser and Nishihara, *Rechtfertigung und Entschuldigung*, iv (1995), p. 383 with further references.

[478] See also the criticism in Ambos, *Der Allgemeine Teil* (2002/2004), pp. 822–4; for an attempt to explain the finalist approach to an English-speaking readership, see Ambos, *CardozoLR*, 28 (2006–2007), 2649 ff.

[479] cf. von Hebel and Robinson, 'Crimes', in Lee, *The ICC* (1999), pp. 113–16; Clark, *GoJIL*, 2 (2010), 710; see also Werle, *Völkerstrafrecht* (2012), mn. 1365.

[480] Crit. Condorelli, 'War Crimes and Internal Conflicts', in Politi and Nesi, *Rome Statute* (2002), p. 112; Kolb, 'Droit international pénal', in Kolb, *Droit international pénal* (2008), p. 164; Cassese et al., *ICL* (2013), p. 81; Alamuddin and Webb, *JICJ*, 8 (2010), 1219, 1223; Peterson, *Einsatz von Waffen* (2009), p. 296; see also Werle, *Völkerstrafrecht* (2012), mn. 1357, 1373–4; Clark, *GoJIL*, 2 (2010), 709–10.

this offence is effectively suspended.[480] Of course, this does not affect prohibitions and criminalizations under customary international law, extending especially to the prohibitions regarding weapons of mass destruction since they cause indiscriminate and unnecessary suffering.[481]

As to specific criminalizations, Article 8(2)(b)(xvii)–(xix) ICC Statute declares punishable the use of poison or poisoned weapons, gases, and analogous liquids etc. as well as expanding bullets. As already mentioned,[482] this criminalization has been extended to non-international conflicts by the Kampala Review Conference (Article 8(2)(e)(xiii)–(xv)). All these offences criminalize the mere use or employment of these means of warfare, independent of a concrete harmful result (death, injury) or danger, that is, they constitute offences of abstract endangerment.[483]

Article 8(2)(b)(xvii) and (e)(xiii) cover any use of poison, directly or as part of weapons. 'Poison' means a substance that 'causes death or serious damage to health . . . through its toxic properties'.[484] This excludes less harmful substances, so-called incapacitating agents, with only short-term effects.[485] Article 8(2)(b)(xvii) and (e)(xiv), based on the respective Geneva Protocol of 1925,[486] prohibit the use of 'gas, substance or device' causing 'death or serious damage to health . . . through its asphyxiating or toxic properties'.[487] While this wording (again) excludes less harmful substances (for example any kind of irritant gases), it includes—in contrast to Article 8(2)(b)(xvii) and (e)(xiii)—modern chemical means of warfare, given that these clearly fall under the wording and are also covered by the Geneva Protocol.[488] Article 8(2)(b)(xix) and (e)(xv) criminalize the employment of bullets that 'expand or flatten easily in the human body'.[489] The offence goes back to the respective Declaration of 1899[490] and is a concrete application of the general prohibition on causing unnecessary suffering.[491] As to the subjective level of

[481] cf. also Bothe, 'War Crimes', in Cassese et al., *Rome Statute*, i (2002), p. 420 (arguing that '[t]he use of anti-personnel mines and of chemical and biological weapons is . . . clearly prohibited in case of non-international armed conflicts under the relevant treaties as well as . . . under customary international law'); *ICRC Study I* (2005), pp. 256–67 (regarding biological and chemical weapons, riot-control agents, and herbicides); Werle, *Völkerstrafrecht* (2012), mn. 1358, 1375–85, 1390–5.

[482] Note 341 and main text.

[483] Werle, *Völkerstrafrecht* (2012), mn. 1358.

[484] Element 2 of the Elements of Crimes to Article 8(2)(b)(xvii) and (e)(xiii).

[485] cf. Werle, *Völkerstrafrecht* (2012), mn. 1362–3; critically, Bothe, 'War Crimes', in Cassese et al., *Rome Statute*, i (2002), p. 407; on the negotiations of the Elements, see Dörmann, 'War Crimes in the Elements of Crimes', in Fischer et al., *Prosecution* (2001), pp. 128–30.

[486] Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 17 June 1925, available at <http://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=58A096110540867AC12563CD005187B9> accessed 13 June 2013.

[487] Element 2 of the Elements of Crimes to Article 8(2)(b)(xviii) and (e)(xiv).

[488] cf. Bothe, 'War Crimes', in Cassese et al., *Rome Statute*, i (2002), p. 407; Dörmann, *Elements of War Crimes* (2003), pp. 285–91; Cottier, 'Article 8', in Triffterer, *Commentary* (2008), mn. 180; Werle, *Völkerstrafrecht* (2012), mn. 1367. In contrast, biological weapons are not included, cf. Cottier, 'Article 8', in Triffterer, *Commentary* (2008), mn. 181; Werle, *Völkerstrafrecht* (2012), mn. 1368.

[489] Element 2 of the Elements of Crimes to Article 8(2)(b)(xix) and (e)(xv).

[490] Hague Declaration (IV,3) concerning Expanding Bullets, 29 July 1899 (available at <http://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=F5FF4D9CA7E41925C12563CD0051616B> accessed 21 June 2013).

[491] Bothe, 'War Crimes', in Cassese et al., *Rome Statute*, i (2002), p. 408; Oeter, 'Methods and Means of Combat', in Fleck, *Handbook IHL* (2008), mn. 407; Werle, *Völkerstrafrecht* (2012), mn. 1370.

[492] cf. Element 3 of the Elements of Crimes to Article 8(2)(b)(xix) and (e)(xv).

responsibility, there is the special requirement that the perpetrator must be aware of the suffering and wounding effect of the munitions employed.[492]

(ii) Child soldiers

As already mentioned, the use of child soldiers is punishable in both international and non-international armed conflict (Article 8(2)(b)(xxvi) and (e)(vii)), but in the former only use in 'national' armed forces is covered. The main issue here is whether 'national' restricts the scope of Article 8(2)(b)(xxvi) ICC Statute to governmental armed forces, and is therefore inapplicable to recruitments into an irregular force. Based on several judgments of the ICTY, the ICC *Lubanga* PTC argued that 'national' does not necessarily mean 'governmental' armed forces.[493] However, in the judgments invoked by the *Lubanga* PTC, the ICTY dealt with the question of whether 'national' in terms of Article 4(1) GC IV might be interpreted as 'ethnic' or as 'belonging to the opposing party', that is, they were rendered in a totally different context. Thus, it is highly questionable whether these considerations can be applied without more to the interpretation of 'national armed forces' within the meaning of Article 8(2)(b)(xxvi) ICC Statute.[494] Besides, the original proposal of the PrepCom provided for the recruitment of children into 'armed forces'; only later was the term 'national' added. This was done in order to meet the concerns of several Arab states, especially of the Lebanon, which feared that the former version would cover the forces of *Hisbollah*. Thus, clearly, the addition of 'national' was intended to limit the provision's application only to the official armed forces of a state.[495]

As to the forms of conduct, the alternative structure of the offence, unambiguously reflected in the disjunctive wording 'or' ('conscripting or enlisting . . . or using . . . '),[496] makes crystal clear that the realization of one of these forms of conduct suffices for the realization of the offence (provided, of course, that the victims are children under the age of fifteen); each conduct stands on its own, independent from the others. The offence has a permanent or continuous character, and thus it continues to be committed as long as the child remains in the military group (until reaching the age of fifteen). This is also affirmed by the ICC PTC and TC.[497] However, the problem with such offences, as already seen with regard to the enforced disappearance of persons (Article 7(1)(i) ICC Statute),[498] lies in their possible retroactive effect. Thus, arguably, the Court may even be competent for recruitments that occurred before the entry into force of the ICC Statute, provided that the commission of the crime continued after 1 July 2002.[499]

[493] *Lubanga*, No. ICC-01/04-01/06-803-tEN, para. 277.

[494] Bekou, *HRLR*, 8 (2008), 353; Palomo Suárez, *Kindersoldaten* (2009), p. 156.

[495] Von Hebel and Robinson, 'Crimes within the Jurisdiction of the Court', in Lee, *The ICC* (1999), p. 118; see also de Beco, *ICLR*, 8 (2008), 328; Bekou, *HRLR*, 8 (2008), 353–4; Palomo Suárez, *Kindersoldaten* (2009), pp. 151–2.

[496] Therefore, it is unclear why an ICC TC considers the provision as 'potentially ambiguous', see *Lubanga*, No. ICC-01/04-01/06-2842, para. 609.

[497] *Lubanga*, No. ICC-01/04-01/06-803-tEN, para. 248; *Lubanga*, No. ICC-01/04-01/06-2842, paras. 618, 759.

[498] cf. Chapter II, D. (9).

[499] For this view, see, for example, Ochoa, *EJCCLCJ*, 16 (2008), 45.

Such a retroactive application, however, certainly goes against the will of the drafters, if not even against the wording of Articles 11 and 22 ICC Statute.

The definition of 'enlisting' as voluntary recruitment as opposed to 'conscripting' as a compulsory one is settled.[500] With the enlisting conduct, any—even non-compulsory ('voluntary')—recruitment may amount to a war crime,[501] that is, the autonomous decision of a child (if this is possible at all) to join an armed group is part of the conduct definition and thus of the *actus reus* of the offence. If, in contrast, children are recruited against their will, the conscripting-alternative applies.[502] Thus, the interplay between (voluntary) enlistment and (compulsory) conscription prevents a punishability gap since any form of child recruitment (voluntary or not) is covered by the offence.[503] However, other (derived) forms of integration of a child into an armed group (e.g. by being born into the group),[504] are not covered by the offence, since they do not constitute a recruitment.

The plausible interpretations of the 'active participation' requirement could range from a very restrictive reading, limiting the participation to exclusively combat-related activities,[505] to a broader reading, including any supporting activity or role.[506] What is clear from this and indeed quite uncontroversial is that, on the one hand, activities

[500] cf. *Lubanga*, No. ICC-01/04-01/06-803-tEN, para. 246; *Lubanga*, No. ICC-01/04-01/06-2842, para. 608; Ambos, 'Commentary', in Klip and Sluiter, *Annotated Leading Cases*, xxiii (2010), p. 739.

[501] Cottier, 'Article 8', in Triffterer, *Commentary* (2008), mn. 231 ('the act [or omission] of not refusing voluntary enlistment'); Robinson, 'War Crimes', in Cryer et al., *Introduction ICL* (2010), p. 310; Palomo Suárez, *Kindersoldaten* (2009), p. 140 (stating that the incorporation of 'enlisting' clarifies that any recruitment of a child fulfills the offence, regardless any voluntariness); Smith, *JICJ*, 2 (2004), 1148.

[502] See also *Lubanga*, No. ICC-01/04-01/06-803-tEN, paras. 246–7; *Prosecutor v Fofana and Kondewa*, No. SCSL-04-14-A, Appeal Chamber Judgment, para. 140 (28 May 2008). However, at least one scholar has raised the criticism that international jurists tend to blur the distinction between the enlisting and the conscripting of child soldiers, see Drumbl, *Reimagining Child Soldiers* (2012), pp. 62–3, 79.

[503] Similarly, *Fofana and Kondewa*, No. SCSL-04-14-A, para. 140; cf. also Robinson, 'War Crimes', in Cryer et al., *Introduction ICL* (2010), p. 310. On the issue of a possible consent of the victim, see Ambos, *ICLR*, 12 (2012), 134 ff.

[504] cf. Drumbl, *Reimagining Child Soldiers* (2012), p. 62.

[505] *Lubanga*, No. ICC-01/04-01/06-2842, paras. 583–7; on the 'broad definition of the notion of "active" participation in hostilities' in the *Lubanga* Judgment Wagner, *CLF*, 24 (2013), 152–9.

[506] In favour of including supporting activities with slight differences, UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute for the International Criminal Court, UN Doc. A/CONF.183/2/Add.1, 14 April 1998, 21 with note 12 ('The words "using" and "participate" have been adopted in order to cover both direct participation in combat and also active participation in military activities linked to combat such as scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoints . . . use of children in a direct support function such as acting as bearers to take supplies to the front line, or activities at the front line itself, would be included within the terminology.'); *Prosecutor v Brima, Kamara and Kamu*, No. SCSL-04-16-T, Trial Chamber Judgment, para. 737 (20 June 2007) ('Any labour or support that gives effect to, or helps maintain, operations in a conflict . . . '); *Lubanga*, No. ICC-01/04-01/06-2842, paras. 576–8. Generally on the acceptance of child labour as one reason for child soldiering in the Sierra Leone conflict, see Drumbl, *Reimagining Child Soldiers* (2012), p. 70.

[507] Classifying the transportation of food as 'delicate', see Quenivet, *AJICL*, 16 (2008), 233.

[508] Draft Statute, p. 21 with note 12 ('[i]t would not cover activities clearly unrelated to the hostilities such as food deliveries to an airbase of the use of domestic staff in an officer's married accommodation'); *Lubanga*, No. ICC-01/04-01/06-803-tEN, para. 262; *Lubanga*, No. ICC-01/04-01/06-2842, paras. 575, 621, 623.

clearly unrelated to the hostilities, for example delivering food[507] or working as domestic staff, are excluded[508] and, on the other hand, a 'direct' participation 'in hostilities', as required by Article 77(2) AP I,[509] is not necessary.[510] The latter follows not so 'clearly', as suggested by the *Lubanga* TC,[511] from the apparent difference between the terms 'active' and 'direct', but rather from the fact that Article 4(3)(c) AP II refers to any participation (direct or indirect)[512] and, more importantly, from the broad protective purpose of the criminalization of child recruitment. Given that the respective offences aim to protect children under fifteen years, as a particularly vulnerable group, from the inherent risks arising out of armed conflicts, including those originating in their own groups,[513] in principle all (direct or indirect) activities which expose such children to this particular 'armed conflict risk' should be covered by the active participation requirement[514]—of course respecting the *nullum crimen* principle.[515]

(iii) Due process violations

Article 8(2)(c)(iv) ICC Statute declares punishable sentencing and execution 'without previous judgment' by a 'regularly constituted court affording all judicial guarantees'. This is another example of a quite imprecise provision since it is not clear what exactly is meant by a 'regularly constituted court' or 'judicial guarantees . . . generally recognized as indispensable'. Neither Article 8(2)(c)(iv) ICC Statute nor Common Article 3 GCs give much guidance in that respect. The wording of the chapeau of Article 6(2) AP II is, however, in its essence identical to Common Article 3 GCs, and thus also to Article 8(2)(c)(iv) ICC Statute.[516] The relevance of Article 6(2) AP II for the interpretation of Common Article 3 GCs is underlined in the ICRC Commentary on Article 6 AP II:

[509] Article 77(2) AP I reads: '2. The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces.'

[510] Referring to evidentiary questions in this regard, see Quenivet, *AJICL*, 16 (2008), 234; contra *Lubanga* arguing in favour of a narrow interpretation of the active participation requirement interpreting it identically to the general 'direct participation' approach in IHL (Section A. (7)(b)); Wagner, *CLF*, 24 (2013), 148, 165–97.

[511] *Lubanga*, No. ICC-01/04-01/06-2842, para. 627.

[512] Ambos, 'Commentary', in Klip and Sluiter, *Annotated Leading Cases*, xxiii (2010), p. 740.

[513] cf. Robinson, 'War Crimes', in Cryer et al., *Introduction ICL* (2010), p. 309 ('Primary purpose is to protect all children'); Palomo Suárez, *Kindersoldaten* (2009), p. 168 (focusing on specific dangers); Cottier, 'Article 8', in Triffterer, *Commentary* (2008), p. 228 ('protect children against their own authorities').

[514] Palomo Suárez, *Kindersoldaten* (2009), pp. 121–2; von Schorlemer, *Kindersoldaten und bewaffneter Konflikt* (2009), p. 315; *contra* Wagner, *CLF*, 24 (2013), 197 ('participating actively in hostilities [should meet] the [IHL] threshold of direct participation in hostilities', i.e. 'the act itself of participating directly').

[515] This means, for example, that reading 'sexual violence' into the using-conduct (Separate and Dissenting Opinion of Judge Odio Benito in *Lubanga*, No. ICC-01/04-01/06-2842, paras. 15–21) violates the strict construction requirement and amounts to a prohibited analogy (Article 22(2)). In addition, 'sexual violence' only alludes to a criminal phenomenon which may well have been relevant in the factual situation on the ground (*Lubanga*, No. ICC-01/04-01/06-2842, paras. 890–6) but the actual offences are covered, as acknowledged by Odio Benito herself, by 'distinct and separate crimes' (Article 7(1)(g) and Article 8(2)(b)(xxii), (e)(vi)). In the same vein, see Wagner, *CLF*, 24 (2013), 198.

[516] The wording of Common Article 3 'which are recognized as indispensable by civilized peoples' has been replaced by 'which are generally recognized as indispensable' (Preparatory Commission for the ICC, 97).

> Article 6 lays down some principles of universal application which every responsibly organized body must, and can, respect. It supplements and develops common Article 3, paragraph 1, sub-paragraph (1)(d), which prohibits the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples. This very general rule required clarification to strengthen the prohibition of summary justice and of convictions without trial, which it already covers. Article 6 reiterates the principles contained in the Third and Fourth Conventions, and for the rest is largely based on the International Covenant on Civil and Political Rights, particularly Article 15, from which no derogation is permitted, even in the case of a public emergency threatening the life of the nation.[517]

Given the fact that the Statute has retained verbatim the language of Common Article 3 GCs, dissident armed groups are also bound to set up 'a regularly constituted court' before a sentencing might take place. Thus, special courts set up on an ad hoc basis by rebel groups are prohibited. Independence and impartiality are the main features of 'a regularly constituted court' (cf. Articles 14(1) ICCPR, 6(1) ECHR, 8(1) ACHR).[518] In determining whether a body can be considered to be independent, the court has regard to the manner of appointment of its members and the duration of their term of office, the existence of guarantees against outside pressure, and the question of whether the body presents an appearance of independence. The court is impartial when the judges stand above the parties, and decide without personal influence and objectively, only according to their best knowledge and conscience. Impartiality also means lack of prejudice or bias.[519]

[517] Preparatory Commission for the ICC, 91. [518] Preparatory Commission for the ICC, 92.

[519] Preparatory Commission for the ICC, 94. See also the consolidated jurisprudence of the ECtHR concerning Article 6 ECHR, for example, *Kamasinski v Austria*, Application No. 9783/82 (19 December 1989), paras. 61, 96; *Kremzow v Austria*, Application No. 12350/86 (21 September 1993), paras. 43–4; *Remli v France*, Application No. 16839/90 (23 April 1996), paras. 24, 28 ff., 43, 48; *Ferrantelli and Santangelo v Italy*, Application No. 19874/92 (7 August 1996), paras. 37, 54; *Gregory v the United Kingdom*, Application No. 22299/93 (25 February 1997), paras. 35, 38, 49.

Chapter IV

The Crime of Aggression

*The full chapter bibliography can be downloaded from **http://ukcatalogue.oup.com/product/9780199665600.do.**

A. Introduction: Historical Development, Concept, and Protected Legal Interests

The crime of aggression was prosecuted for the first time under the title of 'crime against peace' by the Nuremberg and Tokyo Tribunals,[1] which defined it as 'planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances . . .'.[2] In the Nuremberg Trials, 'to initiate a war of aggression'[3] was still considered to be 'the supreme international crime', containing 'within itself the accumulated evil of the whole',[4] while before the International Military Tribunal for the Far East (IMTFE) aggression belonged to the 'major war crimes' (so-called 'Class A' crimes).[5]

[1] For a thorough historical account, see Solera, *Aggression* (2007), pp. 15 ff.; Kemp, *Aggression* (2010), pp. 73 ff.; Corredor C., *Agresión* (2012), pp. 5 ff.; Sellars, *JICJ*, 10 (2012), 7 ff. (mainly between the two world wars); for more succinct accounts see Werle, *Principles* (2009), mn. 1312 ff.; Werle, *Völkerstrafrecht* (2012), mn. 1420 ff.; Safferling, *Internationales Strafrecht* (2011), § 6 mn. 165 ff.; Wilmshurst, 'Aggression', in Cryer et al., *Introduction ICL* (2010), pp. 312 ff.; Gaja, 'Repressing Aggression', in Cassese et al., *Rome Statute*, i (2002), pp. 427 ff.; Kreß and von Holtzendorff, *JICJ*, 8 (2010), 1180 ff.; *Kreß*, *GA*, 158 (2011), 66 ff.; Kacker, *Suffolk Transnat'lLR*, 33 (2010), 258 ff; Kolb, 'Droit international pénal' in Kolb, *Droit international pénal* (2008), pp. 169–70; Bassiouni, *Introduction to ICL* (2013), pp. 632 ff.

[2] See Article 6(a) IMT(S) reprinted in *UNTS*, 82 (1951), 280; Article 5 (a) IMTFE(S) reprinted in Boister and Cryer, *Tokyo Tribunal* (2008), pp. 7–11. See also Principle VI (a)(i) Nuremberg Principles, UN-YB ILC 1950 II, 3, 376 ff.; on the Nuremberg Principles, see Volume I of this treatise, pp. 9–10; see also Einarsen, *Universal Crimes* (2012), p. 43–5.

[3] On the meaning of 'war of aggression', see also Müller-Schieke, *LJIL*, 14 (2001), 418–19; critically, Clark, *LJIL*, 15 (2002), 878; on violation of *the nullum crimen* principle, see Vest, *Gerechtigkeit für Humanitätsverbrechen?* (2006), p. 148; critical also Zahar and Sluiter, *ICL* (2008), pp. 84–5; on the judgments of the IMTFE, see Boister and Cryer, *Tokyo Tribunal* (2008), pp. 119 ff. On the historical importance of the Nuremberg Trials for the Kampala Compromise, see Kaul, *ZIS*, 5 (2010), 637 ff.

[4] cf. IMT, *Judgment of IMT* (1946), p. 12; Bassiouni, *Introduction to ICL* (2013), p. 227 ('most harmful [crime] to peace and security'). For a critical analysis of the Nuremberg Judgment in this regard, see Weigend, *JICJ*, 10 (2012), 44 ff.

[5] cf. Pritchard, *Tokyo Trial* ii (1998), p. xxxv; also Roggemann, *Die internationalen Strafgerichtshöfe* (1998), p. 185.

On 14 December 1974, the UN General Assembly (GA) adopted a groundbreaking definition of an 'act of aggression'[6] in Resolution 3314 (XXIX)[7] which served as the basis for all subsequent discussion leading up to the Kampala compromise. In June 1998, the Rome Conference granted the ICC jurisdiction over the crime of aggression (Article 5(d) ICC Statute), but was unable to reach a consensus on a concrete definition of the crime and further possible conditions for the exercise of jurisdiction.[8] This task was assigned to a Working Group on the Crime of Aggression (1999–2002) of the Preparatory Commission,[9] and then to the Special Working Group on the Crime of Aggression (SWGCA) (2003–2009), which presented its final report to the Assembly of States Parties (ASP) on 13 February 2009.[10] The SWGCA's proposal was adopted by the ASP on 26 November 2009 by consensus[11] and presented to the Kampala Review Conference as a 'Conference Room Paper on the Crime of Aggression' on 25 May 2010.[12] In Kampala, as in Rome, delegates strived to reach consensus, even though a two-thirds majority would have been sufficient.[13]

[6] GA Res. 3314 (XXIX) (14 December 1974), UN Doc. A/RES/3314(XXIX), Annex, Definition of Aggression: Article 1: 'Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations [...]; Article 3: Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of Article 2, qualify as an act of aggression: (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof, (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State; (c) The blockade of the ports or coasts of a State by the armed forces of another State; (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State; (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement; (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State; (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.'

[7] Reprinted in Barriga, Danspeckgruber, and Wenaweser, *Princeton* (2009), pp. 231–4 (hereafter '*Princeton* (2009)').

[8] See for the Rome negotiations, Solera, *Aggression* (2007), pp. 356 ff.; Kemp, *Aggression* (2010), pp. 194 ff.; Wilmshurst, 'Aggression', in Cryer et al., *Introduction ICL* (2010), pp. 316–17; Gaja, 'Repressing Aggression', in Cassese et al., *Rome Statute*, i (2002), pp. 430 ff., 435 ff.

[9] On its work, see Fernández de Gurmendi, 'An Insider's View', in Politi and Nesi, *The ICC and Aggression* (2004), pp. 175, 176 ff.

[10] SWGCA, February 2009 Report (February 2009—ICC-ASP/7/20/Add.1, Annex II), reprinted in *Princeton* (2009), pp. 49–59; all ICC Documents are available at <http://icc-cpi.int>. See on the post-Rome negotiations, Clark, 'Aggression', in Stahn and Sluiter, *Emerging Practice* (2009), p. 709; Kemp, *Aggression* (2010), pp. 207 ff.; Kreß and von Holtzendorff, *JICJ*, 8 (2010), 1183 ff.; Trahan, *ICLR*, 11 (2011), 54 ff.; Weisbord, *DukeJCompᴂIL*, 20 (2009), 1 ff.

[11] Resolution No. ICC-ASP/8/Res.6, 26 November 2009, 1. The proposal is annexed as Appendix I to the February 2009 Report, see note 10, pp. 60–2.

[12] RC/WGCA/1, 25 May 2010, available at <http://icc-cpi.int/iccdocs/asp_docs/RC2010/RC-WGCA-1-ENG.pdf> accessed 1 April 2013; thereto, Wenaweser, *LJIL*, 23 (2010), 884.

[13] See Rules 49(2), 51 of the Review Conference Rules of Procedure, Resolution No. ICC-ASP/6/Res.2, Annex IV, 28, available at <http://icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-ASP6-Res-02-ENG.pdf> accessed 1 April 2013. See also Kreß and von Holtzendorff, *JICJ*, 8 (2010), 1201 on the uncertain political will to even hold a vote and the uncertainty as to the sufficient number of delegates; 'on the power of consensus' in this context, see Blokker and Kreß, *LJIL*, 23 (2010), 890–1. On the negotiations, see also Wenaweser, *LJIL*, 23 (2010), 883 ff.; Manson, *CLF*, 21 (2010), 417 ff.; Corredor C., *Agresión* (2012), 35 ff.

The crime of aggression protects collective legal interests, namely the peace, security and well-being of the world,[14] and has a dual nature. It encompasses the collective state *act of aggression* ('*Gesamttat*')[15] at the macro level and the individual *crime of aggression* at the micro level ('*Einzeltat*').[16] Individual criminal responsibility is defined broadly, encompassing, on the one hand, as part of the crime definition, 'participation in a common plan or conspiracy for the accomplishment' of any of the acts of aggression;[17] on the other hand, extending to 'leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit' a crime against peace 'for *all* acts performed by *any* persons in execution of such plan'.[18]

This short historical overview shows that the discussions about the crime of aggression centred on the issue of the crime definition and, with a view to the ICC, the exercise of jurisdiction. Both issues are closely interrelated and one cannot be analysed without the other to fully understand the crime of aggression. It is for this reason that the exercise of jurisdiction over the crime of aggression must be considered here, although it largely concerns international criminal procedure and would thus otherwise be included in the third volume of this treatise. The following considerations are divided into two parts which, in turn, are subdivided into a further two parts dealing with the two areas mentioned. We will first look more closely at the solutions provided by the Kampala compromise in these two areas, and then perform a critical analysis of the solutions reached.[19]

B. The Compromise at the ICC's First Review Conference in Kampala

Pursuant to Article 5(2) ICC Statute, the Court's exercise of jurisdiction[20] over the crime of aggression depends on two requirements: States Parties must agree on a definition of the crime and 'the conditions under which the Court shall exercise jurisdiction'. While the definition of aggression was already agreed on at the February 2009 session of the SWGCA, jurisdictional issues almost led to the failure of the entire endeavour. These issues boiled down to two major questions: whether France and the UK (as the two States Parties which are also permanent members of the UN Security Council) would give up their positions on the Security Council's role in the

[14] On protected legal interests in ICL, see Volume I of this treatise, pp. 60 ff., 66; cf. also Safferling, *Internationales Strafrecht* (2011), § 6 mn. 174; Bassiouni, *Introduction to ICL* (2013), p. 227.

[15] On the distinction between '*Einzeltat*' and '*Gesamttat*', see Volume I of this treatise, pp. 84 ff. with further references.

[16] Hummrich, *Aggression* (2001), p. 149; van Schaack, *JICJ*, 10 (2012), 149 ('State committed an act of aggression as a predicate to assigning individual criminal responsibility'); stressing the collective dimension of aggression Fletcher, *Grammar* (2007), p. 333.

[17] Article 6(a) IMT(S); Article 5(a) IMTFE(S); Principle VI(a)(ii) Nuremberg Principles.

[18] Article 6 IMT(S) and Article 5 IMTFE(S), both last clauses (emphasis added).

[19] The following considerations draw largely on Ambos, *GYIL*, 53 (2010), 463 ff.

[20] Note that, according to Article 5(1), the crime of aggression was already within the jurisdiction of the Court and thus the question for the states to solve concerned the conditions for the exercise of this jurisdiction, see also Manson, *CLF*, 21 (2010), 425. Critical of whether Article 5(2) can be the 'basis for bringing into force any amendment regarding the crime of aggression', see Zimmermann, *JICJ*, 10 (2012), 212–15.

(preliminary) determination of an act of aggression, and how dissenting states could be accommodated.[21]

(1) The definition

The definition proposed in the February 2009 report[22] was adopted, *tel quel*, by the ASP in November 2009[23] and also by the Kampala Conference.[24] It was only opposed by those states—the USA, in particular—that did not take part in the SWGCA and rejected the crime of aggression for reasons of principle.[25] The definition reads as follows:

Article 8*bis*
Crime of aggression

1. For the purpose of this Statute, 'crime of aggression' means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.
2. For the purpose of paragraph 1, 'act of aggression' means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:
   a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
   b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
   c) The blockade of the ports or coasts of a State by the armed forces of another State;
   d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
   e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

[21] See also Kaul, *GoJIL*, 2 (2010), 663: 'The real debate was on three related issues regarding the exercise of jurisdiction by the Court'; similarly, Heinsch, *GoJIL*, 2 (2010), 716; Schmalenbach, *JZ*, 65 (2010), 746–7.

[22] Report of the SWGCA (see note 10), Appendix I. See also for the different 'definitional models', Kaul, 'Aggression', in Politi and Nesi, *The ICC and Aggression* (2004), pp. 99 ff.

[23] See note 11.

[24] Resolution No. RC/Res.6, advance version, 16 June 2010. Critical, see Scheffer, *LJIL*, 23 (2010), 897 ff.; detailed, see Kacker, *Suffolk Transnat'lLR*, 33 (2010), 258 ff.

[25] See Koh, 'Statement at the Review Conference', available at <http://state.gov/s/l/releases/remarks/142665.htm> accessed 1 April 2013: 'Finishing the unfinished business of Rome does not mean rushing into a premature conclusion on institution-transforming amendments [without] genuine consensus'. On the US engagement in the negotiations, see Kreß and von Holtzendorff, *JICJ*, 8 (2010), 1204 ff.; Kreß, *GA*, 158 (2011), 84 ff.

f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

While para. 2 of this definition adopts a conservative approach regarding the definition of an 'act of aggression' which essentially repeats Articles 1 and 3 of Resolution 3314 (XXIX),[26] para. 1 is innovative in at least two respects. First, it limits individual responsibility to persons in command or leadership positions, that is, 'in a position effectively to exercise control over or to direct the political or military action of a State'. Article 25(3) was adjusted accordingly, with a para. 3*bis* limiting individual responsibility for the crime of aggression to those responsible leaders.[27] Secondly, it introduces a threshold requirement, limiting a 'crime of aggression' to an act that 'by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations'. In contrast, the conduct required ('planning, preparation, initiation or execution') follows the historical precedents of Nuremberg and Tokyo.[28] The first three forms of conduct are identical[29] and thus preparatory acts are still covered.[30] The change in the last form—'execution' instead of 'waging of a war of aggression'—is only a change in wording and does not entail a difference in substance. In both cases the actual carrying out of an act of aggression is required.[31]

Arguing that the definition contained considerable deficits,[32] the USA proposed supplementary 'Understandings' on its interpretation.[33] Following informal discussions

[26] Reprinted in *Princeton* (2009), pp. 231–4.

[27] Resolution No. RC/Res. 6, advance version, 16 June 2010. Annex I No. 5. On the special offence character of the crime of aggression as a Leadership Crime, see Section C. (2)(c); Kacker, *Suffolk Transnat'lLR*, 33 (2010), 258 ff.; on the roots of the Leadership Clause see Weisbord, *DukeJCompé&IL*, 20 (2009), 44 ff.

[28] See note 2 and main text. For the *travaux*, see SWGCA, November 2008 Report (November 2008—ICC-ASP/6/SWGCA/1), para. 29, reprinted in *Princeton* (2009), p. 76 ('mainly for historical reasons'); see also SWGCA, December 2007 Report (December 2007—ICC-ASP/6/SWGCA/1), para. 8, reprinted in *Princeton* (2009), p. 100. See also Corredor C., *Agresión* (2012), p. 70.

[29] 'Planning requires that one or more persons design the criminal conduct constituting [the] statutory crime[s] that [is] later perpetrated' (cf. Manacorda, 'Planning', in Cassese, *Companion* (2009), pp. 456–7); 'Preparation' means 'the act or process of devising the means necessary to commit a crime' (Garner, *Law Dictionary* (2009), p. 1301). 'Initiation' means that the perpetrator is 'taking action that commences the execution by means of a substantial step' (Eser, 'Article 25', in Cassese et al., *Rome Statute*, i (2002), p. 812). See also Corredor C., *Agresión* (2012), pp. 63 ff.

[30] On the overcriminalization to which this early intervention of criminal law leads, see Section C. (2)(d).

[31] cf. Section C. (2)(d).

[32] See Koh, 'Statement at the Review Conference', available at <http://state.gov/s/l/releases/remarks/142665.htm> accessed 1 April 2013, pp. 3 ff. In the view of the USA, certain uses of force would remain both lawful and necessary and the proposed definition did not truly reflect customary international law. Furthermore, Koh criticized the risk of unjustified domestic prosecutions, as too little attention had been paid to the application of the principle of complementarity and the dependence of the definition on the trigger mechanism was not sufficiently addressed.

[33] See Trahan, *ICLR*, 11 (2011), 73 ff.; Blokker and Kreß, *LJIL*, 23 (2010), 892; Resolution No. RC/Res. 6, advance version, 16 June 2010, Annex III (Understandings regarding the amendments to the Rome Statute on the ICC on the Crime of Aggression); on the Understandings, see Kreß, Barriga, Grover, and von

moderated by the German focal point, the six US proposals could be converted into three additional Understandings:

- a clarification that any amendment solely affects the ICC Statute;[34]
- the understanding that aggression is 'the most serious and dangerous form of the illegal use of force' to be determined considering 'all the circumstances of each particular case' in accordance with the UN Charter;[35] and
- the threshold required for a 'manifest' violation of the UN Charter presupposes that the 'three components of character, gravity and scale' exist not only isolated but in a combined form, that is, two out of three elements must be present.[36]

The SWGCA continued to discuss the Elements of Crimes for the crime of aggression following its June 2004 Princeton meeting.[37] On the basis of a discussion paper prepared by the Australian and Samoan delegations,[38] Draft Elements were adopted at the June 2009 Princeton inter-sessional meeting.[39] The Draft was approved by the

Holtzendorff, 'Negotiating the Understandings', in Barriga and Kreß, *Travaux Préparatoires* (2012), pp. 81 ff; on the legal status of the Understandings, see Heller, *JICJ*, 10 (2012), 231 ff. who considers them as mere supplementary means of interpretation that can be ignored by the court (245 ff.).

[34] Resolution No. RC/Res. 6, advance version, 16 June 2010, Annex III: '4. It is understood that the amendments that address the definition of the act of aggression and the crime of aggression do so for the purpose of this Statute only. The amendments shall, in accordance with Article 10 of the Rome Statute, not be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute. 5. It is understood that the amendments shall not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State.' These Understandings respond to concerns voiced at the beginning of the Conference, see ICC, *Non-Paper by the Chair: Further elements for a solution on the Crime of Aggression*, RC/WGCA/2, 25 May 2010, para. 4; see Kreß, Barriga, Grover, and von Holtzendorff, 'Negotiating the Understandings', in Barriga and Kreß, *Travaux Préparatoires* (2012), pp. 90–4.

[35] Resolution No. RC/Res. 6, advance version, 16 June 2010, Annex III: '6. it is understood that aggression is the most serious and dangerous form of the illegal use of force; and that a determination whether an act of aggression has been committed requires consideration of all the circumstances of each particular case, including the gravity of the acts concerned and their consequences, in accordance with the Charter of the United Nations.' See Kreß, Barriga, Grover, and von Holtzendorff, 'Negotiating the Understandings', in Barriga and Kreß, *Travaux Préparatoires* (2012), pp. 95–6.

[36] Resolution No. RC/Res. 6, advance version, 16 June 2010, Annex III: '7. It is understood that in establishing whether an act of aggression constitutes a manifest violation of the Charter of the United Nations, the three components of character, gravity and scale must be sufficient to justify a "manifest" determination. No one component can be significant enough to satisfy the manifest standard by itself.'

[37] First mentioned under 'list of issues' in the SWGCA, June 2004 Report (June 2004—ICC-ASP/3/SWGCA/INF.1), Appendix, section II, reprinted in *Princeton* (2009), p. 210; see then—in chronological order with increasing importance—June 2005 Report (June 2005—ICC-ASP/4/32), Appendix II No. 4, reprinted in *Princeton* (2009), p. 183; June 2006 Report (June 2006—ICC-ASP/5/SWGCA/INF.1), Appendix II, section II, reprinted in *Princeton* (2009), pp. 159–60 (preliminary draft); December 2007 Report (December 2007—ICC-ASP/6/SWGCA/1), para. 40, reprinted in *Princeton* (2009), p. 106; June 2008 Report (June 2008—ICC-ASP/6/20/Add.1, Annex II), paras. 93–7, reprinted in *Princeton* (2009), pp. 92–3; November 2008 Report (November 2008—ICC-ASP/6/SWGCA/1), paras. 30–4, reprinted in *Princeton* (2009), pp. 76–7; February 2009 Report (February 2009—ICC-ASP/7/20/Add.1, Annex II), section IV, reprinted in *Princeton* (2009), p. 58; on the negotiations for the Elements, see Anggadi, French and Potter, 'Negotiating the Elements', in Barriga and Kreß, *Travaux Préparatoires* (2012), pp. 58 ff.

[38] SWGCA, June 2009 Report (June 2009—ICC-ASP/8/INF.2), Annex II No. 2 and Appendix I, reprinted in *Princeton* (2009), pp. 36–7.

[39] SWGCA, June 2009 Report, Annex I, reprinted in *Princeton* (2009), p. 35.

ASP in November 2009,[40] presented to the Kampala Conference[41] and so adopted.[42] The Elements now read:

Introduction

1. It is understood that any of the acts referred to in Article 8*bis*, paragraph 2, qualify as an act of aggression.
2. There is no requirement to prove that the perpetrator has made a legal evaluation as to whether the use of armed force was inconsistent with the Charter of the United Nations.
3. The term 'manifest' is an objective qualification.
4. There is no requirement to prove that the perpetrator has made a legal evaluation as to the 'manifest' nature of the violation of the Charter of the United Nations.

Elements

1. The perpetrator planned, prepared, initiated or executed an act of aggression.
2. The perpetrator was a person[43] in a position effectively to exercise control over or to direct the political or military action of the State which committed the act of aggression.
3. The act of aggression—the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations—was committed.
4. The perpetrator was aware of the factual circumstances that established that such a use of armed force was inconsistent with the Charter of the United Nations.
5. The act of aggression, by its character, gravity and scale, constituted a manifest violation of the Charter of the United Nations.
6. The perpetrator was aware of the factual circumstances that established such a manifest violation of the Charter of the United Nations.

(2) The exercise of jurisdiction

(a) The starting point

The most contentious issue with regard to the Court's jurisdiction over aggression was the role of the UN Security Council.[44] While the five permanent members of the Security Council defended, for obvious reasons, the Security Council's primary power in determining whether an act of aggression has occurred (Articles 24, 39 UN Charter), many other states favoured, in accordance with Articles 13(c) and 15 ICC Statute, an

[40] Res. No. ICC-ASP/7/20/Add. 1, Annex II, Appendix 7.

[41] RC/WGCA/1, 25 May 2010, Annex II, 6.

[42] Amendments to the Elements of Crimes, Resolution No. RC/Res. 6, advance version, 16 June 2010, Annex II, 5. See also Clark, *GoJIL*, 2 (2010), 694; Heinsch, *GoJIL*, 2 (2010), 720.

[43] With respect to an act of aggression, more than one person may be in a position to meet these criteria (footnote in the original); cf. Anggadi, French, and Potter, 'Negotiating the Elements', in Barriga and Kreß, *Travaux Préparatoires* (2012), p. 67.

[44] See also Barriga, 'Against the Odds', in *Princeton* (2009), pp. 11 ff.; Wenaweser, *LJIL*, 23 (2010), 884; Werle, *Völkerstrafrecht* (2012), mn. 1461 ff.; Werle, *Principles* (2009), mn. 1349 ff; Weisbord, *ColJTransnat'lL*, 50 (2011–2012), 93–8; Corredor C., *Agresión* (2012), pp. 140 f, 145; Bassiouni, *Introduction to ICL* (2013), pp. 635; Politi, *JICJ*, 10 (2012), 272 ff. Critical of the role of the Security Council from the perspective of human rights organizations, see von Braun and Micus, *JICJ*, 10 (2012), 115 ff.

additional *proprio motu* power of the Prosecutor submitted to an internal judicial check by the Pre-Trial Chamber (PTC).[45] Further, the position of the European states (with the exception of Switzerland and Greece), demanding the consent of the aggressor state to trigger jurisdiction, was controversial. It was strongly opposed mainly by African, Latin American, and Caribbean states. Linked to this question was the issue of the appropriate amendment procedure according to Article 121(3)–(5).[46]

Thus, the SWGCA's proposal,[47] as adopted by the ASP[48] and presented to the Review Conference,[49] read as follows:

Article 15*bis*
Exercise of jurisdiction over the crime of aggression

1. The Court may exercise jurisdiction over the crime of aggression in accordance with Article 13, subject to the provisions of this Article.
2. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.
3. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.
4. (Alternative 1) In the absence of such a determination, the Prosecutor may not proceed with the investigation in respect of a crime of aggression,
   Option 1—end the paragraph here.
   Option 2—add: unless the Security Council has, in a resolution adopted under Chapter VII of the Charter of the United Nations, requested the Prosecutor to proceed with the investigation in respect of a crime of aggression.

4. (Alternative 2) Where no such determination is made within [6] months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression,
   Option 1—end the paragraph here.
   Option 2—add: provided that the Pre-Trial Chamber has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in Article 15;
   Option 3—add: provided that the General Assembly has determined that an act of aggression has been committed by the State referred to in Article 8*bis*;
   Option 4—add: provided that the International Court of Justice has determined that an act of aggression has been committed by the State referred to in Article 8*bis*.

[45] See Clark, *GoJIL*, 2 (2010), 699–700; Schmalenbach, *JZ*, 65 (2010), 749 left column. On the correct legal interpretation, see note 193; in particular on the possible options, see Trahan, *ICLR*, 11 (2011), 60 ff.
[46] On the appropriate amendment regime applicable to the crime of aggression, see Zimmermann, *JICJ*, 10 (2012), 212 ff.
[47] SWGCA, February 2009 Report (February 2009—ICC-ASP/7/20/Add.1, Annex II), reprinted in *Princeton* (2009), pp. 49 ff.
[48] Res. No. ICC-ASP/8/Res. 6 (note 11), Annex II, 3.
[49] RC/WGCA/1/Rev.1, (note 12), Annex I, 3.

5. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.
6. This Article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in Article 5.

The crux of the issue resides in para. 4, with its two alternatives referring to the situation where the Security Council has abstained from making a determination of an act of aggression.[50] According to alternative 1, the Prosecutor does not have a *proprio motu* triggering power, and this signals the end of the story. In contrast, however, alternative 2 grants such a power after a certain amount of time has lapsed, although leaving the final word to another organ, namely either the PTC, or the UN GA or ICJ (options 2–4). It is important to note that the SWGCA saw no necessity for splitting the triggering procedure of Article 13 into two, distinguishing between a state referral and a *proprio motu* investigation of the Prosecutor, on the one hand, and a Security Council referral on the other.

(b) The negotiations

In the course of the negotiations, the different positions were expressed in different 'non-papers'.[51] The so-called 'ABS proposal', distinguished for the first time between a Security Council referral (amendment 1) and a state referral/*proprio motu* action of the Prosecutor (amendment 3) and provided for different modalities for the entry into force of these different amendments (operative para. 1 of the proposal): amendment 3 should enter into force for all States Parties one year after ratification by seven-eighths of the States Parties (Article 121(4)); in contrast, amendment 1 should enter into force one year after ratification by a given State Party for that Party only (an opt-in regime) (Article 121(5)).[52] As a consequence, the Court would have *immediate* jurisdiction (one year after the first ratification) for Security Council referrals only, while the jurisdiction for state referrals or *proprio motu* action of the Prosecutor would be considerably delayed. On 8 June 2010, Canada proposed[53] for the allowance of a *proprio motu* investigation after six months with authorization of the Pre-Trial Chamber, with the limitation that at least both the victim and the aggressor state must have accepted this paragraph. On the same day, Slovenia presented a further proposal for Article 15*bis*, trying to combine the ABS and Canadian proposals by giving the

[50] See also Barriga, 'Against the Odds', in *Princeton* (2009), p. 14; Barriga, 'Negotiating the Amendments', in Barriga and Kreß, *Travaux Préparatoires* (2012), pp. 33–6.

[51] All non-papers quoted here are also reproduced in Trahan, *ICLR*, 11 (2011), 96 ff. For detailed daily summaries, see the blog of William Schabas, 'The ICC Review Conference: Kampala 2010', <http://iccreviewconference.blogspot.com> accessed 1 April 2013; see also Reisinger-Coracini, *GoJIL*, 2 (2010), 756 ff.; Schmalenbach, *JZ*, 65 (2010), 746; Barriga, *ZIS*, 5 (2010), 645 ff.; Trahan, *ICLR*, 11 (2011), 68 ff.; on the four boxes relating to the filter mechanisms, Trahan, *ICLR*, 11 (2011), 62–3.

[52] The proposal was made by Argentina, Brazil, and Switzerland on 6 June. See also Barriga, 'Against the Odds', in *Princeton* (2009), pp. 15–16; Barriga, 'Negotiating the Amendments', in Barriga and Kreß, *Travaux Préparatoires* (2012), pp. 37–9; Wenaweser, *LJIL*, 23 (2010), 885; Kreß and von Holtzendorff, *JICJ*, 8 (2010), 1202; Manson, *CLF*, 21 (2010), 421.

[53] Canada proposed an Article 15*bis* based on the Working Group's proposal of para. 4, alternative 2, option 2 as quoted earlier.

Prosecutor the possibility to 'read[d]ress the possibility of the Security Council referral' if the States Parties concerned had not accepted the *proprio motu* investigation. On 9 June 2010, at 4pm, still within the SWGCA negotiations, the ABS group and Canada presented a joint proposal for the contentious issue of state referral/*proprio motu* action (Article 15*bis*) introducing two innovations: first, a postponement or suspension clause as to the beginning of the Court's exercise of jurisdiction pursuant to a state referral/*proprio motu* action ('... five years after the entry into force ... for any State Party', Article 15*bis*(1)), thereby trying to respond to concerns already voiced at the beginning of the negotiations);[54] and, secondly, an opt-out clause for States Parties ('declaration of non-acceptance of the jurisdiction') which do not want to accept jurisdiction on the basis of a state referral/*proprio motu* action (para. 4*bis*).

Moving from the SWGCA to the plenary, a series of 'informal informal' meetings took place and the President of the ASP, Christian Wenaweser, issued various non-papers on 10 and 11 June 2010 containing a draft resolution.[55] The splitting of the triggers in an Article 15*bis* (state referral/*proprio motu*) and Article 15*ter* (Security Council referral) was now accepted, but it was not until the final proposal of 11 June at 4.30pm that it was decided that the Prosecutor would have a *proprio motu* power after six months of inactivity by the Security Council, 'provided that the Pre-Trial Division has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in Article 15, and the Security Council has not decided otherwise **in accordance with Article 16**'.[56]

While this was clearly a success for the states in favour of a strong Prosecutor, in other words, most States Parties except the five permanent members of the Security Council, it was not without consequences.[57] The same proposal confirmed the postponement (Articles 15*bis* and *ter* para. 3)[58] and opt-out clauses (operative para. 1 and Article 15*bis*(4))[59] introduced by the ABS-Canada proposal and excluded non-parties from jurisdiction over aggression, even if committed by those states on the territory of a

[54] See RC/WGCA/2, 25 May 2010, para. 2: '**Timing of the entry into force of the amendments:** Concerns have been raised at the prospect of an early entry into force of the amendments on the crime on aggression in case Article 121, paragraph 5, of the Statute was to be applied. Such concerns could possibly be addressed by a provision specifying that the Court should begin exercising jurisdiction over the crime of aggression at a later stage only. Such a provision would not as such affect the timing of the entry into force of the amendments, but would effectively delay the Court's exercise of jurisdiction ...' (emphasis in the original). cf. Barriga, 'Negotiating the Amendments', in Barriga and Kreß, *Travaux Préparatoires* (2012), pp. 50–1.

[55] Wenaweser, *LJIL*, 23 (2010), 886. For a summary of the President's papers and non-papers, see Barriga, 'Negotiating the Amendments', in Barriga and Kreß, *Travaux Préparatoires* (2012), pp. 51–6.

[56] Article 15*bis* (8). The emphasis is in the original to make clear that the bold part was added to this last proposal.

[57] Critically, Stahn, *LJIL*, 23 (2010), 878–9.

[58] Para. 3 reads: '[3. *insert provision on delayed entry into force*] The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute' (italics and brackets in original).

[59] Para. 4 reads: 'The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar. The withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years.'

State Party (Article 15*bis*(5)).[60] In fact, a double postponement was proposed with regard to the entry into force: in addition to the delay clause contained in para. 3, which was still to be exactly defined, the Court's exercise of jurisdiction would only be possible one year after ratification by thirty States Parties (Article 15*bis*(2)).

(c) The final compromise

The last draft resolution paved the way for compromise. When the President of the Conference put forward the motion for consensus,[61] the compromise was accepted by the negotiators, as neither France nor the United Kingdom asked for the floor,[62] and Japan, despite stating its 'serious doubts on the legal integrity of the amendment',[63] did not question the deal. The new key provisions, Articles 15*bis* and *ter*, read:[64]

> **Article 15*bis***
> **Exercise of jurisdiction over the crime of aggression**
> **(State referral, *proprio motu*)**
>
> 1. The Court may exercise jurisdiction over the crime of aggression in accordance with Article 13, paragraphs (a) and (c), subject to the provisions of this article.
> 2. The Court may exercise jurisdiction only with respect to crimes of aggression committed *one year after* the ratification or acceptance of the amendments by *thirty State Parties*.
> 3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken *after 1 January 2017* by the same majority of State Parties as is required for the adoption of an amendment to the Statute.
> 4. The Court may, in accordance with Article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does *not accept such jurisdiction* by lodging a declaration with the Registrar. The withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years.

[60] Para. 5 reads: 'In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression *when committed by that State's nationals* or on its territory' (emphasis added).

[61] According to Reisinger-Coracini, *GoJIL*, 2 (2010), 763 the time was 12:19am, on 12 June 2010 (the clocks in the conference hall had been taken down); on the Final Compromise Proposal, see also Barriga, 'Negotiating the Amendments', in Barriga and Kreß, *Travaux Préparatoires* (2012), pp. 56–7.

[62] According to Blokker and Kreß, *LJIL*, 23 (2010), 893, the consensus solution became possible because 'the delegations of the United Kingdom and of France had to realize their isolation within the community of State Parties to the Rome Statute'.

[63] Manson, *CLF*, 21 (2010), 434–5; Manson, 'Smoothing out the Rough Edges of the Kampala Compromise, 18 June 2010', 6 <http://mediafire.com/?kmdzhwozudo> accessed 1 April 2013; Schmalenbach, *JZ*, 65 (2010), 746; Kreß and von Holtzendorff, *JICJ*, 8 (2010), 1180.

[64] Resolution No. RC/Res.6, advance version, 16 June 2010, Annex I, Nos. 3 and 4, 3–4 (emphasis added). A critical analysis of the exercise of jurisdiction follows in Section C. (3); crit. also Scheffer, *LJIL*, 23 (2010), 901 ff.; Manson, *CLF*, 21 (2010), 420 ff.

5. In respect of a State that is *not a party* to this Statute, the Court shall *not* exercise its *jurisdiction* over the crime of aggression when committed by that State's nationals or on its territory.
6. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the *Security Council* has made a *determination* of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.
7. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.
8. Where *no* such *determination* is made within *six months* after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression, provided that the *Pre-Trial Division* has *authorized* the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in Article 15, and the *Security Council* has not decided otherwise in accordance with *Article 16*.
9. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.
10. This Article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in Article 5.

Article 15*ter*
Exercise of jurisdiction over the crime of aggression
(Security Council referral)

1. The Court may exercise jurisdiction over the crime of aggression in accordance with Article 13, paragraph (b), subject to the provisions of this article.
2. The Court may exercise jurisdiction only with respect to crimes of aggression committed *one year after* the ratification or acceptance of the amendments by *thirty State Parties*.
3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken *after 1 January 2017* by the same majority of State Parties as is required for the adoption of an amendment to the Statute.
4. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.
5. This Article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in Article 5.

As to entry into force, the interplay of paras. 2 and 3 (of both Article 15*bis* and *ter*) entails that the ICC may exercise its jurisdiction *at earliest* after 1 January 2017 if a majority of the States Parties have made a decision pursuant to para. 3 *and* if, at that time, one year has passed since the acceptance of the amendment by the first *thirty* States Parties (para. 2). In other words, the exercise of jurisdiction requires a (further) positive collective decision of the States Parties (presumably the ASP) and individual acceptance decisions of up to thirty States Parties. The importance of these postponement rules is reinforced by the first

three *Understandings* adopted.[65] Understandings 1 and 3 confirm that in both a Security Council referral pursuant to Article 15*ter* (Understanding 1) and a state referral/*proprio motu* investigation pursuant to Article 15*bis* (Understanding 3) the Court may only exercise jurisdiction if the decision regarding the 2017 date has been taken and, in addition, one year has passed since the ratification or acceptance of thirty States Parties. As to a Security Council referral, it is also binding for non-parties, as it is additionally clarified in Understanding 2 that the Court 'shall' exercise jurisdiction 'irrespective of whether the state concerned has accepted the Court's jurisdiction in this regard'.

C. Critical Analysis

(1) Preliminary clarifications

While the customary law character of the crime of aggression is beyond dispute among both supporters and sceptics of its criminalization,[66] it is an entirely different matter, and thus highly controversial, whether a workable and legally satisfactory *definition* can be achieved at all and whether it was effectively achieved in Kampala.[67] In fact, radical sceptics are opposed to any attempt to define the crime of aggression in the first place,[68] a position perhaps academically sound but not an option for the SWGCA in light of the clear mandate of Article 5(2) ICC Statute. In fact, this clear mandate downplayed various fundamental questions,[69] including the fact that one may question the decision to work for years on a consensus of a highly controversial and immanently

[65] Resolution No. RC/Res.6, advance version, 16 June 2010, Annex III, No. 6. On the advantages of this postponement see Politi, *JICJ*, 10 (2012), 270 ff.

[66] See, on the one hand, Kreß, *EJIL*, 20 (2009), 1132–3 and, on the other, Paulus, *EJIL*, 20 (2009), 1118. See also Griffiths, *ICLR*, 2 (2002), 313; Werle, *Principles* (2009), mn. 1322 ff.; Werle, *Völkerstrafrecht* (2012), mn. 1430 ff.; Satzger, *Internationales Strafrecht* (2013), § 16 mn. 77 ff.; Satzger, *ICL* (2012), § 14 mn. 77 ff.; Wilmshurst, 'Aggression', in Cryer et al., *Introduction ICL* (2010), pp. 312, 321; Cassese et al., *ICL* (2013), pp. 139–40, 142–3; Reddi, *ICLR*, 8 (2008), 686; Reisinger-Coracini, 'Evaluating Domestic Legislation', in Stahn and Sluiter, *Emerging Practice* (2009), p. 725; Gomaa, 'The Definition of the Crime of Aggression', in Politi and Nesi, *The ICC and Aggression* (2004), pp. 72 ff.; Manson, *CLF*, 21 (2010), 439 (even *ius cogens*); Bassiouni, *Introduction to ICL* (2013), p. 667 ('codifies developments in customary international law'). From the case law, see *R v Jones et al.* [2006] UKHL 16 paras. 12, 19, 44, 59, 96, 97 and 99 (2006). See also Mancini, *NordJIL*, 81 (2012), 245 ff., considering that the Kampala definition of aggression is broader than that of customary international law.

[67] Critically, Satzger, *Internationales Strafrecht* (2013), § 16 mn. 87; Satzger, *ICL* (2012), § 14 mn. 87; in favour of a judicial determination of the crime, see King, 'Aggression', in Brown, *Handbook ICL* (2011), p. 140; on the concerns of human rights organizations as to an 'overburdening and politicizing the Court' through a definition of the crime of aggression, see von Braun and Micus, *JICJ*, 10 (2012), 118 ff.

[68] See, for example, Schuster, *CLF*, 14 (2003), 2, suggesting the deletion of aggression from the Statute because a 'legally sound' definition is not possible and because its codification cannot be supported by arguments of precedent, supremacy or deterrence (9 ff., 18); also critical, Creegan, *JICJ*, 10 (2012), 62 ff. arguing that aggression is a 'political crime'. For a 'cautious attitude towards [...] the invocation of criminal law to regulate the use of force by States', see also Wilmshurst, 'Aggression', in Cryer et al., *Introduction ICL* (2010), p. 332; sceptical also Kittichaisaree, *ICL* (2002), p. 217 (' doubtful whether an iron clad definition of aggression that satisfies the principle of legality ... could ever be agreed upon'); cf. also Milanovic, *JICJ*, 10 (2012), 172 ff., advocating for independence of the Statute from customary law in 'creating the international crimes defined within it'.

[69] For example, the question whether of the prosecution of *jus ad bellum* violations has a negative impact on compliance with *jus in bello* rules by the State concerned; see Paulus, *EJIL*, 20 (2009), 1126; cf. also contra Kreß, *EJIL*, 20 (2009), 1133–5.

political crime, instead of using these resources for the consolidation of the ICC project at a time when the Court was struggling at various fronts.[70]

A second, more fundamental issue concerns the *unprincipled approach* adopted in the law-making process of ICL as far as the underlying normative foundations and justifications of the international core crimes are concerned. While this issue goes beyond the mere text of the compromise reached, it also influences the assessment, and perhaps even the subsequent interpretation, of the aggression definition. The pragmatic, policy-driven and norm-creating process of ICL always took a predominantly positivist, anti-normative approach, unconcerned with theoretical considerations as to punitive power, overall function, and purposes of punishment in ICL,[71] as if general recourse to the Nuremberg and Tokyo precedents (or on any other norm of international law) would render the discussion of these underlying normative questions superfluous. As to the crime of aggression, the positivist approach is particularly doubtful given the widespread criticism of the Nuremberg law (not only by German defence lawyers)[72] and of GA Resolution 3314.[73] Indeed, it was recognized more than once in the SWGCA that there was a need to do better[74] and that Resolution 3314 constituted a rather problematic starting point for a definition.[75]

All this said, now the existence of the Kampala compromise leaves no other option than to accept it and submit it to a critical legal analysis elaborating a constructive, *bona fide* interpretation in order to mitigate, as far as possible, negative (and unintended) consequences. Such an analysis should proceed step by step along the lines of the normative structure now before us, but it must not, with a view to the overall assessment, focus on its individual elements in isolation, since then it would run the risk of losing sight of the whole picture. By way of example: an isolated analysis of the 'act of aggression' as defined in Article 8*bis*(2) without taking into account the definition of the 'crime of aggression' in Article 8*bis*(1) does not do justice to the result achieved, as it would effectively bring together the collective (i.e. act) and individual

[70] See, for example, Paulus, *EJIL*, 20 (2009), 1127, with the similar argument that the Court is 'grappling with problems partly of its own making, partly being the inevitable result of its remoteness from the scenes of the crimes under its jurisdiction, it needs to keep the ranks closed…'.

[71] cf. Volume I of this treatise, pp. 56 ff.

[72] For a reappraisal of the classical criticism in terms of the principle of legality, see May, *Aggression* (2008), pp. 146 ff.; Glennon, *YaleJIL*, 35 (2010), 74 ff. See also Werle, *Principles* (2009), mn. 1324; Werle, *Völkerstrafrecht* (2012), mn. 1432. This sharply contrasts with Benjamin Ferencz's quite romantic glorification of Nuremberg, see Ferencz, *CWRJIL*, 41 (2009), 281, considering the crime to have been 'adequately defined'.

[73] cf. Glennon, *YaleJIL*, 35 (2010), 78 ff.

[74] As put by one of the drafters himself: 'The ultimate challenge that Nuremberg leaves us with, in respect of the crime against peace is whether twenty-first century drafters can do better than those in London sixty-one years ago. It is still a daunting task' (Clark, *WashUGlSLR*, 6 (2007), 550).

[75] See SWGCA, June 2005 Report, (June 2005—ICC-ASP/4/32), Discussion Paper 3, reprinted in *Princeton* (2009), p. 196; SWGCA, June 2006 Report (June 2006—ICC-ASP/5/SWGCA/INF.1), reprinted in *Princeton* (2009), pp. 142–3, pp. 145–6; SWGCA, January 2007 Report (January 2007—ICC-ASP/5/SWGCA/1), reprinted in *Princeton* (2009), p. 134; SWGCA, June 2007 Report (June 2007—ICC-ASP/6/SWGCA/INF.1), reprinted in *Princeton* (2009), pp. 116–17; SWGCA, December 2007 Report (December 2007—ICC-ASP/6/SWGCA/1), reprinted in *Princeton* (2009), p. 101; SWGCA, June 2008 Report (June 2008—ICC-ASP/6/20/Add.1, Annex II), reprinted in *Princeton* (2009), p. 89. See also Barriga, 'Against the Odds', in *Princeton* (2009), pp. 9–10; Barriga, 'Negotiating the Amendments', in Barriga and Kreß, *Travaux Préparatoires* (2012), pp. 24–8; Kreß, *EJIL*, 20 (2009), 1136; Corredor C., *Agresión* (2012), pp. 106–7.

(i.e. crime) level in one common definition.[76] We will return to the underlying structural issue later. Similarly, an overall assessment must not separate the crime definition from the jurisdictional compromise, but must instead take into account the overall result of the negotiations.

(2) The definition

(a) The dual nature of the crime of aggression and the threshold clause

As already explained,[77] the crime of aggression has a dual nature encompassing the collective state act of aggression at the macro level and the individual crime of aggression at the micro level.[78] From this it follows that the existence of an (unlawful) act of aggression, as defined by Article 8*bis*(2) on the basis of GA Resolution 3314, does not automatically entail the individual criminal responsibility of the persons involved in this act. While this was not yet the view of the Nuremberg law[79] which relied essentially on the Kellog-Briand Pact's[80] prohibition of the criminalization of the Nazi war of aggression,[81] GA Resolution 3314 itself distinguishes between an act of aggression and a 'war of aggression', qualifying only the latter as a 'crime against international peace' (Article 5(2)).[82] Yet, since GA Resolution 3314 was only concerned with the macro level, that is, the definition of the collective state act of aggression, it did not further elaborate on the qualitative difference which transforms the merely unlawful act into a crime entailing individual criminal responsibility. This qualitative difference is now captured in the threshold clause of Article 8*bis*(1) requiring an 'act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations'.[83] The obvious purpose of this threshold is to clearly exclude minor incidents (e.g. border skirmishes) or legally controversial cases (e.g. a humanitarian intervention) from criminalization.[84] While the threshold clause remained

[76] See also Clark, *EJIL*, 20 (2009), 1104–5. In contrast, Glennon's analysis (*YaleJIL*, 35 (2010), 88 ff., 98) appears quite isolated.

[77] See Section A. (1); cf. also Schabas, *Introduction* (2011), p. 149; Safferling, *Internationales Strafrecht* (2011), § 6 mn. 175 ff.; King, 'Aggression', in Brown, *Handbook ICL* (2011), pp. 120 ff.

[78] For the three different levels (Security Council, ICJ, ICL) of the 'notion of aggression', see also Reddi, *ICLR*, 8 (2008), 660.

[79] See Article 6 (a) IMT(S) reprinted in *UNTS*, 82 (1951), 280; Principle VI (a)(i) Nuremberg Principles, UN-YB ILC 1950 II, 3, 376 ff.

[80] Treaty for the Renunciation of War as an Instrument of National Policy of 27 August 1928, available at <www.iilj.org/courses/documents/kellogg-briandpact_000.pdf> accessed 1 April 2013.

[81] See Ambos, *Der Allgemeine Teil* (2002/2004), pp. 111 ff. with further references in note 221250.

[82] See also Clark, *GoJIL*, 2 (2010), 695 ('drafting convention that builds on this combination of state and individual responsibility').

[83] For a basis in ICJ case law and a comparison to the grave breaches regime of IHL, see Heinsch, *GoJIL*, 2 (2010), 726, 727, 731. Considering the violation of the UN Charter as the main criterion for the qualification of the crime of aggression, see Rebut, *Droit pénal international* (2012), mn. 1013.

[84] See SWGCA, June 2005 Report (June 2005—ICC-ASP/4/32), Discussion Paper 3, No. 3, reprinted in *Princeton* (2009), p. 197; see also Barriga, 'Against the Odds', in *Princeton* (2009), p. 8; Barriga, 'Negotiating the Amendments', in Barriga and Kreß, *Travaux Préparatoires* (2012), pp. 29; cf. also Clark, 'Alleged Aggression in Utopia', in Schabas et al., *Research Companion ICL* (2013), p. 66. On the non-punishability of humanitarian intervention as a matter of principle, see May, *Aggression* (2008), pp. 273 ff.

controversial until the end of the SWGCA's mandate,[85] the principled decision for an objective qualification had already been taken in 2002 by the Working Group of the Preparatory Commission with a slightly different formula.[86] The alternative subjective approach calling for a specific aggressive intent or purpose (*animus aggressionis*), coupled with the aim of (long-term) occupation, subjugation, or annexation,[87] albeit still mentioned in the 2002 Working Group discussion paper,[88] did not find enough support and was not pursued further by the SWGCA.[89]

It should be clear from this explanation that there was hardly an alternative to a threshold clause to capture the qualitative difference between an 'act' and a 'crime' of aggression.[90] The remaining question, then, is whether this difference could have been expressed in more precise terms as insinuated by those who point, with quite some reason, to the vagueness and ambiguity of the threshold clause.[91] However, the critics themselves do not propose anything more precise—maybe because they are, as suggested earlier,[92] opposed to the whole endeavour in the first place.[93] In any case, it is difficult, if not impossible, to think of a more precise formula. In fact, the lack of precision is embedded in the primary norm regulating the use of force. Indeed, if it is not possible to clearly delimitate lawful from unlawful use of force, how could the lines

[85] See SWGCA, June 2009 Report (June 2009—ICC-ASP/8/INF.2), paras. 23 ff., reprinted in *Princeton* (2009), pp. 27–8; see also SWGCA, November 2006 Report (November 2006—ICC-ASP/5/SWGCA/1), reprinted in *Princeton* (2009), p. 140; SWGCA, January 2007 Report (January 2007—ICC-ASP/5/SWGCA/1), reprinted in *Princeton* (2009), p. 133; SWGCA, June 2007 Report (June 2007—ICC-ASP/6/SWGCA/INF.1), reprinted in *Princeton* (2009), p. 119; SWGCA, December 2007 Report (December 2007—ICC-ASP/6/SWGCA/1), reprinted in *Princeton* (2009), p. 103; SWGCA, June 2008 Report (June 2008—ICC-ASP/6/20/Add.1, Annex II), reprinted in *Princeton* (2009), pp. 87–8; SWGCA, February 2009 Report (February 2009—ICC-ASP/7/20/Add.1, Annex II), reprinted in *Princeton* (2009), p. 51; see also Barriga, 'Against the Odds', in *Princeton* (2009), pp. 8–9; Barriga, 'Negotiating the Amendments', in Barriga and Kreß, *Travaux Préparatoires* (2012), pp. 28–30; Solera, *Aggression* (2007), pp. 409 ff.

[86] 'Flagrant' instead of 'manifest' violation, see 'Discussion paper on the definition of the elements of the crime of aggression prepared by the Coordinator of the Working Group on the Crime of Aggression during the Preparatory Commission of the ICC', in *Assembly of State Parties to the Rome Statute of the International Criminal Court*, *Second session*, *New York*, *8–12 September 2003*, Official Records ICC-ASP/2/10, 234; see also SWGCA, June 2005 Report (June 2005—ICC-ASP/4/32), Discussion Paper 3, No. 3, in *Princeton* (2009), p. 197.

[87] cf. Werle, *Principles* (2009), mn. 1331, 1342; Werle, *Völkerstrafrecht* (2012), mn. 1439, 1450; Cassese et al., *ICL* (2013), pp. 142, 144; Wilmshurst, 'Aggression', in Cryer et al., *Introduction ICL* (2010), pp. 325, 327; Solera, *Aggression* (2007), pp. 423 ff., 427. See also May, *Aggression* (2008), pp. 14–15, arguing that such an aggressive intent may frequently be missing since state leaders are often only aiming to advance legitimate state interests; see also May, *Aggression* (2008), pp. 257–8.

[88] See ICC-ASP/2/10, 234.

[89] Kreß, *EJIL*, 20 (2009), 1139–40.

[90] See also Clark, *GoJIL*, 2 (2010), 698–9, quoting the Legal Adviser to the US Department of State; Dascalopoulou-Livada, 'Aggression and the ICC', in Politi and Nesi, *The ICC and Aggression* (2004), p. 83; Wilmshurst, 'Aggression', in Wilmshurst, pp. 93 ff.; critical of the distinction, see Corredor C., *Agresión* (2012), pp. 88–9.

[91] See Glennon, *YaleJIL*, 35 (2010), 101–2; Paulus, *EJIL*, 20 (2009), 1121; Murphy, *EJIL*, 20 (2009), 1150–1; Wilmshurst, 'Aggression', in Cryer et al., *Introduction ICL* (2010), pp. 326–7; Heinsch, *GoJIL*, 2 (2010), 726–7; Corredor C., *Agresión* (2012), pp. 86 ff., 215 (with Colombia's attack on FARC rebels in Ecuador as a concrete example at pp. 127 ff).

[92] See note 68 and main text.

[93] See especially Glennon, *YaleJIL*, 35 (2010), 101 ('A statute permitting the prosecution of only clear-cut, blatant instances of "impropriety" would still be vague. This is the central difficulty in seeking to eliminate vagueness merely by announcing that marginality is excluded: it is impossible to know from the terms at issue what within their reach is marginal and what is essential') and also, 102, arguing that the threshold clause is 'irretrievably vague'.

be drawn any more clearly at the level of the secondary norm criminalizing the unlawful use of force?[94] Apart from that, given the highly normative content of any qualifier attempting to capture the criminal essence of a certain act, and the general problem of describing concrete human conduct in a sufficiently precise form using abstract legal terms, it is barely possible to think of any *objective* definition which would express the substance of the threshold clause more precisely. Also, if Andreas Paulus is right and 'any lawyer of some quality [may] find reasons why almost anything is legal or illegal under prevailing circumstances' a more precise definition would, at most, gradually diminish legal uncertainty but not eliminate it completely.[95] In the result, both a high threshold, as expressed by the term 'manifest',[96] to be understood objectively[97] and qualitatively,[98] and the combined existence of character, gravity, and scale,[99] albeit confused by Understandings 6 and 7,[100] are necessary to stress the difference between the act and crime of aggression, and to avoid its trivialization.[101] In contrast, it does not seem plausible that an excessively high threshold combined with the absence of prosecution entails the unintended consequence of legalizing, or even legitimizing controversial forms of use of force.[102] In fact, this concern overstates, on

[94] See Murphy, *EJIL*, 20 (2009), 1152–4 providing a table with forms of coercive acts which *may* amount to unlawful use of force and a crime of aggression.

[95] Paulus, *EJIL*, 20 (2009), 1123.

[96] Especially critical of this term, see Wilmshurst, 'Aggression', in Cryer et al., *Introduction ICL* (2010), p. 326; also critical, see Corredor C., *Agresión* (2012), pp. 91 ff.

[97] Amendments to the Elements of Crimes, Resolution No. RC/Res.6, advance version, 16 June 2010, Annex II, introduction No. 3. See also SWGCA, June 2009 Report (June 2009—ICC-ASP/8/INF.2), reprinted in *Princeton* (2009), pp. 28, 39, para. 25 and Appendix II No. 7; see also Anggadi, French, and Potter, 'Negotiating the Elements', in Barriga and Kreß, *Travaux Préparatoires* (2012), pp. 76–7; Clark, 'Alleged Aggression in Utopia', in Schabas et al., *Research Companion ICL* (2013), p. 67 ('"reasonable statesmen or soldier" test').

[98] Kreß, *EJIL*, 20 (2009), 1138.

[99] See Resolution No. RC/Res.6, advance version, 16 June 2010, Annex III No. 7. According to Kreß, *EJIL*, 20 (2009), 1138 'gravity and scale' are to be understood quantitatively.

[100] See Koh, 'Statement at the Review Conference', available at <http://state.gov/s/l/releases/remarks/142665.htm> accessed 1 April 2013; Trahan, *ICLR*, 11 (2011), 73 ff.; Blokker and Kreß, *LJIL*, 23 (2010), 892; Resolution No. RC/Res.6, advance version, 16 June 2010, Annex III (Understandings); on the negotiations of these two Understandings see Kreß, Barriga, Grover, and von Holtzendorff, 'Negotiating the Understandings', in Barriga and Kreß, *Travaux Préparatoires* (2012), pp. 95–6. While Article 8*bis* (1) treats 'character, gravity and scale' equally, Understanding 6 focuses on gravity. In addition, while a literal reading of Article 8*bis* (1) implies that the three qualifiers must exist cumulatively ('and'), the second sentence of Understanding 7 suggests that two 'components' would suffice (for the first reading Schmalenbach, *JZ*, 65 (2010), 748 right column). Also, Understanding 7 speaks of a 'manifest determination', but Article 8*bis* (1) of a 'manifest violation'; admittedly, the reference is clear but it is unclear how the three qualifiers can contribute to the qualification of a violation as 'manifest'. For a good critique see Heinsch, *GoJIL*, 2 (2010), 728–9; critical also Scheffer, *LJIL*, 23 (2010), 898 ff.; Corredor C., *Agresión* (2012), pp. 89–90; O'Connel and Niyazmatov, *JICJ*, 10 (2012), 201–4.

[101] cf. Kreß, *EJIL*, 20 (2009), 1142; in favour, as a matter of principle, also May, *Aggression* (2008), p. 73; Wilmshurst, 'Aggression', in Cryer et al., *Introduction ICL* (2010), p. 321; for the same result Scheffer, *CWRJIL*, 41 (2009), 400, 409; Kemp, *Aggression* (2010), pp. 234, 243, 249; see also Einarsen, *Universal Crimes* (2012), p. 216 ('considering that '"character" and "scale" can . . . contribute to the cumulative gravity of a concrete act of aggression, which in turn determines whether the acts oversteps the threshold of a "manifest violation" . . . '); critical of these three qualifiers for enabling 'any party to address potentially unlawful but nonetheless legitimate uses of force', see van Schaack, *ICLR*, 11 (2011), 486.

[102] See Paulus, *EJIL*, 20 (2009), 1124, 1127; Murphy, *CWRJLR*, 41 (2009), 361 ff. In contrast, Creegan, *JICJ*, 10 (2012), 69 ff., 81–2 criticizes the 'doctrinal messy and normatively confusing' penalization of uses of force which may be desirable and legitimate for pursuing just purposes, for example humanitarian

the one hand, the impact that a negative prosecutorial decision could have on the question of the lawfulness of the use of force and, on the other hand, does not fully account for the fundamental distinction between the prohibition (regarding the act of aggression) and the actual crime. For example, while classical wars of aggression such as the Nazi attacks on neighbouring countries in 1939 and the Iraqi invasion in Kuwait in 1990 constitute both acts and crimes of aggression, the 2003 US-led invasion in Iraq, albeit considered by most international lawyers as an unlawful act of aggression,[103] might not have amounted to a crime of aggression due to the absence of a 'manifest violation' of the UN Charter in light of the fact that a respectable scholarly view existed according to which the invasion was justified, especially on the basis of Security Council Resolution 678 of 29 November 1990.[104] All this said, the inclusion of the alternative *subjective* requirement mentioned earlier would—despite its obvious evidentiary problems[105]—as an *additional* threshold still have been preferable.[106] The combination of an objective–subjective threshold makes it easier to decide difficult cases for the simple fact that this places not just one (objective), but two (objective and subjective) qualifiers at one's disposal. Thus, for example, in the case of humanitarian intervention, the subjective qualifier would more clearly exclude criminality than a mere objective threshold since the essence of such an intervention is, provided that the states involved are acting *bona fide*, its humanitarian purpose.[107] Even in the more controversial case of the 2003 Iraq invasion, the subjective threshold would confirm the objective negation of a crime of aggression, for one can hardly argue that the US-led coalition acted with a specific *animus aggressionis* with a view to the long-term occupation of Iraq.[108]

intervention, anticipatory self-defence, substituted law enforcement and defence against non-state actors, prevention of conflict escalation, self-determination of peoples, restoring rightful or democratic regimes.

[103] See Kreß, *ZStW*, 115 (2003), 313 ff., 331 with further references; see also Ambos and Arnold, *Der Irak-Krieg* (2003).

[104] Kreß, *ZStW*, 115 (2003), 331; see also Ambos, 'Strafrecht und Krieg', in Arnold et al., *FS Eser* (2005), 681–2; critical, Paulus, *EJIL*, 20 (2009), 1123.

[105] See Solera, *Aggression* (2007), pp. 428 ff.

[106] For this subjective element as the 'determinant factor', see Solera, *Aggression* (2007), pp. 415, 423 ff.; for a 'special intent' (in relation to conspiracy), see May, *Aggression* (2008), pp. 260 ff.

[107] In the same vein, see Kreß, *EJIL*, 20 (2009), 1141 arguing that in the case of humanitarian intervention 'a specific collective intent . . . is conspicuously absent'. For the same result, see Solera, *Aggression* (2007), pp. 461 ff. with regard to NATO's 'humanitarian intervention' against Yugoslavia in favour of Kosovo (462: 'difficult to assert that NATO acted with the specific *animus aggressionis* . . .'; 'difficulty of establishing an aggressive intent'); van Schaack, *ICLR*, 11 (2011), 479, 482 ff., 493 ('exempt *bona fide* humanitarian interventions from prosecution as the crime of aggression'); May, *Aggression* (2008), pp. 294–5 considering that the *mens rea* element is the most difficult to prove. For an explicit exclusion of the humanitarian intervention from the offence definition, see Trahan, *ICLR*, 11 (2011), 78. Considering humanitarian intervention as a 'noble aggression' and therefore exempt from criminalization, see Creegan, *JICJ*, 10 (2012), 69 ff.

[108] See Ambos, 'Strafrecht und Krieg', in Arnold et al., *FS Eser* (2005), 681. The withdrawal of US troops from Iraq in 2011 (see BBC, 18 December 2011, 'Last US troops withdraw from Iraq' <http://www.bbc.co.uk/news/world-middle-east-16234723> accessed 27 April 2013) and the official end of the US military mission in Iraq in 2013 (see USF-Iraq, 28 January 2013, 'US Military Mission in Iraq ends' <http://usf-iraq.com/2013/01/28/us-military-mission-in-iraq-ends> accessed 27 April 2013) confirms this view. For Solera, *Aggression* (2007), pp. 477 ff., 500, 'the Iraq case illustrates the difficulties of establishing the mental element [. . .] when various defenses can be introduced to justify action'.

(b) The reference to Resolution 3314

The interplay of Article 8*bis*(1) and (2) para. 2 as the primary conduct norm containing the prohibition, and para. 1 as the secondary decision norm providing for a criminal sanction,[109] is a consequence of the dual nature of the crime of aggression, and shows that the SWGCA was well aware of this dual nature.[110] This entails the further consequence, as explained earlier,[111] that para. 2 must not be interpreted in isolation and detached from para. 1. After all, to do justice to the drafters, it should be recognized that the combined adoption of Articles 1 and 3 of GA Resolution 3314—instead of agreeing on an autonomous and generic definition of an act of aggression[112]—was quite controversial and, for many delegations, only acceptable in light of the high threshold in para. 1.[113] In fact, as is often the case in diplomatic negotiations, Resolution 3314 was finally used because it was 'already there' and, being a GA Resolution, carried some authority having been invoked on various previous occasions.[114] However, the obvious problem with this approach is that Resolution 3314 was not drafted with a future criminal law provision in mind, but only to help the Security Council determine an 'act of aggression' in the sense of Article 39 of the UN Charter with a view to its powers under Chapter VII.[115] As a consequence, the Resolution equates 'aggression' with 'use of force'[116] and its Articles 2 and 4 give the Security Council special powers of definition which are incompatible with the 'self-contained' criminal law regime of the ICC Statute where, according to the principle of legality (Articles 22–24), criminal responsibility cannot be established *ex post facto* and the definitions of crimes must be strictly construed.[117] For this very reason the list of acts contained in Article 8*bis*(2) can neither be open nor 'semi-open' but must be considered exhaustive.[118]

[109] For two different legal regimes, see Cassese et al., *ICL* (2013), pp. 142 ff.

[110] It is therefore incorrect for Glennon, *YaleJIL*, 35 (2010), 79 with n. 63 to state that the 'SWGCA ignored this distinction'.

[111] See note 76 and main text.

[112] See SWGCA, June 2005 Report (June 2005—ICC-ASP/4/32), Discussion Paper 3, No. 1, reprinted in *Princeton* (2009), p. 196. See WGCA, June 2005 Report (June 2005—ICC-ASP/4/32), Discussion Paper 3, No. 2 on the different terms (use of force, armed attack, use of armed force) discussed as an alternative to 'act of aggression'.

[113] See Barriga, 'Against the Odds', in *Princeton* (2009), pp. 9–10; Barriga, 'Negotiating the Amendments', in Barriga and Kreß, *Travaux Préparatoires* (2012), pp. 25 ff.; Kreß, *EJIL*, 20 (2009), 1136.

[114] See Glennon, *YaleJIL*, 35 (2010), 79 ('. . . recurring presence in subsequent efforts to define aggression . . . '); in favour for this reason, see Heinsch, *GoJIL*, 2 (2010), 725–6; for a thoughtful critique of the Resolution, see Weisbord, *DukeJComp&IL*, 20 (2009), 21 ff.

[115] See Paulus, *EJIL*, 20 (2009), 1121; Glennon, *YaleJIL*, 35 (2010), 79; Wilmshurst, 'Aggression', in Cryer et al., *Introduction ICL* (2010), p. 326; Heinsch, *GoJIL*, 2 (2010), 723; especially critical, see Corredor C., *Agresión* (2012), pp. 123 ff., 219 calling the definition 'anacrónica y desconectada'; cf. also O'Connel and Niyazmatov, *JICJ*, 10 (2012), 198 ff., stressing the need for a maintenance of the *jus ad bellum* understanding of aggression, namely as 'any serious violation of the UN Charter, irrespective of the ICC Statute's definition of the crime' (200).

[116] For a critical view, see Murphy, *EJIL*, 20 (2009), 1151.

[117] See also Barriga, 'Against the Odds', in *Princeton* (2009), p. 12; Barriga, 'Negotiating the Amendments', in Barriga and Kreß, *Travaux Préparatoires* (2012), pp. 30–1. On the *nullum crimen* principle see Volume I of this treatise, pp. 88–93. On the principle in the Nuremberg Judgment, see Weigend, *JICJ*, 10 (2012), 51 ff; cf. also Milanovic, *JICJ*, 10 (2012), 167 ff.

[118] For the discussion in the SWGCA see SWGCA, November 2006 Report (November 2006—ICC-ASP/5/SWGCA/1), reprinted in *Princeton* (2009), p. 140; SWGCA, June 2007 Report (June 2007—ICC-ASP/6/SWGCA/INF.1), reprinted in *Princeton* (2009), pp. 117–18; SWGCA, December 2007 Report (December

A semi-open interpretation in the sense of accepting further acts not listed but falling within the generic definition of the existing acts[119] could only be compatible with the principle of legality if Article 8*bis*(2) ICC Statute would provide for such an 'extension' by referring, as does Article 7(1)(k), for example, to other similar acts.[120] Yet, even such an interpretation would be difficult to reconcile with a strict reading of the *lex certa* element of the legality principle.[121] Apart from that, the actual list contains a number of acts which do not even constitute a use of force *stricto sensu*, for example lit. (c) and (e), and therefore are far below the gravity threshold of Article 8*bis*(1).[122] Also, from a criminal law perspective, lit. (f) and (g) confuse the proper use of force in the sense of perpetration with the assistance of the use of force by another state (lit. (f)) or non-state actors (lit. (g)).[123] Last but not least, the first strike principle contained in Article 2 of GA Resolution 3314 is but one possible test for identifying an aggressor state and does not sufficiently account for a pre-emptive reaction to imminent threats from long distance weapons.[124]

While most of these flaws may not become relevant at the level of the crime itself because of the threshold clause or a reasonably restrictive interpretation by the Court, the reference to Resolution 3314 entails the more fundamental problem that the definition of aggression turns out to be exclusively state-centric[125] and thus unable to capture modern forms of aggression carried out by non-state actors in asymmetric conflicts.[126] While, from a traditional state-oriented perspective, such an expansion of the crime may be

2007—ICC-ASP/6/SWGCA/1), reprinted in *Princeton* (2009), pp. 102–3; SWGCA, June 2008 Report (June 2008—ICC-ASP/6/20/Add.1, Annex II), reprinted in *Princeton* (2009), pp. 89–90. See also Barriga, 'Against the Odds', in *Princeton* (2009), pp. 10–11; Barriga, 'Negotiating the Amendments', in Barriga and Kreß, *Travaux Préparatoires* (2012), p. 28. The Elements do not clarify the matter since they only repeat that 'any of the acts … qualify as an act of aggression', see Amendments to the Elements of Crimes, Resolution No. RC/Res.6, advance version, 16 June 2010, Annex II, Introduction No. 1; see also Anggadi, French, and Potter, 'Negotiating the Elements', in Barriga and Kreß, *Travaux Préparatoires* (2012), pp. 69–72.

[119] See Kreß, *EJIL*, 20 (2009), 1117; Clark, *EJIL*, 20 (2009), 1105; Clark, *GoJIL*, 2 (2010), 696; crit. of an open list also Corredor C., *Agresión* (2012), pp. 113–14.

[120] For a critical analysis see Chapter II, Section C. (11).

[121] Against such a strict reading, apparently, Kreß, *EJIL*, 20 (2009), 1137 who does not even require a 'similar acts' clause as contained in Article 7(1)(k). Without such a clause the extension of the list would, however, violate the *lex praevia* in the first place. In any case, Kreß is right in that the principle of legality is not clearly defined in ICL and especially the *lex certa* component has been largely ignored; see Volume I of this treatise, pp. 91–2; previously, Ambos, 'Nulla Poena', in Haveman and Olusanya, *Sentencing and Sanctioning* (2006), pp. 23 ff. For a more flexible approach, see also Heinsch, *GoJIL*, 2 (2010), 724–5, 742; against an open-ended list, see Kemp, *Aggression* (2010), pp. 236, 249. Far too imprecise, however, is *Scheffer's* proposal (Scheffer, *CWRJIL*, 41 (2009), 409) according to which the 'elements of the crime of aggression shall draw, inter alia [sic!], from Articles 2 and 3' of GA Res. 3314.

[122] cf. Kreß, *EJIL*, 20 (2009), 1137. For a detailed analysis of the acts, see Corredor C., *Agresión* (2012), pp. 116 ff.

[123] cf. Paulus, *EJIL*, 20 (2009), 1121; Kreß, *EJIL*, 20 (2009), 1137.

[124] See for a discussion, May, *Aggression* (2008), pp. 21, 81 ff., 90 ff., 217 ff. calling for a more normative understanding of a first strike as a 'first wrong'.

[125] In the same vein, see Solera, *Aggression* (2007), pp. 416–18; Corredor C., *Agresión* (2012), pp. 124–5 (critical of the requirement of a *state* territory to be attacked).

[126] For a thoughtful analysis in this regard, see Weisbord, *DukeJCompᴂIL*, 20 (2009), 23 ff.; Drumbl, *CWRJIL*, 41 (2009), 305; see also May, *Aggression* (2008), suggesting treating non-state actors like states if they act like states (298), applying this affirmatively to terrorist groups (306 ff.) and arguing in favour of their prosecution for aggression (308 ff.); in the same vein, see Wills, *JICJ*, 10 (2012), 84 ff., arguing in favour of a broader understanding of the term 'state' in the *Kampala* definition, in order to include so-called 'quasi-international armed conflicts'.

questioned or even rejected,[127] ICL's human-oriented approach, focusing on *individual* criminal responsibility, strongly suggests the inclusion of non-state actors.[128] The essence of the crime of aggression is not so much determined by the actor but by the wrongfulness of the act. This brings us back to the unprincipled approach of the drafters, previously criticized,[129] which prevented them from inquiring more fundamentally with regard to the interests and values to be protected by a modern definition of the crime of aggression. Depending on the outcome of such an inquiry, the crime must be either more narrowly or broadly defined, in the latter case going beyond the state-centric approach of the Nuremberg law and Resolution 3314. To be sure, the SWGCA's state-centric approach is defensible (e.g., by using the argument that the maintenance of the existing legal order is predicated on states),[130] but such a defence cannot be limited merely to a formal recourse to pre-existing international law. In any case, as the law stands now, it is difficult, if not impossible, to read non-state acts of aggression into Article 8*bis*(2).[131] Any extension of the list, especially by way of an analogy,[132] conflicts with the principle of legality, as explained earlier. Apart from that, it would not eliminate the state-centric nature of the definition which already follows from the first sentence of Article 8*bis*(2) where reference is made to the use of 'armed force by a State'. A broad reading of the term 'armed'—if at all compatible with the principle of legality—would not change this requirement either. It may only be more inclusive with a view to other types of state attack, for example by way of the internet ('cyber attacks').[133]

(c) The special offence character of the crime and the leadership clause

The leadership character of the crime of aggression has long been recognized.[134] It is ultimately a consequence of the collective nature of the crime of aggression as a state

[127] cf. Wilmshurst, 'Aggression', in Cryer et al., *Introduction ICL* (2010), pp. 318, 319.

[128] cf. Cassese et al., *ICL* (2013), pp. 140, 144. See also the Protocol of Non-Aggression and Mutual Defense in the Great Lakes Region, 30 November 2006, <www.lse.ac.uk/collections/law/projects/greatlakes/1.%20Peace%20and%20Security/1c.%20Protocols/Protocol%20-%20Non-Aggression.pdf> accessed 1 April 2013, extending aggression to 'an armed group' as a non-state actor but always directed against the territorial integrity of a state (Article 1[2]).

[129] See Section C. (1).

[130] The recognition of non-state actors as a *legal* category disrupts this order; see, similarly, May, *Aggression* (2008), pp. 298.

[131] In this vein, see Rebut, *Droit pénal international* (2012), mn. 1012 ('par un État . . . contre un autre État').

[132] See Weisbord, *DukeJComp&IL*, 20 (2009), 40, who, however, sees the conflict with Article 22(2) Rome Statute; in the same vein, see Rebut, *Droit pénal international* (2012), mn. 1012 ('ce qui exclut toutes les aggressions d'un autre type', 'Les actes . . . sont préciséments définis . . . ').

[133] See for this interpretation, Weisbord, *DukeJComp&IL*, 20 (2009), 40–1. On cyber attacks as a violation of the prohibition of the use of force and thus perhaps amounting to a crime of aggression, see Schmitt, *Tallinn Manual Cyber Warfare* (2013), pp. 42–53 (defining, as Rule 11, a 'cyber operation' as use of force 'when its scale and effects are comparable to non-cyber operations rising to the level of a use of force'); sceptical 'about the ability of [this] definition . . . to address future conflicts' carried out with 'types of modern warfare', see Bassiouni, *Introduction to ICL* (2013), pp. 671, 674.

[134] See Ambos, 'Strafrecht und Krieg', in Arnold et al., *FS Eser* (2005), 677 with various references in n. 46. There was also a quite early consensus on this question in the SWGCA, see SWGCA Report, June 2006, in *Princeton* (2009), p. 154, para. 88; see also Weisbord, *DukeJComp&IL*, 20 (2009), 43; Clark, 'Aggression', in Stahn and Sluiter, *Emerging Practice* (2009), pp. 718–19; Clark, 'Alleged Aggression in Utopia', in Schabas et al., *Research Companion ICL* (2013), p. 66; May, *Aggression* (2008), pp. 11, 14, 16; Cassese

crime which can only, if at all, be brought about by the leader(s) of the aggressive state acting in a collective form.[135] Yet, the leadership requirement does not answer the question of who exactly belongs to the leadership circle (insider, *intraneus/intranei*) and how the possible criminal responsibility of persons outside the circle (outsider, *extraneus/extranei*) should be treated.

As to the first question, the definition of Article 8*bis*(1)—'a person in a position effectively to exercise control over or to direct the political or military action of a State'—focuses on *de facto* effective control and direction rather than formal status. For that reason, leadership is not per se limited to political leaders and/or members of government, but may also extend to business or religious leaders.[136] While it is true that the 'effective control' requirement is stricter than the Nuremberg 'shape or influence policy' criterion,[137] this 'retreat from Nuremberg'[138] is justified since the 'shape or influence' or similar 'major role'[139] standards are so broad that, especially in democracies, an excessively large group of people would be covered.[140] Criminal responsibility requires more than mere influence—namely, it requires effective control over aggressive policy in the sense of the control theories discussed in connection with (indirect) perpetration and command responsibility.[141] Ultimately, this standard does cover non-political leaders with sufficient effective control[142] and still extends too far

et al., *ICL* (2013), p. 141; Wilmshurst, 'Aggression', in Cryer et al., *Introduction ICL* (2010), p. 318; Kemp, *Aggression* (2010), pp. 236–7.

[135] Thus, the leadership element does not entail the lonely conduct of '*un dictateur absolu*' (misleading insofar Condorelli, 'Conclusions Générales', in Politi and Nesi, *The ICC and Aggression* (2004), p. 157). See for an interesting discussion about the 'conceptual puzzle' arising out of the State and individual nature of the crime of aggression, May, *Aggression* (2008), pp. 229 ff., 232. See also on the impossibility of an individual act of aggression (without a State structure), Corredor C., *Agresión* (2012), pp. 66, 68.

[136] cf. Barriga, 'Against the Odds', in *Princeton* (2009), p. 8; Barriga, 'Negotiating the Amendments', in Barriga and Kreß, *Travaux Préparatoires* (2012), pp. 22–3; Clark, *EJIL*, 20 (2009), 1105; Schmalenbach, *JZ*, 65 (2010), 748 right column; earlier, Kemp, *Aggression* (2010), p. 251. See also SWGCA, February 2009 Report (February 2009—ICC-ASP/7/20/Add.1, Annex II), reprinted in *Princeton* (2009), p. 54, para. 25. For a more restrictive understanding, apparently, see Heinsch, *GoJIL*, 2 (2010), 722–3, referring to political and military leaders; in the same vein, see Corredor C., *Agresión* (2012), pp. 77 ff. (79); Rebut, *Droit pénal international* (2012), mn. 1014 ('dirigeants politiques ou militaires').

[137] See SWGCA, June 2007 Report (June 2007—ICC-ASP/6/SWGCA/INF.1), reprinted in *Princeton* (2009), p. 111, para. 12 with note 5 referring to the Nuremberg case law. See also SWGCA, December 2007 Report (December 2007—ICC-ASP/6/SWGCA/1), para. 9, in *Princeton* (2009), p. 100, and SWGCA, June 2006 Report (June 2006—ICC-ASP/5/SWGCA/INF.1), para. 88, reprinted in *Princeton* (2009), p. 154, ('ability to influence policy').

[138] See Heller, *EJIL*, 18 (2007), 478–9 arguing that the SWGCA's approach is more restrictive than what he identifies as the 'shape or influence' standard articulated at Nuremberg by both the Nuremberg IMT and the subsequent military tribunals; Wilmshurst, 'Aggression', in Cryer et al., *Introduction ICL* (2010), p. 319. Critical also Drumbl, *CWRJIL*, 41 (2009), 316.

[139] SWGCA, June 2004 Report (June 2004—ICC-ASP/3/SWGCA/INF.1), para. 44, reprinted in *Princeton* (2009), p. 204.

[140] cf. Barriga, 'Against the Odds', in *Princeton* (2009), p. 8; Barriga, 'Negotiating the Amendments', in Barriga and Kreß, *Travaux Préparatoires* (2012), p. 22. Also too imprecise, *Scheffer's* proposal (Scheffer, *CWRJIL*, 41 (2009), 404, 409) requiring effective control and direction only 'in whole or substantial part'.

[141] cf. Volume I of this treatise, pp. 150, 151, 154 ff., 210 ff.

[142] See also SWGCA (see note 139), p. 205, para. 49 ('broad enough to encompass most influential leaders'). Similarly, Heinsch, *GoJIL*, 2 (2010), 723, focusing on the influence over policy; Schmalenbach, *JZ*, 65 (2010), 748 right column. Clearly, the scope of liability depends on the concept of 'business' or 'religious leader'; for a definition of the former, see Vest, *JICJ*, 8 (2010), 852.

down the political hierarchy for some.[143] Indeed, the Nuremberg prosecutions of top bureaucrats, high-ranking military officials and industrialists show how difficult it is to hold persons directly below the actual leadership of a criminal regime responsible for a crime of aggression—at least if one wants to prove their personal responsibility, especially their *mens rea*.[144]

The second question as to the responsibility of *extranei* depends on the extent to which the leadership requirement reaches into the forms of participation recognized under the differentiated model of Article 25(3) ICC Statute.[145] While the SWGCA's decision to apply Article 25 to the crime of aggression is convincing from a systematic perspective since it is in line with the ICC Statute's application of its general principles (the general part) to the crimes (the special part),[146] the extension of the leadership clause to Article 25(3) by incorporating a subpara. 3*bis* reduces the effect of this differentiated solution to virtually *nil* (contrary to what the language of a qualitative 'differentiated approach', used during the negotiations, suggests). While an unreserved, differentiated solution would mean that *extranei* could be liable as 'ordinary' participants to a crime of aggression, the new Article 25(3*bis*) means that all these and other *extranei* are exempted from criminal responsibility since it is limited to *intranei*, that is, those 'persons in a position effectively to exercise control over or to direct the political or military action of a State' (subpara. 3*bis*). Thus, for example, the bureaucrat who prepares the plan for the invasion but does not belong to the leadership level cannot be held responsible for assisting a crime of aggression according to Articles 25(3)(c), 8*bis*.[147] The soldier who forms part of the invasion army does not incur responsibility as a direct (physical) perpetrator of a crime of aggression according to Articles 25(3)(a), 8*bis*. Thus, Article 25(3*bis*), by limiting the application of Article 25 for the crime of aggression exclusively to *intranei*, creates impunity for *extranei* (at least as far as

[143] Critical, for example, Glennon, *YaleJIL*, 35 (2010), 99–100.

[144] cf. May, *Aggression* (2008), pp. 153 ff., 165 ff., 185 ff., convincingly demonstrating by way of reference to several Nuremberg cases (Karl Dönitz/Erich Raeder, accused before the IMT; Ernst von Weizsäcker, *Ministries* Case; and Alfried Krupp/Karl Krauch, *Krupp/IG Farben* Cases) how difficult it is to prosecute top responsible persons close to, but not an immediate part of the leadership.

[145] On the (controversial) model of Article 25(3) ICC Statute, see Volume I of this treatise, pp. 144 ff.; on participation regarding the crime of aggression, see p. 171.

[146] On the respective dispute along the lines of so-called 'monistic' and 'differentiated' approaches, see especially SWGCA, June 2005 Report (June 2005—ICC-ASP/4/32), Discussion Paper 1, reprinted in *Princeton* (2009), pp. 184, 190. See also the sometimes confusing discussion in the SWGCA, June 2006 Report (June 2006—ICC-ASP/5/SWGCA/INF.1), reprinted in *Princeton* (2009), pp. 153–4, paras. 84–93 and p. 161, Appendix III Item 1; SWGCA, January 2007 Report (January 2007—ICC-ASP/5/SWGCA/1), reprinted in *Princeton* (2009), pp. 131–2, paras. 6 ff.; SWGCA, June 2007 Report (June 2007—ICC-ASP/6/SWGCA/INF.1), reprinted in *Princeton* (2009), pp. 109–10, paras. 5 ff.; SWGCA, December 2007 Report (December 2007—ICC-ASP/6/SWGCA/1), paras. 6–11, reprinted in *Princeton* (2009), p. 100. For a summary of the discussion see Barriga, 'Against the Odds', in *Princeton* (2009), p. 7; Barriga, 'Negotiating the Amendments', in Barriga and Kreß, *Travaux Préparatoires* (2012), pp. 20–2; Clark, 'Aggression', in Stahn and Sluiter, *Emerging Practice* (2009), p. 719; Kemp, *Aggression* (2010), pp. 212 ff.; Weisbord, *HarvILJ*, 49 (2008), 191 ff.

[147] See also Barriga, 'Against the Odds', in *Princeton* (2009), p. 8 and Barriga, 'Negotiating the Amendments', in Barriga and Kreß, *Travaux Préparatoires* (2012), p. 21 (responsibility of leader's personal assistant).

aggression is concerned).[148] While this was apparently a conscious policy decision,[149] albeit related to the decision in favour of the differentiated approach,[150] the ensuing wide exemption of responsibility covering everyone who does not belong to the leadership circle is highly questionable and certainly deserves criticism.

Apart from that, it is questionable whether the leadership concept, rooted in a Weberian, Prussian model of organization with a clear hierarchy and chain of command[151]—which is, in fact, just as state-centric as the concept of act of aggression already criticized[152]—can be interpreted flexibly enough so as to capture modern, post-bureaucratic forms of organization as represented, for example, by paramilitary or terrorist non-state actors.[153] For this purpose one would have to interpret the effective control criterion broadly and read into its second part ('or to direct') a form of decisive influence.[154] But here again the limits imposed by the principle of legality must be respected and the intention of the drafters to narrow responsibility by the leadership requirement should not be ignored. In any case, what remains from the differentiated approach is the application of the forms of participation of Article 25(3) only to leaders,[155] that is, in practice their responsibility as direct, indirect, or co-perpetrators

[148] Also critical, see Drumbl, *CWRJIL*, 41 (2009), 314 stating that the combined effect of Article 8*bis* (1) and 25 (3*bis*) 'bestows collective innocence on all involved in aggressive war below the levels of the state political and military elite'.

[149] A number of delegations certainly wanted to restrict participation in the crime of aggression as much as possible, see for example SWGCA, June 2007 Report (June 2007—ICC-ASP/6/SWGCA/INF.1), reprinted in *Princeton* (2009), p. 110, para. 11, where it is stated that the unreserved application of Article 25 (3) could 'undermine' the leadership character of the crime; see also Barriga, 'Against the Odds', in *Princeton* (2009), pp. 7–8; Barriga, 'Negotiating the Amendments', in Barriga and Kreß, *Travaux Préparatoires* (2012), pp. 20–2.

[150] The combination of the differentiated solution with the transfer of the leadership qualifier to Article 25 (3) was already discussed at the SWGCA June 2004 Meeting, see SWGCA, June 2004 Report (June 2004—ICC-ASP/3/SWGCA/INF.1), paras. 52–3, reprinted in *Princeton* (2009), pp. 205–6. See also SWGCA, June 2005 Report (June 2005—ICC-ASP/4/32), reprinted in *Princeton* (2009), pp. 169 ff., paras. 19 ff. and Discussion Paper 1, s. A. I. 2, p. 185.

[151] Weber, *Wirtschaft und Gesellschaft* (1922), 625 ff.; in English, Gerth and Mills, *From Max Weber* (1946), 196 ff. On these roots, see Weisbord, *DukeJComp&IL*, 20 (2009), 44 ff. (describing the classical concept of leadership as 'an individual holding high office or a high top position within a complex bureaucracy, exercising formal and effective control over the political or military action of a state').

[152] See note 125 and main text.

[153] Critical, Weisbord, *DukeJComp&IL*, 20 (2009), 46 ff. (stating that the Nuremberg leadership concept 'is not a sociologically accurate description of leadership within Al Qaeda and the vast number of aggressive organizations emerging today' and that the effective control concept 'does not go far enough to capture the leaders of post-bureaucratic organizations'). See also Drumbl, *CWRJIL*, 41 (2009), 316, arguing that 'the decentralized and fragmented groups that pose major security threats today do not proceed in the highly organized and hierarchical lines of the *Wehrmacht* or Imperial Army and, accordingly, an absolute leadership requirement may not square so cleanly with fighters whose call to arms is not animated by a strict sense of national obligation but, rather, in some cases by a more independent assertion of agency'.

[154] See Weisbord, *DukeJComp&IL*, 20 (2009), 47 ff.

[155] cf. SWGCA, June 2004 Report (June 2004—ICC-ASP/3/SWGCA/INF.1), para. 52, reprinted in *Princeton* (2009), p. 205; SWGCA, June 2005 Report (June 2005—ICC-ASP/4/32), paras. 19 ff., reprinted in *Princeton* (2009), pp. 169 ff.; SWGCA, January 2007 Report (January 2007—ICC-ASP/5/SWGCA/1), reprinted in *Princeton* (2009), p. 132, para. 6; SWGCA, June 2007 Report (June 2007—ICC-ASP/6/SWGCA/INF.1), reprinted in *Princeton* (2009), p. 110, paras. 6 ff.; SWGCA, December 2007 Report (December 2007—ICC-ASP/6/SWGCA/1), para. 9, reprinted in *Princeton* (2009), p. 100; SWGCA, June 2008 Report (June 2008—ICC-ASP/6/20/Add.1, Annex II), reprinted in *Princeton* (2009), p. 87, para. 62; SWGCA, February 2009 Report (February 2009—ICC-ASP/7/20/Add.1, Annex II), reprinted in *Princeton* (2009), p. 54, para. 25. See also Corredor C., *Agresión* (2012), p. 82.

(subpara. (a)),[156] for ordering, instigating (both subpara. (b)), or any form of assistance (subpara. (c)). In contrast, responsibility for a contribution to a crime of aggression by a group of leaders (subpara. (d)) does not appear to be of great relevance, because a leader himself will normally belong to the criminal group committing such crime. Similarly, responsibility for an attempted crime (subpara. (f)) is, as generally in ICL,[157] of little practical importance. We will return to this anticipated form of responsibility in the next subsection. Finally, superior responsibility within the meaning of Article 28, indeed discussed in the SWGCA,[158] is logically impossible since it rests on the commission of the 'base crimes' by the subordinates who, however, due to the very existence of the leadership clause, cannot be perpetrators (or even secondary participants) of aggression.[159]

(d) The conduct verbs and the criminalization of preparatory acts

As to the actual conduct entailing criminal responsibility, Article 8*bis* (1) borrows again from Nuremberg (and Tokyo), adopting the same wording apart from the final term, where 'execution' instead of 'waging of a war' is used.[160] Thus, the drafters again preferred to rely on a historic precedent[161] instead of initiating a principled discussion with a view to achieving an improved codification. In fact, the criminalization of clearly preparatory acts ('planning' and 'preparation')[162] and the ensuing anticipated early intervention of criminal law is highly problematic for reasons of principle. Both the harm principle and the *Rechtsgutslehre* require the actual causation of harm or the actual violation of a protected (legal) interest in order to justify the intervention of the criminal law without violating the principle of culpability.[163] Preparatory conduct, in contrast, creates, at most, certain risks which may lead to actual harm or a violation of a legal interest.[164] In more practical terms current (customary) international law

[156] In this regard the SWGCA states the obvious when it says that 'more than one person may be in a leadership position', see SWGCA, June 2009 Report (June 2009—ICC-ASP/8/INF.2), reprinted in *Princeton* (2009), pp. 25, 40, para. 15 and Appendix II No. 15; see also Amendments to the Elements of Crimes, Resolution No. RC/Res.6, advance version, 16 June 2010, Annex II.

[157] cf. Volume I of this treatise, pp. 235–6.

[158] SWGCA, June 2004 Report (June 2004—ICC-ASP/3/SWGCA/INF.1), para. 54, reprinted in *Princeton* (2009), p. 206; SWGCA, June 2005 Report (June 2005—ICC-ASP/4/32), paras. 47 ff., reprinted in *Princeton* (2009), p. 173; SWGCA, June 2007 Report (June 2007—ICC-ASP/6/SWGCA/INF.1), reprinted in *Princeton* (2009), p. 111, para. 13; SWGCA, June 2008 Report (June 2008—ICC-ASP/6/20/Add.1, Annex II), paras. 63 ff., reprinted in *Princeton* (2009), p. 87.

[159] See also Weisbord, *DukeJComp⅋IL*, 20 (2009), 57 ('nonsensical'); Clark, 'Aggression', in Stahn and Sluiter, *Emerging Practice* (2009), pp. 720–1; for the same result, see Corredor C., *Agresión* (2012), p. 83.

[160] For a detailed analysis of the conceptual roots and problems of the conduct verbs, see Weisbord, *DukeJComp⅋IL*, 20 (2009), 49 ff.

[161] Note 28.

[162] For definitions, see note 29.

[163] cf. Volume I of this treatise, pp. 60–5, 93–5.

[164] This is a core question of criminal law theory which has been extensively treated in academic writings. See, for example, for a civil law approach, Puschke, 'Grund und Grenzen des Gefährdungsstrafrechts', in Hefendehl, *Grenzenlose Vorverlagerung* (2010), pp. 23–4, calling for a strictly limited criminalization of preparatory acts with a view to their potential to violate *Rechtsgüter*; see, for a common law approach, Alexander and Kessler, *Crime and Culpability* (2009), pp. 289–90, criticizing overcriminalization, that is, punishing 'conduct that does not risk harm to any interest the criminal law might wish to protect' in the form of too early intervention of criminal law ('only [...] attenuated connection to legally protected interests') or its 'overinclusiveness'. For the same twofold approach, see 'Resolution of the XVIII AIDP

supports the criminalization of the preparation of an aggression only, at best, if hostilities are actually initiated.[165] Thus, the criminalization of 'planning' and 'preparation' presupposes that the collective act of aggression has at least been 'initiated', that is, has reached the attempt stage. In any case, it seems as if Article 8*bis*(1) requires, as to the *collective* act, more than a mere attempt or threat since the drafters focused on the actual 'act of aggression', abandoning any preliminary conduct, in particular a mere threat to commit such an act.[166] This is confirmed by the Elements, which make clear that the act of aggression must be 'committed'.[167]

If this is the correct reading, any form of *individual* conduct contained in Article 8*bis*(1) can only become relevant if a qualified (*collective*) act of aggression, in the sense of para. 1 in connection with para. 2, has actually occurred. While this makes sense with a view to the generally restrictive tendency seen in the definition of the crime, the problem remains that the first three conduct verbs ('planning', 'preparation', and 'initiation') contained in para. 1 refer to a stage of the *iter criminis* before the actual 'execution', that is, apparently to stages of attempt ('initiation') and preparation ('planning', 'preparation').[168] How can this be reconciled with the general criminalization of (individual) attempt according to Article 25(3)(f) which, by way of the differentiated solution mentioned earlier,[169] also applies to the leaders (Article 25 (3*bis*)) involved in a crime of aggression? The answer depends on the exact meaning of these three conduct verbs with regard to general attempt in the sense of Article 25(3)(f). If one argues, as has been insinuated, that the last of these verbs ('action that commences its execution by means of a substantial step') corresponds to the 'initiation' phase of aggressive conduct, while 'planning' and 'preparation' belong to an earlier phase, preceding attempt in a similar manner to conspiracy,[170] only 'planning' and 'preparation' would criminalize conduct that is not already covered by Article 25(3)(f), while the separate codification of 'initiation' by Article 8*bis*(1) would be superfluous. Apart from this, the possibility of an attempted crime of aggression (Articles 8*bis*(1), 25(3)(f))

International Congress of Penal Law (Istanbul, 20–27 September 2009)', reprinted in *ZStW*, 122 (2010), 474, calling for strict conditions to consider the punishment of preparatory offences and autonomous acts of participation as legitimate; see on the discussions of the respective section I (General Part), Müller, *ZStW*, 122 (2010), 453 ff.

[165] cf. Werle, *Principles* (2009), mn. 1341; Werle, *Völkerstrafrecht* (2012), mn. 1449; see also Ambos, 'Strafrecht und Krieg', in Arnold et al., *FS Eser* (2005), 675 with references in n. 38.

[166] The inclusion of a 'threat' of aggression has been discussed in connection with attempt, see SWGCA, June 2005 Report (June 2005—ICC-ASP/4/32), reprinted in *Princeton* (2009), p. 172; SWGCA, June 2006 Report (June 2006—ICC-ASP/5/SWGCA/INF.1), paras. 47 ff., reprinted in *Princeton* (2009), p. 147); however, this was finally abandoned, see Clark, *EJIL*, 20 (2009), 1109. See also Murphy, *EJIL*, 20 (2009), 1150, 1152 (critical); Wilmshurst, 'Aggression', in Cryer et al., *Introduction ICL* (2010), p. 320; on the different forms of threats, see May, *Aggression* (2008), p. 14; Corredor C., *Agresión* (2012), pp. 73–4, 103; on 'attempted aggression', see Volume I of this treatise, pp. 263–4.

[167] Amendments to the Elements of Crimes, Resolution No. RC/Res.6, advance version, 16 June 2010, Annex II, Element 3; see also Anggadi, French, and Potter, 'Negotiating the Elements', in Barriga and Kreß, *Travaux Préparatoires* (2012), pp. 69, 80.

[168] On the difficult distinction between planning and preparation in the case law, see Wilmshurst, 'Aggression', in Cryer et al., *Introduction ICL* (2010), p. 320.

[169] Note 146 and main text.

[170] The SWGCA's debate on the relationship between attempt and the preparatory acts indicates some confusion; see for example SWGCA, June 2006 Report (June 2006—ICC-ASP/5/SWGCA/INF.1), paras. 45–6, reprinted in *Princeton* (2009), p. 147.

entails, if taken at face value, the criminalization of attempted preparatory acts ('planning', 'preparation') and attempted attempt ('initiation'). There is no convincing reason for such an overcriminalization.

From a more fundamental perspective of principle and policy, the anticipated ICL intervention brought about by the new crime of aggression raises serious questions.[171] First of all, such an unprincipled extension of punishability is, as explained earlier,[172] at least with regard to mere preparatory acts, difficult to justify in light of the harm principle and the *Rechtsgutslehre* (although the tension with these theories is mitigated by the fact that an act of aggression must actually have occurred).[173] More importantly, such an overcriminalization will not have any tangible practical effect. In the SWGCA itself it was suggested that attempt is of little practical relevance[174] and this applies, *a fortiori*, to mere preparatory acts. This is confirmed by the fact that attempt has, as an autonomous form of responsibility, never played any significant role in international criminal proceedings.[175] It was implicitly recognized in the preparatory acts for the Nuremberg and Tokyo crimes against peace, but even there it became only judicially relevant as conspiracy[176] (which is not included in Article 8*bis*!).[177] In fact, prosecutors and courts normally only take recourse to preparatory acts if the actual crime has not been executed or consummated, not least for the evidentiary challenges involved in proving anything prior to the actual execution.[178] While this could theoretically happen in the case of an aggression,[179] it is not very probable that it will actually happen in the practice of the ICC, given the generally restrictive definition of Article 8*bis*(1) and the restrictive conditions for the exercise of jurisdiction. Indeed, if definition and jurisdiction are taken together, it is not very likely that a case of aggression still in the preparatory or attempt stage will ever come before the Court.

[171] In favour of the 'criminalization of the early stages of preparation', Cassese et al., *ICL* (2013), p. 145.

[172] See note 163 and main text.

[173] Also critical, Glennon, *YaleJIL*, 35 (2010), 98–9 arguing that responsibility for 'planning' and 'preparation' is far too broad.

[174] SWGCA, June 2007 Report (June 2007—ICC-ASP/6/SWGCA/INF.1), reprinted in *Princeton* (2009), p. 111, para. 13; SWGCA, June 2005 Report (June 2005—ICC-ASP/4/32), Discussion Paper 1, reprinted in *Princeton* (2009), p. 191, sec. B. II. 1b ('rather theoretical in nature' but giving two examples, see note 179). See also Clark, *EJIL*, 20 (2009), 1109 ('bizarre case').

[175] cf. Volume I of this treatise, pp. 235–6.

[176] cf. Ambos, *Der Allgemeine Teil* (2002/2004), pp. 101–2 (Nuremberg), 136 ff. (Tokyo).

[177] See Clark, *EJIL*, 20 (2009), 1109; critical of conspiracy, see May, *Aggression* (2008), pp. 198 ff., 254 ff.; in favour, see Cassese et al., *ICL* (2013), p. 145.

[178] See also Weisbord, *HarvILJ*, 49 (2008), 190, pointing to the evidentiary challenge of proving attempted aggression.

[179] See SWGCA, June 2005 Report (June 2005—ICC-ASP/4/32), Discussion Paper 1, reprinted in *Princeton* (2009), p. 191, sec. B. II. 1 b, admitting that 'cases of attempt remain rather theoretical in nature' but giving the example of the high-ranking state official who has commenced participation in the preparation of the collective act of aggression but is then prevented from taking part in the actual decision making, and the example of a high-ranking military leader who was about to give an important order in the course of the state use of force but is then prevented from completing his act of ordering; see also Discussion Paper 3, p. 197, No. 6 ('whether attempt of aggression is conceivable').

(e) The mental element

As to the mens rea of a leader participating in the crime of aggression, it was recognized quite early by the SWGCA that Article 30 applies as a default rule and therefore any reference to mental elements in the definition of the crime, even to a special *animus aggressionis*,[180] would be superfluous.[181] As a consequence, the specific mental requirement depends on the qualification of the corresponding objective element as conduct, consequence or circumstance (Article 30(2)(a), (b) and (3)).[182] Thus, for example, as to the leadership qualifier—a circumstance in the sense of Article 30(3)—in order to effectively control and direct state action, awareness of the factual position is required.[183] As in the other international crimes,[184] the mental element serves as the linking interface between the objective acts and the overarching criminal context, which is here the aggressive states' conduct.[185] Thus, the respective leader must be aware of the state act of aggression and of its criminal character.[186]

Yet, this awareness does not, as in the other crimes of the Statute,[187] amount to a legal understanding, that is, to knowledge of the legal elements that turn a certain use of force into an unlawful act of state or even a crime of aggression.[188] Awareness presupposes actual knowledge, not a lower standard of constructive knowledge, or even recklessness.[189] Thus, regarding the use of force, for example, it is required that 'the perpetrator knew of facts establishing the inconsistency of the use of force with the

[180] See notes 87 ff. and main text.

[181] SWGCA, June 2004 Report (June 2004—ICC-ASP/3/SWGCA/INF.1), para. 55, reprinted in *Princeton* (2009), p. 206; SWGCA, June 2005 Report (June 2005—ICC-ASP/4/32), para. 51, reprinted in *Princeton* (2009), p. 174; SWGCA, June 2009 Report (June 2009—ICC-ASP/8/INF.2), para. 13, reprinted in *Princeton* (2009), p. 25. See also Clark, *EJIL*, 20 (2009), 1109; Solera, *Aggression* (2007), pp. 420–1. Generally on the importance of the mental element in the crime of aggression, see May, *Aggression* (2008), pp. 180–1, 184, 198 ff., 202, 250 ff., 267. On the subjective requirements of international crimes cf. also Volume I of this treatise, pp. 266 ff.

[182] See also SWGCA, June 2009 Report (June 2009—ICC-ASP/8/INF.2), Appendix II Nos. 9–10, reprinted in *Princeton* (2009), p. 39.

[183] SWGCA, June 2009 Report (June 2009—ICC-ASP/8/INF.2), pp. 25, 40 para. 14 and Appendix II No. 14.

[184] cf. Volume I of this treatise, pp. 278 ff.

[185] See also May, *Aggression* (2008), pp. 234 ff. (238–9) considering the state aggression as an 'overarching' circumstance (referring to the concept of a 'contextual circumstance' discussed in the ICC negotiations).

[186] See Amendments to the Elements of Crimes, Resolution No. RC/Res.6, advance version, 16 June 2010, Annex II, Elements 4 and 6; see also Anggadi, French, and Potter, 'Negotiating the Elements', in Barriga and Kreß, *Travaux Préparatoires* (2012), pp. 71–7.

[187] See Elements of Crimes, UN Doc. PCNICC/2000/1/Add.2 (2000), general introduction No. 4 and the respective elements to the crimes; see insofar Ambos, 'Reflections on the mens rea Requirements', in Vohrah et al., *Inhumanity* (2003), pp. 15–16. The general introduction also applies to the elements for aggression; see SWGCA, June 2009 Report (June 2009—ICC-ASP/8/INF.2), reprinted in *Princeton* (2009), p. 24, para. 8; see also Anggadi, French, and Potter, 'Negotiating the Elements', in Barriga and Kreß, *Travaux Préparatoires* (2012), pp. 77–8.

[188] Amendments to the Elements of Crimes, Resolution No. RC/Res.6, advance version, 16 June 2010, Annex II, Introduction No. 2 and 4 and Elements 4 and 6. See also SWGCA, June 2009 Report (June 2009—ICC-ASP/8/INF.2), pp. 26, 38, 41, para. 17 and Appendix II No. 6, 19; Corredor C., *Agresión* (2012), pp. 79–80.

[189] SWGCA, June 2009 Report (June 2009—ICC-ASP/8/INF.2), p. 26, para. 19; less clear, Appendix II No. 22.

Charter of the United Nations'.[190] The preference of 'knowledge of facts' over 'knowledge of law' entails that, in principle, only a mistake of fact (Article 32(1) ICC Statute) would be relevant, while a mistake of law (Article 32(2)) would be *a limine* precluded[191] unless it negates the mental element required by the crime (Article 32(2 cl. 2)). This may be the case if the mistake refers to normative elements of the *actus reus*, that is, *in casu*, to 'manifest' or 'use of force'.[192]

(3) The exercise of jurisdiction

(a) The trigger procedures and the role of the Security Council

In light of the Security Council's primary, albeit not exclusive, power to determine whether an act of aggression has occurred (Articles 24, 39 UN Charter)[193] and the options on the table in Kampala, including the Council's exclusive authority to trigger an investigation,[194] it is fair to say that the final result is a success in that the Court's autonomy and integrity towards the Council was secured. The first achievement in this respect, already brought about by the SWGCA overcoming the former position of the Preparatory Commission's working group,[195] was to de-couple the definition of the crime of aggression (Article 8*bis* ICC Statute) from the conditions for the exercise of jurisdiction (Articles 15*bis/ter*).[196] If this had not been achieved, the Security Council would have obtained the power to determine jurisdiction by way of the definition, and an unacceptable politicization and disastrous subversion of the Court's authority would have ensued.[197] However, while the Security Council is not—indeed, cannot be

[190] SWGCA, June 2009 Report (June 2009—ICC-ASP/8/INF.2), Appendix II No. 20, p. 41.

[191] See also SWGCA, June 2009 Report (June 2009—ICC-ASP/8/INF.2), Appendix II No. 21, p. 41.

[192] cf. Ambos, *Der Allgemeine Teil* (2002/2004), pp. 811 ff.; see also Clark, 'Aggression', in Stahn and Sluiter, *Emerging Practice* (2009), pp. 716–17; Clark, 'Alleged Aggression in Utopia', in Schabas et al., *Research Companion ICL* (2013), pp. 67–8. For availability '[p]resumably . . . in certain circumstances', see also Wilmshurst, 'Aggression', in Cryer et al., *Introduction ICL* (2010), p. 328.

[193] For a thorough analysis, see McDougall, *ICLR*, 7 (2007), 281 ff., 307, concluding 'that granting the ICC the jurisdiction to determine independently the existence or occurrence of an act of aggression for the purpose of assessing the State act element of the crime of aggression would not contravene the Charter'. See also Bassiouni, *Introduction to ICL* (2013), pp. 674–8 ('symbiotic relationship'); Politi, *JICJ*, 10 (2012), 277 ff.; Schaeffer, *ICLR*, 9 (2009), 414, correctly arguing that 'the only exclusivity for the Security Council lies with its power to make binding enforcement measures under Chapter VII'. For the same result, see Blokker and Kreß, *LJIL*, 23 (2010), 894 ('rejection of a Security Council monopoly [. . .] is beyond serious argument'); Reddi, *ICLR*, 8 (2008), 663–4; Clark, *GoJIL*, 2 (2010), 699–700; Reisinger-Coracini, *GoJIL*, 2 (2010), 783; Wilmshurst, 'Aggression', in Cryer et al., *Introduction ICL* (2010), pp. 329–30; Gomaa, 'The Definition of the Crime of Aggression', in Politi and Nesi, *The ICC and Aggression* (2004), pp. 75–6; Yengejeh, 'Reflections', in Politi and Nesi, *The ICC and Aggression* (2004), pp. 125, 127 ff. (good discussion); Escarameia, 'The ICC and the Security Council on Aggression', in Politi and Nesi, *The ICC and Aggression* (2004), pp. 133, 139 ff.; Corredor C., *Agresión* (2012), pp. 198 and *passim*. Contra Meron, *Suffolk Transnat'lLR*, 25 (2001–2002), 14 and Glennon, *YaleJIL*, 35 (2010), 104 ff., 107–8, both arguing, albeit mainly for policy reasons, for an exclusive (plenary) power of the Security Council.

[194] See note 45 and main text.

[195] See Coordinator's Discussion paper, Official Records ICC-ASP/2/10, section I.

[196] Clark, *EJIL*, 20 (2009), 1113; Clark, *GoJIL*, 2 (2010), 700.

[197] This is a quite generalized view among scholars, independent of their principled position towards the crime of aggression; see on the one hand, Paulus, *EJIL*, 20 (2009), 1124 ff., and on the other, Kreß, *EJIL*, 20 (2009), 1143–4; Clark, *GoJIL*, 2 (2010), 700. See also Werle, *Principles* (2009), mn. 1351; May, *Aggression* (2008), pp. 227; Reddi, *ICLR*, 8 (2008), 665 ff.; Corredor C., *Agresión* (2012), pp. 182 ff. (generally critical of

(according to Article 24 UN Charter)—prevented from making a determination of an act of aggression (Article 15*bis*(6)–(8) ICC Statute), such a determination 'by an organ outside the Court' is 'without prejudice to the Court's own findings' (Articles 15*bis*(9), 15*ter*(4)). More importantly, such a determination is not a prerequisite for the exercise of jurisdiction given that all 'ordinary' triggers (Article 13) apply (Articles 15*bis*(1), 15*ter*(1))[198] and the Security Council operates as a kind of 'jurisdictional filter'.[199] Thus, not only is the Court's independence secured[200] and it remains the 'master of its own decisions',[201] but also the Prosecutor's *proprio motu* authority (Article 15) has been maintained and even reinforced, since the Prosecutor may proceed even in the absence of a Security Council determination after six months 'provided that the Pre-Trial Division authorizes the commencement of an investigation' (Article 15*bis* (8)).[202] Similar to the control of the Prosecutor's 'ordinary' *proprio motu* authority under Article 15, the negotiators succeeded in avoiding external (preemptive) interference (by a political organ such as the Security Council) leaving it to the Court itself to make sure that there will be no abuse of power by the Prosecutor. The only difference is that Article 15*bis*(8) provides for an 'enhanced internal filter',[203] entrusting the Pre-Trial Division instead of a mere Pre-Trial Chamber (see Article 15(3)) with the control, that is, a majority of all six members of that Division (Article 39(1)) sitting together *en banc*.[204] Although the Security Council may suspend an ongoing investigation or prosecution pursuant to Article 16,

the Security Council's role); critical, also see Bassiouni, *Introduction to ICL* (2013), pp. 638–42 (arguing that the Security Council can be 'an indefinite guarantee of immunity for future aggressors'); in a similar vein, see Gaja, 'Respective Roles', in Politi and Nesi, *The ICC and Aggression* (2004), p. 124, arguing that exclusive dependence on Security Council determination would deprive the provision of aggression 'of almost all its meaning'; discussing the policy arguments in favour and against Security Council determination McDougall, *ICLR*, 7 (2007), 307 ff. Critical of the politicization argument invoked against any autonomous determination of the ICC, see Lehto, 'The ICC and the Security Council', in Politi and Nesi, *The ICC and Aggression* (2004), pp. 145 ff.

[198] Barriga, 'Against the Odds', in *Princeton* (2009), p. 12; Barriga, 'Negotiating the Amendments', in Barriga and Kreß, *Travaux Préparatoires* (2012), pp. 31–2; SWGCA, June 2009 Report (June 2009—ICC-ASP/8/INF.2), reprinted in *Princeton* (2009), p. 29, para. 30. Obviously, the triggers refer to a crime, not a mere act of aggression (cf. Article 15*bis/ter* (1) ICC Statute). Thus, contrary to Scheffer's assertions (Scheffer, *LJIL*, 23 (2010), 900–1), the respective situations of crimes, not acts of aggressions, are referred to. Apart from that, the existence of a threshold is not unique to the crime of aggression; it also exists, one way or the other, in the case of the other ICC crimes in the form of their context elements.

[199] Barriga, 'Against the Odds', in *Princeton* (2009), p. 12; Barriga, 'Negotiating the Amendments', in Barriga and Kreß, *Travaux Préparatoires* (2012), p. 32; SWGCA June 2009 Report (June 2009—ICC-ASP/8/INF.2), para. 30, reprinted in *Princeton* (2009), p. 29.

[200] Reisinger-Coracini, *GoJIL*, 2 (2010), 787; Stahn, *LJIL*, 23 (2010), 877 ('undoubtedly a victory for the independence of the ICC'); Manson, *CLF*, 21 (2010), 419 ('concession' of veto powers); Corredor C., *Agresión* (2012), p. 216.

[201] Clark, *GoJIL*, 2 (2010), 703; similarly Reisinger-Coracini, *GoJIL*, 2 (2010), 749.

[202] Explicitly welcoming this possibility, Corredor C., *Agresión* (2012), pp. 169 ff.

[203] Reisinger-Coracini, *GoJIL*, 2 (2010), 783 with references in n. 193. For Blokker and Kreß, *LJIL*, 23 (2010), 893–4, this 'specific institutional device complements' the substantive threshold clause.

[204] Kaul, *GoJIL*, 2 (2010), 665 sees here a challenge for the organization of the Court; critical with regard to quorum etc also Reisinger-Coracini, *GoJIL*, 2 (2010), 783–4; welcoming a judicial instead of an external control Corredor C., *Agresión* (2012), pp. 177 ff.

this is, again, a power which it already possesses under the ordinary procedure[205] and which has not yet been used to this effect.[206]

It is not entirely clear, however, what will happen if the Security Council makes a negative determination. This situation is not explicitly regulated in Article 15*bis* since it only speaks of a 'determination' (paras. 6–9). This refers to a positive determination as follows from para. 6 ('determination of an act of aggression committed') which serves as the basis of para. 7, 8 ('*such* (a) determination').[207] Consequently, a negative determination must be treated equivalently to a non-determination in the sense of para. 8, and the corresponding procedure is applicable. It may well be in such a situation that the Prosecutor and/or the Pre-Trial division take the negative determination as a strong argument against proceeding with an investigation, but formally, pursuant to para. 9 ('without prejudice to the Court's own findings'), they are not obliged to do so.[208]

All in all, it is fair to say that the final compromise reconciles these conflicting views,[209] namely those that did not want to renounce the Security Council's authority (i.e. especially its permanent members) and those that wanted to ensure the integrity and autonomy of the Court on the basis of the ordinary rules (especially Article 15). Indeed, the compromise certainly achieved the realistic (and, at the same time, unexpected)[210] maximum in terms of ensuring the Court's independence[211] and also accounts for the fears of those critics who predicted a (further) politicization of the Court through the strong involvement of the Security Council.[212]

*(b) Conditions for the exercise of jurisdiction and jurisdictional limitations (Article 15*bis*(4) and (5))*

As described in the previous subsection, the interplay of paras. 2 and 3 (of both Article 15*bis* and *ter*) makes the Court's exercise of jurisdiction dependent on two separate,

[205] And which also has been recognized by alternative (academic) proposals, see for example McDougall, *ICLR*, 7 (2007), 328, 331; see also Corredor C., *Agresión* (2012), p. 195.

[206] But only to exclude non-States Parties from the ICC's jurisdiction, see Security Council Resolution 1422 (2002) 12 July 2002, UN Doc. S/RES/1422 (2002), Security Council Resolution 1487 (2003) 12 June 2003, UN Doc. S/RES/1487 (2003) and Security Council Resolution 1497 (2003) 1 August 2003, UN Doc. S/RES/1497 (2003); see also Schmalenbach, *JZ*, 65 (2010), 751 right column.

[207] For the same result, see Scheffer, *LJIL*, 23 (2010), 902; for a good critical analysis, see Corredor C., *Agresión* (2012), pp. 203 ff.

[208] In the same vein, see Corredor C., *Agresión* (2012), pp. 192 ff. (199). For a critical view, see Scheffer, *LJIL*, 23 (2010), 902 ('yawning gap'), but his own proposal does not explicitly address a negative determination either.

[209] Kaul, *GoJIL*, 2 (2010), 664.

[210] See Reisinger-Coracini, *GoJIL*, 2 (2010), 787 arguing that the achieved limitation of the Security Council's power and the maintenance of the Court's independence 'clearly exceeds the expectations'; in a similar vein for a qualified role of the Security Council, see Kemp, *Aggression* (2010), pp. 236, 254.

[211] Compare, for example, the proposal by McDougall, *ICLR*, 7 (2007), 328 ff., which correctly acknowledges that '*realpolitik* may prevent the adoption or successful operation of any model that allows for ICC determination independent of any special role for the Council'. In a similar vein, see Schaeffer, *ICLR*, 9 (2009), 419 ff., emphasizing the need for compromise and giving the Security Council a veto power which could only be overturned by the GA (see his proposal at 421–2). According to Schmalenbach, *JZ*, 65 (2010), 749 right column, the consensual adoption of Article 15*bis* came as a surprise to many.

[212] See, for example, Paulus, *EJIL*, 20 (2009), 1124–6 warning of dependence on the Security Council and further politicization; on the fears of human rights organizations in this regard, see also von Braun and Micus, *JICJ*, 10 (2012), 120 ff., 128 ff.

but *cumulative*[213] mechanisms whose final outcome in terms of substance and timing is difficult to predict. What is clear is that the Court cannot exercise jurisdiction before 1 January 2017, that is, before a 'majority of State Parties' (i.e. two-thirds[214]) has taken the decision required by para. 3 (of Article 15*bis/ter*), even if the thirty States Parties necessary pursuant to para. 2 have already ratified or accepted the amendment by 31 December 2015[215] (i.e. one year before the postponement date provided for in para. 3).[216] It is much more probable, though, that the exercise of jurisdiction will be delayed[217] well beyond 1 January 2017, either because the respective decision required according to para. 3 will be taken months or years later—indeed para. 3 only speaks of a decision to be taken 'after'—or because thirty States Parties will not have ratified or accepted the amendment by this date.[218] Even worse, if the 'majority of States Parties' does not take the decision provided for in para. 3 at all—considered an unlikely scenario by some[219]—the compromise in Kampala could turn out to be little more than a paper tiger. In fact, as of 19 August 2013 only seven States Parties have ratified the amendments on the crime of aggression.[220] In practical terms, it is probable that the ASP will decide to hold a new Review Conference in 2017, or once the thirty ratifications become effective (if this is later than 2017). The ASP could also decide to adopt the new definition of aggression on its own. A different issue is whether the Court can exercise its jurisdiction over a crime of aggression committed before the para. 3 decision has been taken but after the receipt of the thirtieth instrument of ratification pursuant to para. 2. While this is incompatible with Understandings 1 and 3,[221] which provide for the cumulative fulfillment of paras. 2 and 3, the legal nature of the Understandings is controversial.[222]

[213] See Understandings 1 and 3 Resolution No. RC/Res.6, advance version, 16 June 2010, Annex III; see also Kreß, Barriga, Grover, and von Holtzendorff, 'Negotiating the Understandings', in Barriga and Kreß, *Travaux Préparatoires* (2012), pp. 83–9.

[214] See note 227.

[215] Even this is not uncontroversial; see Reisinger-Coracini, *GoJIL*, 2 (2010), 771.

[216] Kaul, *GoJIL*, 2 (2010), 666, considers this as 'quite likely'. Critical of para. 3 ('carece de honestidad') and the other conditions, see Corredor C., *Agresión* (2012), pp. 150 ff. (153). For a presentation of the ICC's jurisdiction by way of tables, see Milanovic, *JICJ*, 10 (2012), 182.

[217] In fact, Article 15*bis/ter* (3) establishes a 'delayed activation' of the Court's jurisdiction, see Wenaweser, *LJIL*, 23 (2010), 887; Manson, *CLF*, 21 (2010), 433–4.

[218] See also Kaul, *GoJIL*, 2 (2010), 665 ('it will take quite some time . . . '); Corredor C., *Agresión* (2012), pp. 154 ff., 218; more optimistic apparently Blokker and Kreß, *LJIL*, 23 (2010), 892 ('taken not too long after 1 January 2017').

[219] See also Blokker and Kreß, *LJIL*, 23 (2010), 893 ('generally expected that it is the wish of the overwhelming majority of the State Parties to activate this jurisdiction . . . '); on the 'open issues', see also Trahan, *ICLR*, 11 (2011), 64 ff.

[220] Liechtenstein (8 May 2012), Samoa (25 September 2012), Trinidad and Tobago (13 November 2012), Luxembourg (15 January 2013), Estonia (27 March 2013), Germany (3 June 2013), Botswana (4 June 2013). On the concrete progress on the ratification and implementation process of the Kampala amendments, see Crime of Aggression, 'Status of Ratification and Implementation' <http://crimeofaggression.info/the-role-of-states/status-of-ratification-and-implementation> accessed 19 August 2013. On the problems that the domestic prosecution of the crime may cause, see van Schaack, *JICJ*, 10 (2012), 134 ff.

[221] See Section B. (2)(c).

[222] See on this point, Schmalenbach, *JZ*, 65 (2010), 752 arguing that there is a contradiction between Article 15*bis* (2) and (3) and these Understandings. Generally on the controversial legal nature of the Understandings Heinsch, *GoJIL*, 2 (2010), 729–30; see also Kreß, Barriga, Grover, and von Holtzendorff, 'Negotiating the Understandings', in Barriga and Kreß, *Travaux Préparatoires* (2012), p. 83.

Against this background, it seems to be of minor importance to establish the exact provisions according to which such decisions must be taken. In fact, this rather technical question has been largely ignored in academic discussion so far. The starting point is Article 5(2),[223] which refers in not unambiguous terms[224] to Article 121 and 123, the former being the relevant Article for amendments. According to Article 121(3), an amendment may be 'adopted' by the ASP or a Review Conference with a two-thirds majority if consensus cannot be reached. Yet, 'adoption' in the sense of Article 121(3) only requires simple approval by the Review Conference giving full effect to the amendment without further ado. In particular, a national ratification procedure is not required. This may be adequate for amendments of an institutional nature according to Article 122, but does not suffice for a substantive amendment creating an actionable crime, which can hardly be accepted by states without an internal process of approval. This remains the case even if its basis was already laid in Rome with Article 5(2), and this kind of 'automatic' adoption seems to be in line with the automatic jurisdiction regime of Article 12(1).[225] Thus, 'adopted' in Article 5(2) means more than 'adoption' in Article 121(3), calling for a qualified adoption procedure going beyond mere approval in the sense of Article 121(3).[226] While the mention of the 'same majority of States Parties' in Article 15*bis/ter*(3) refers to the two-thirds majority of States Parties of Article 121(3) (Articles 15*bis/ter*(3) only require a 'decision'),[227] Articles 15*bis/ter*(2) require individual ratification by States Parties to ensure the qualified adoption procedure mentioned. It must be read together with para. 1 of the operative part of the Resolution stipulating that the amendment is 'subject to ratification or acceptance and shall enter into force in accordance with Article 121, paragraph 5'.[228]

Article 121(5), in turn, refers to amendments of Articles 5–8 and is *insofar lex specialis* to Article 121(4), which applies to other (jurisdictional or procedural) amendments.[229] Yet, the difficult question remains whether adoption in the sense of Article 5(2) is an 'amendment' in the sense of Article 121(5). While this is debatable and indeed was debated quite extensively during the negotiations,[230] the different consequences of

[223] On its 'ambiguous' wording, see McDougall, *ICLR*, 7 (2007), 280.

[224] See also Blokker and Kreß, *LJIL*, 23 (2010) ('fraught with very considerable ambiguity').

[225] See also the preamble of Resolution No. RC/Res.6, advance version, 16 June 2010, 'recalling' Arts. 5(2) and 12(1) ICC Statute.

[226] See for discussion Clark, *CWRJIL*, 41 (2009), 416 ff.; Clark, *EJIL*, 20 (2009), 1114–15; Clark, 'Alleged Aggression in Utopia', in Schabas et al., *Research Companion ICL* (2013), pp. 72 ff.; Reisinger-Coracini, *GoJIL*, 2 (2010), 764–5; see also SWGCA, June 2005 Report (June 2005—ICC-ASP/4/32), reprinted in *Princeton* (2009), paras. 5 ff., pp. 167 ff.; SWGCA, June 2004 Report (June 2004—ICC-ASP/3/SWGCA/INF.1), paras. 10–19, reprinted in *Princeton* (2009), pp. 199–201; SWGCA, February 2009 Report (February 2009—ICC-ASP/7/20/Add.1, Annex II), reprinted in *Princeton* (2009), pp. 50–1, paras. 6 ff. In any case, the issue is debatable and the automatic adoption argument can be made for the reasons mentioned in the text with note 204, see also SWGCA, February 2009 Report, reprinted in *Princeton* (2009), pp. 55–6, para. 29; Clark, *CWRJIL*, 41 (2009), 418.

[227] Clark, *GoJIL*, 2 (2010), 702; Reisinger-Coracini, *GoJIL*, 2 (2010), 770–1; Schmalenbach, *JZ*, 65 (2010), 752 left column; Manson, *CLF*, 21 (2010), 434.

[228] For Heinsch, *GoJIL*, 2 (2010), 736 this is 'a clear statement in favor of the Art. 121 (5) procedure'.

[229] Concurring, see Manson, *CLF*, 21 (2010), 422.

[230] See Barriga, 'Against the Odds', in *Princeton* (2009), pp. 15–16; Barriga, 'Negotiating the Amendments', in Barriga and Kreß, *Travaux Préparatoires* (2012), pp. 37–8; see also Reisinger-Coracini, *GoJIL*, 2 (2010), 766–7; Clark, *CWRJIL*, 41 (2009), 418 ff.; Heinsch, *GoJIL*, 2 (2010), 735–6; Kreß and von Holtzendorff, *JICJ*, 8 (2010), 1196 ff.; Manson, *CLF*, 21 (2010), 435 ff. (with an alternative proposal).

both provisions are reasonably clear. While Article 121(4) binds all States Parties but requires a seven-eighths majority, Article 121(5) provides for an individual acceptance procedure *per state* and thus corresponds, in essence, to Articles 15*bis* and *ter*(2).[231] In any case, the fact that Article 121(4) is no longer mentioned in the final resolution, but Articles 15*bis/ter*(5) are mentioned (explicitly in para. 1 and implicitly in para. 2), quite clearly indicate that the drafters, ultimately, opted for Article 121(5).[232] This provision is predicated on the distinction between States Parties that accept an amendment and those that do not. In the latter case the Court cannot exercise jurisdiction over the respective crime 'when committed by that State Party's nationals or on its territory'. Taken at face value, this means—in the sense of a so-called negative understanding[233]—that the Court has no jurisdiction over the nationals of an aggressor State Party if this state has not accepted the amendment.[234] This means that if State Party A (aggressor state), which has not accepted the amendment, invades State Party B (victim state), which has accepted it, the nationals of State Party A could not be prosecuted by the Court, even though the territoriality principle (Article 12(2)(a))—A acts on the territory of B!—would demand so. This negative understanding has two further implications. First, it creates two jurisdictional regimes for aggression and the other crimes of the Rome Statute, since the territoriality principle fully applies to the latter without any opt-out possibility for States Parties or even other states (not Parties).[235] Secondly and more importantly, it discriminates against non-States Parties who do not have the possibility of not accepting the amendment for the very fact that they are not States Parties, as Article 121(5) only addresses States Parties.[236]

To avoid this discrimination and respect state sovereignty to the fullest extent possible, Article 15*bis*(5) generally excludes jurisdiction over non-States Parties (adopting the wording of Article 121(5) cl. 2 last part),[237] while para. 4 provides for an opt-out declaration—relatively similar to Article 124—for States Parties.[238] Both provisions

[231] For the difference between Article 121(4) and (5), see also Clark, *CWRJIL*, 41 (2009), 418–19; Clark, 'Alleged Aggression in Utopia', in Schabas et al., *Research Companion ICL* (2013), pp. 73 ff.; Murphy, *EJIL*, 20 (2009), 1149; Manson, *CLF*, 21 (2010), 420–1.

[232] See also Schmalenbach, *JZ*, 65 (2010), 750 left column; critical, Scheffer, *LJIL*, 23 (2010), 903, for whom the delegates' 'radical tinkering with amendment procedures arguably merits an Art. 121 (4) amendment of the Rome Statute's amendment procedures'.

[233] According to the 'positive' understanding, hardly compatible with the wording, the territoriality principle of Article 12 (2)(a) would fully apply and extend jurisdiction also to an aggressor State Party that has not accepted the amendment, see SWGCA, June 2009 Report (June 2009—ICC-ASP/8/INF.2), Annex III, Non-paper by the Chairman on the Conditions for the Exercise of Jurisdiction, reprinted in *Princeton* (2009), pp. 44–5, para. 9; see also SWGCA, February 2009 Report (February 2009—ICC-ASP/7/20/Add.1, Annex II), reprinted in *Princeton* (2009), pp. 56–7, paras. 31 ff; Reisinger-Coracini, *GoJIL*, 2 (2010), 767–8.

[234] cf. Barriga, 'Against the Odds', in *Princeton* (2009), p. 16; Barriga, 'Negotiating the Amendments', in Barriga and Kreß, *Travaux Préparatoires* (2012), pp. 39 ff.; for the need of an acceptance of the amendment, see also Manson, *CLF*, 21 (2010), 423 ff.

[235] Critical also SWGCA, June 2009 Report (June 2009—ICC-ASP/8/INF.2), reprinted in *Princeton* (2009), p. 30, para. 36. See also Clark, *CWRJIL*, 41 (2009), 419 with n. 29.

[236] See also Barriga, 'Against the Odds', in *Princeton* (2009), p. 16; Barriga, 'Negotiating the Amendments', in Barriga and Kreß, *Travaux Préparatoires* (2012), pp. 40–1; SWGCA, June 2009 Report (June 2009—ICC-ASP/8/INF.2), reprinted in *Princeton* (2009), pp. 29–30, para. 33; critical, see also Wilmshurst, 'Aggression', in Cryer et al., *Introduction ICL* (2010), p. 328.

[237] '. . . when committed by that State Party's nationals or on its territory'.

[238] See on the opt-out or opt-in declarations Non-paper (note 233), paras. 11–12; SWGCA, June 2009 Report (June 2009—ICC-ASP/8/INF.2), reprinted in *Princeton* (2009), pp. 31–2, paras. 38 ff. See also Kreß

establish true 'conditions' for the exercise of jurisdiction in the sense of Article 5(2),[239] but raise some critical questions. Para. 4 recognizes Article 12 and thus implicitly amends Article 121(5), second sentence, in that the jurisdiction over the crime of aggression is automatic (Article 12(1));[240] yet, at the same time, para. 4 creates an exception from this by allowing an opt-out.[241] The declaration must be made 'previously', even 'prior to ratification or acceptance' (para. 1 Resolution), that is, in any case before the actual commission of an act of aggression.[242] The problem is, apart from the difficult relationship with Article 121(5)(2),[243] para. 4 could lead to the rather strange situation that a State Party first ratifies the amendment and helps to reach the thirty States Parties threshold of para. 2 and then decides to opt out.[244] Why would it do that? To make the crime enforceable in general but not against itself?[245] To make it possible that only the Security Council can refer cases to the Court?[246] Para. 5, in fact, privileges the three permanent members of the Security Council that are not States Parties (China, Russia, USA) over other non-States Parties. Because Article 15*ter* applies to all states, the Security Council could, if this was initiated by these three members, refer a situation concerning other non-States Parties, but it would obviously never use this power against its own members.[247] Yet, apart from that, para. 5 should not be interpreted as implying a form of reciprocity which would also exclude jurisdiction over States Parties which act together with a non-State Party or commit the crime of aggression against a non-State Party.[248] Para. 5 only impedes jurisdiction for acts 'committed by that State's [i.e., the non-State Party's] nationals or on its [i.e., the non-State Party's] territory'. In contrast, if a State Party is the aggressor, alone or jointly with a non-State Party, only Article 15*bis*(1)–(4) would apply, that is, the Court's jurisdiction depends on the type of referral (para. 1), the general entry into force (paras.

and von Holtzendorff, *JICJ*, 8 (2010), 1213; critical of the differentiation between State and non-States Parties and the resulting scenarios, see Corredor C., *Agresión* (2012), pp. 157 ff.

[239] cf. Reisinger-Coracini, *GoJIL*, 2 (2010), 776 (for para. 4).

[240] cf. Schmalenbach, *JZ*, 65 (2010), 750 left column affirming the compatibility with international treaty law. See notes 225 and 226 with main text.

[241] For a discussion see Reisinger-Coracini, *GoJIL*, 2 (2010), 773 ff.; critical (only) as to the procedure Trahan, *ICLR*, 11 (2011), 90–1; critical as to the substance Corredor C., *Agresión* (2012), p. 163–4, 217 ('brecha de impunidad', interpreting this as a reservation prohibited according to Article 120 ICC Statute).

[242] See also Reisinger-Coracini, *GoJIL*, 2 (2010), 777; Schmalenbach, *JZ*, 65 (2010), 750 left column.

[243] One tricky issue is whether the Article 121(5)(2) sentence entails that an opt-out declaration is only effective if the respective State Party has accepted the amendment, against this view, see Schmalenbach, *JZ*, 65 (2010), 750 left column; for further problems see Reisinger-Coracini, *GoJIL*, 2 (2010), 768–9; see also Zimmermann, *JICJ*, 10 (2012), 220 ff.

[244] Also critical, see Clark, *GoJIL*, 2 (2010), 704–5: 'It would take some nerve to help make up the thirty and then opt out, but one should never underestimate the acrobatic ability of the diplomatic mind in construing the national interest!'; Clark, 'Alleged Aggression in Utopia', in Schabas et al., *Research Companion ICL* (2013), p. 76; Manson, *CLF*, 21 (2010), 426 ff.

[245] In more concrete terms, to invoke it as a victim of aggression but to exclude it as an aggressor state itself, see critical Manson, *CLF*, 21 (2010), 431.

[246] On these questions see also Heinsch, *GoJIL*, 2 (2010), 739.

[247] Also critical, see Clark, *GoJIL*, 2 (2010), 705 ('another example of a small but powerful minority protecting its own position in a consensus negotiation'); Reisinger-Coracini, *GoJIL*, 2 (2010), 788 ('a rule unprecedented in the Rome Statute'); in favour, see Heinsch, *GoJIL*, 2 (2010), 739–40.

[248] For this view, see Schmalenbach, *JZ*, 65 (2010), 749 right column; Reisinger-Coracini, *GoJIL*, 2 (2010), 779–81 who, however, on the other hand, considers para. 5 'to some extent' as 'symbolic'; Trahan, *ICLR*, 11 (2011), 91–2 ('intended to facilitate coalition building').

2, 3) and the absence of an opt-out declaration (para. 4). If all these conditions are fulfilled, the general rule of Article 12 applies, so that jurisdiction can be based on the principles of territoriality or nationality.[249] Thus, if, for example, State Party A attacks non-State Party B, the Court's jurisdiction could be based either on territoriality (Article 12(2)(a)) for the acts carried out on A's territory, or on nationality (Article 12(2)(b)) for the acts carried out on B's territory in as far as A's nationals participate in the aggression.

Clearly, the restrictions of paras. 4 and 5 refer only to state referrals and *proprio motu* proceedings, but not to Security Council referrals. The Security Council acts on the basis of its Chapter VII authority and thus may extend jurisdiction to non-States Parties once the amendment has entered into force (Article 15*ter* omitting Article 15*bis* (4) and (5)). Nothing different follows from Article 15*ter*(2), since the ratification of thirty States Parties is only a 'procedural hurdle' to the entry into force.[250] Also, quite remarkably, a Security Council referral is not predicated on a (explicit) Security Council determination of an act of aggression.[251]

A further controversial question, referring to both Article 15*bis* and *ter*, is whether, with the ratification of the thirty States Parties (para. 2) and the two-thirds majority decision to be taken after 1 January 2017 (para. 3 in connection with Article 121(3)), the new provisions will enter into force for *all* States Parties.[252] While this seems to fly in the face of Article 121(5) since this provision requires an entry into force *per* state ('for those State Parties that . . . '), it would give the opt-out clause of Article 15*bis*(4) its full effect, leaving it then in the hands of each State Party if it wants to be bound by the (new) crime of aggression.[253] This seems to be a reasonable interpretation. The apparent conflict with Article 121(5) could be resolved by interpreting Articles 15*bis/ter*(2) as a partial *lex specialis*, and *posterior* to Article 121(5) as to the number of ratifications required. In other words, Article 121(5) applies with a view to Articles 15*bis/ter*(2) (only) until thirty ratifications have been reached.

Taken together, the general conditions for the exercise of jurisdiction (Article 15*bis/ter*(2) and (3)) and the jurisdictional limitations only applicable to state referral and *proprio motu* investigations (Article 15*bis*(4) and (5)) lead to a situation which an experienced observer has aptly described as the 'patchy coverage' of the crime of aggression.[254] Indeed, while under the current jurisdictional regimes the Prosecutor must basically distinguish, except in case of a Security Council referral, between States and non-States Parties (Article 12), the new crime of aggression will make a more

[249] An 'Understanding 4' allowing for the application of Article 12(3) has finally been deleted (Manson, *CLF*, 21 (2010), 438 ff.) but the question remains as to how this possibility can be reconciled with Article 15*bis*(5) (see Stahn, *LJIL*, 23 (2010), 880).

[250] Clark, *GoJIL*, 2 (2010), 702–3; see also Reisinger-Coracini, *GoJIL*, 2 (2010), 785–6; Schmalenbach, *JZ*, 65 (2010), 751–2.

[251] See also Blokker and Kreß, *LJIL*, 23 (2010), 894.

[252] See Heinsch, *GoJIL*, 2 (2010), 737, 739; Reisinger-Coracini, *GoJIL*, 2 (2010), 770.

[253] Similarly Reisinger-Coracini, *GoJIL*, 2 (2010), 770.

[254] Scheffer, *LJIL*, 23 (2010), 904; concurring, Stahn, *LJIL*, 23 (2010), 879 ('highly fragmented'); Corredor C., *Agresión* (2012), p. 162 (referring to the different possible scenarios of ratification and non-ratification).

sophisticated analysis necessary to determine jurisdiction.[255] If the current regime and proliferation of international criminal courts makes the lives of interested observers, especially journalists, difficult, things will get much worse once the jurisdiction over the crime of aggression can be exercised. Apart from that the overall assessment is mixed. While the 'delayed' start for the jurisdiction is beneficial for both the States Parties and the Court in that it leaves enough time for them to prepare for the entry into force,[256] the jurisdictional exceptions constitute significant limitations which may undermine the Court's legitimacy, at least with regard to its treatment of the crime of aggression.[257]

D. Final Remarks

Given the effort spent on codifying the crime of aggression over many decades, the complex issues involved and the generally pessimistic expectations as to the actual implementation of Article 5(2),[258] the results achieved at Kampala can rightly be qualified as a success.[259] Of course, the drafters' heavy reliance on the historical precedents (Nuremberg, Tokyo, and Resolution 3314) and the ensuing unprincipled

[255] See also the chart on 'Jurisdictional scenarios' in SWGCA, February 2009 Report (February 2009—ICC-ASP/7/20/Add.1, Annex II), Appendix II, Non-paper on other substantive issues on aggression to be addressed by the Review Conference, reprinted in *Princeton* (2009), p. 65, para. 8.

[256] See Heinsch, *GoJIL*, 2 (2010), 737; Blokker and Kreß, *LJIL*, 23 (2010), 892 ('ample time to prepare').

[257] Also critical, see Reisinger-Coracini, *GoJIL*, 2 (2010), 787–8 ('highly regrettable and questionable'); Scheffer, *LJIL*, 23 (2010), 904 ('slap at the equality of states, or at least the theory of equality'); Corredor C., *Agresión* (2012), pp. 150 ff., 217 (speaking at p. 156 of a 'revés jurídico', i.e., a setback with a view to the activation of jurisdiction and, consequently, the crime of aggression); Milanovic, *JICJ*, 10 (2012), 181 ('short-lived'); less critical, Kaul, *GoJIL*, 2 (2010), 666 ('[t]he significance of these limitations should not be overestimated').

[258] See, for example, Zimmermann, 'Article 5', in Triffterer, *Commentary* (2008), mn. 39 ('quite unlikely that the Parties to the Statute will be able during the upcoming Review Conference to include the crime within the list of crimes'). For a different view, see May, *Aggression* (2008), pp. 228 ('defining aggression . . . is a manageable task and certainly should not cause the international community to shy away from prosecuting this important crime').

[259] In the same vein, see Blokker and Kreß, *LJIL*, 23 (2010), 889 ('historic achievement'); Kreß and von Holtzendorff, *JICJ*, 8 (2010), 1216 ('exceeds the expectations that one could have reasonably entertained'); *Kreß*, *GA*, 158 (2011), 94; Schabas, *Introduction* (2011), p. 146 ('singular achievement'); Schmalenbach, *JZ*, 65 (2010), 745 ('Wunder von Kampala' [miracle of Kampala]); 752 right column ('*Meilenstein*' [milestone]); Scheffer, *ASIL Insight*, 14 (2010), ('historic milestone'), <http://www.asil.org/files/insight100622pdf.pdf> accessed 1 April 2013; Kaul, *GoJIL*, 2 (2010), 666 ('a giant step forward'), but see also 665 ('the result is not revolutionary'); Reisinger-Coracini, *GoJIL*, 2 (2010), 748, 787 ('important step for international criminal justice', 'success'); Wenaweser, *LJIL*, 23 (2010), 887; Stahn, *LJIL*, 23 (2010), 880; Trahan, *ICLR*, 11 (2011), 93 ff. ('historic,' 'solid achievement'); Satzger, *Internationales Strafrecht* (2013), § 16 mn. 87 ('*Erfolg*' [success]); Satzger, *ICL* (2012), §14 mn. 87 ('success', 'successful compromise'); Gless, *Internationales Strafrecht* (2011), mn. 851 ('*Erfolg*' [success]); Barriga, 'Amendments', in Barriga and Kreß, *Travaux Préparatoires* (2012), p. 3 ('historic achievement'); Weigend, *JICJ*, 10 (2012), 57 ('breakthrough', 'giant step towards fulfilling the long dormant promise of Nuremberg'); O'Connel and Niyazmatov, *JICJ*, 10 (2012), 191 ('best political outcome under the circumstances'); Mancini, *NordJIL*, 81 (2012), 247 ('remarkable step forward'); Haumer and Marschner, *HuV-I*, 23 (2010), 196 ('nicht zu erwartenden Erfolg'). For a more critical view, see Scheffer, *LJIL*, 23 (2010), 903–4, especially regarding the fragmented liability landscape for aggression, resulting from the jurisdiction provisions ('patchy coverage'); Ferencz, *LJIL*, 23 (2010), 907 ('akin to a doctor putting a patient in a medically induced coma in order to save its life'); Manson, *CLF*, 21 (2010), 434 with additional criticism 442–3; Clark, 'Alleged Aggression in Utopia', in Schabas et al., *Research Companion ICL* (2013), p. 77 ('no agreement on what it [the amendments] means'); Corredor C., *Agresión* (2012), pp. 97 ff., 215 ff. (summarizing).

approach may give rise to the criticism that the result (establishing any crime of aggression) was more important than its contents,[260] but this would ignore the dynamics of diplomatic negotiations of this kind. In any case, only time will tell if this success will also, despite the flaws and inconsistencies in the final outcome, translate into an effective instrument to fight and ultimately reduce aggressive wars by means of classical criminal law deterrence.[261] The delegates' successful attempt to maintain the integrity of the Court and to reduce the interference of the Security Council to the unavoidable minimum, thereby preventing the politicization of the crime of aggression from the outset, gives reason to hope that the judges of the ICC will indeed, as stated by its current Vice-President, 'reject every attempt to politically exploit the Court'.[262]

[260] See Corredor C., *Agresión* (2012), p. 123 ('definición del crimen . . . más importante que el contenido . . . ').

[261] In this sense, see Corredor C., *Agresión* (2012), p. 99–100; for hypothetical scenarios see Trahan, *ICLR*, 11 (2011), 88–9; generally on deterrence in ICL, see Volume I of this treatise, pp. 69–70.

[262] Kaul, *GoJIL*, 2 (2010), 657 continuing: 'I might be proven wrong, but at the present stage I am convinced that the judges at our Court will be able to assess whether a crime against peace has been committed or not, just as the judges at Nuremberg have been in 1946.'

Chapter V
Treaty Crimes

*The full chapter bibliography can be downloaded from **http://ukcatalogue.oup.com/product/9780199665600.do.**

A. Introduction

Apart from the international core crimes authoritatively defined in the ICC Statute (Articles 5–8*bis*), there are a series of other crimes whose suppression is also of interest to the international community and which are the objects of multilateral treaties ('treaty-based') but for which no supranational criminal jurisdiction exists. While the former crimes constitute ICL *stricto sensu*, the latter crimes belong to the area of transnational criminal law.[1] This distinction is well accepted in scholarly writings,[2] notwithstanding some terminological differences.[3]

[1] See Kreß, 'International Criminal Law', in Wolfrum, *MPEPIL* (2008 ff.), mn. 15; Werle, *Principles* (2009), mn. 85; Cryer and Wilmshurst, 'Introduction', in Cryer et al., *Introduction* (2010), p. 4; Gaeta, 'International Criminalization', in Cassese, *Companion* (2009), pp. 65–6, 69–70; Cassese et al., *ICL* (2013), p. 21, extends this list to torture and international terrorism (the previous edition only included 'some extreme forms of international terrorism', Cassese, *ICL* (2008), p. 12). Kolb, 'Droit international pénal', in Kolb, *Droit international pénal* (2008), pp. 68–9, recognizes, in addition to the ICC core crimes, 'international crimes' because of their 'nature intrinsèque' distinguishing between public (state) and private (ordinary) crimes, yet he does not provide criteria for the delimitation of transnational crimes.

[2] cf. Kreß, 'International Criminal Law', in Wolfrum, *MPEPIL* (2008 ff.), mn. 2–14 (distinguishing four meanings of ICL, *inter alia* 'Transnational Criminal Law' and 'International Criminal Law stricto sensu'). Previously in 1950, Schwarzenberger, in a seminal paper, had made out six different types of crimes in ICL, see Schwarzenberger, *CLP*, 3 (1950), 263–74. On the concept and meaning of ICL, see also Ambos, *OJLS*, 33 (2013), 295–8.

[3] Kreß, 'International Criminal Law', in Wolfrum, *MPEPIL* (2008 ff.), mn. 6–14 (transnational and supranational international criminal law *stricto sensu*); Cryer and Wilmshurst, 'Introduction', in Cryer et al., *Introduction* (2010), pp. 1, 4–5 (transnational and international crimes); Gaeta, 'International Criminalization', in Cassese, *Companion* (2009), pp. 69–70 (international crimes proper and treaty-based crimes); Luban, 'Fairness to Rightness', in Besson and Tasioulas, *Philosophy of International Law* (2010), pp. 569, 572 (treaty-based transnational and pure international criminal law); Milanovic, *JICJ*, 9 (2011), 25, 28, with n. 7. See also Ambos, *LJIL*, 24 (2011), 667–70 and Volume I of this treatise, pp. 54–5. Bassiouni, *Introduction to ICL* (2013), pp. 144–5 lists twenty-seven different international crimes and classifies them according to the protected interest and the nature of the conduct (pp. 146–9; apparently departing from his earlier terminology—'International Crimes', 'International Delicts' and 'International Infractions'—employed in the first edition, Bassiouni, *Introduction to ICL* (2003), pp. 121–4). On ICL in a narrow and broad sense, see also Schröder, 'Verantwortlichkeit', in Vitzthum, *Völkerrecht* (2010), pp. 579–80; Pastor, *El poder penal internacional* (2006), pp. 80 ff.; Werle, *Völkerstrafrecht* (2012), mn. 122, 130.

(1) Conceptual remarks

Treaty-based crimes are established by special, so-called *suppression conventions*[4] such as the UN Torture Convention,[5] the Terrorist Bombing Convention,[6] and the UN Drugs Conventions.[7] There are over 200 of these conventions[8] all dealing with very specific aspects of criminal conduct with 'actual or potential transboundary effect'.[9] Many of these conventions were concluded in reaction to events current at the time.[10] Their aim is to strengthen the cooperation of states in the fight against conduct which is considered too complex to be dealt with exclusively on a domestic level.[11]

The relevant conventions do not contain autonomous crimes but only *oblige* the State Parties *to criminalize* the respective conduct under their domestic penal laws.[12] A failure of a State Party to comply with this obligation entails its responsibility under the rules of state responsibility.[13] If, on the other hand, a state has made the respective conduct punishable under its domestic law, that crime can then be prosecuted before its national courts providing it has jurisdiction.[14] In contrast, international crimes *stricto sensu* establish a proper individual criminal responsibility and are, therefore, directly binding on individuals.[15] As a consequence, offenders can be prosecuted by international criminal courts and tribunals, and states may prosecute these crimes under the concept of universal jurisdiction even if their penal laws do not criminalize the respective conduct.[16]

[4] See Ambos, *OJLS*, 33 (2013), 296.

[5] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res. 39/46 of 10 December 1984, 1465 *UNTS* 85 (CAT).

[6] International Convention for the Suppression of Terrorist Bombings, UN Doc. A/RES/52/164 (1997), 2149 *UNTS* 256 ('Terrorist Bombing Convention').

[7] Single Convention on Narcotic Drugs, 30 March 1961, 250 *UNTS* 151 ('Single Convention'); United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 20 December 1988, 1582 *UNTS* 95 ('Vienna Drug Convention').

[8] Bassiouni, *Introduction to ICL* (2013), pp. 143–6, lists 281 conventions that contain at least one of the ten penal characteristics that he identifies as a prerequisite for an international crime (list of the conventions at pp. 255–84).

[9] Wilmshurst, 'Transnational Crimes', in Cryer et al., *Introduction* (2010), p. 334.

[10] Kolb, 'Exercise of Criminal Jurisdiction', in Bianchi, *Enforcing International Law Norms* (2004), p. 229; Wilmshurst, 'Transnational Crimes', in Cryer et al., *Introduction* (2010), pp. 339–40 (on the various agreements concerned with terrorism); Boister, *Transnational Criminal Law* (2012), p. 275.

[11] Werle, *Völkerstrafrecht* (2012), mn. 124; Boister, *EJIL*, 14 (2003), 967.

[12] Boister, *EJIL*, 14 (2003), 962–3 (pointing out that 'it is strictly speaking a misnomer to speak of a treaty "crime"', 963).

[13] Boister, *Transnational Criminal Law* (2012), pp. 16–17.

[14] Wilmshurst, 'Transnational Crimes', in Cryer et al., *Introduction* (2010), pp. 335–6; Werle, *Völkerstrafrecht* (2012), mn. 122. Unless, under the given circumstances, the treaty-based crime also constitutes an international crime.

[15] See, for example, Article I of the Genocide Convention of 12 January 1951, 78 *UNTS* 277 ('crime under international law') as opposed to Article 4(1) CAT ('Each State Party . . . offences under its criminal law') or Article 5 International Convention for the Suppression of Acts of Nuclear Terrorism, 2445 *UNTS* 89 ('Nuclear Terrorism Convention') ('to establish as criminal offences under its national law'). See Werle, *Principles* (2009), mn. 84; Kreß, 'International Criminal Law', in Wolfrum, *MPEPIL* (2008 ff.), mn. 10; Cryer and Wilmshurst, 'Introduction', in Cryer et al., *Introduction* (2010), p. 8 (with reference to the seminal quote of the Nuremberg IMT judgment).

[16] See Ambos, *LJIL*, 24 (2011), 667–8 with further references in n. 96; Cryer, 'Drug Crimes', in Schabas and Bernaz, *Routledge Handbook ICL* (2011), pp. 181–2.

As to *jurisdiction* over transnational crimes—relevant with a view to the constitutive criteria to be explained later[17]—it is clear that every form of jurisdiction, except universal jurisdiction, requires a jurisdictional link to the crime. Interestingly, almost every convention prescribes the compulsory establishment of territorial jurisdiction, although this kind of jurisdiction is implicit in the criminalization of the respective crime at the domestic level and the sovereign exercise of criminal jurisdiction of the respective state over its territory.[18] Of course, territorial jurisdiction alone is not sufficient in cases of transnational criminality given that this criminality typically crosses borders. The extension of the jurisdictional link can happen in various ways, for example, through the nationality of perpetrator and victim, the place of planning and execution of the crime, and the impact of the crime. Hence, the suppression conventions provide for different optional principles of jurisdiction that states can choose to implement. As the establishment of these forms of jurisdiction is agreed upon in the respective conventions, other States Parties cannot claim that the exercise of jurisdiction would violate their sovereignty.[19]

Among these optional or voluntary principles of jurisdiction[20] are the active[21] and passive[22] nationality principle, the protective principle,[23] and the principle *aut dedere aut iudicare*[24] (subsidiary universality[25] or principle of representation[26]). The latter principle is of special importance in the context of treaty crimes. It obliges a state in whose territory an offender is present to either extradite the offender to a state with jurisdiction to prosecute the relevant crime, or to prosecute that offender in its own territory without requiring an additional jurisdictional link. Originally, the jurisdiction of the apprehending state depended on a denied extradition request by the state with a jurisdictional link to the crime. This is no longer the case. Supression conventions that follow the so-called Hague Model[27] do not require an extradition request and oblige the

[17] See subsection (3) of this section. [18] Boister, *Transnational Criminal Law* (2012), pp. 138–9.

[19] Boister, *Transnational Criminal Law* (2012), p. 248.

[20] On the various principles of jurisdiction, see Crawford, *Brownlie's Principles* (2012), pp. 456–71; Ambos, *Internationales Strafrecht* (2011), § 3 mn. 1–120.

[21] Article 42(2)(b) of the United Nations Convention against Corruption of 14 December 2005 (UNCAC), 2349 *UNTS* 41 and Article 15(2)(b) of the United Nations Convention Against Transnational Organized Crime of 15 November 2000 (UNTOC), 2225 *UNTS* 209.

[22] See, for example, Article 5(1)(d) of the International Convention against the Taking of Hostages of 17 December 1979, 1316 *UNTS* 206 ('Hostages Convention'); Article 15(2)(a) UNTOC; Article 42(2)(a) UNCAC.

[23] Article 4(1)(b)(ii) Vienna Drug Convention.

[24] Article 4, 6 Vienna Drug Convention; Article 16(10) UNTOC; Article 4(2) Convention for the Suppression of Unlawful Seizure of Aircraft of 16 December 1970 ('Hijacking Convention'), 860 *UNTS* 105. Article 5(2) of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 23 September 1971, 974 *UNTS* 178 ('Civil Aviation Convention'); Article 6(4) of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 10 March 1988, 1678 *UNTS* 222 ('Maritime Convention'); Article 6(4) of the International Convention for the Suppression of Terrorist Bombings, 15 December 1997, 2149 *UNTS* 256 ("Terrorist Bombing Convention').

[25] On this terminology with regard to the suppression conventions, see Boister, *EJIL*, 14 (2003), 964.

[26] cf. Feller, 'Jurisdiction over Offences with a Foreign Element', in Bassiouni and Nanda, *Treatise on ICL* (1973), pp. 34–7.

[27] See Article 7 Hijacking Convention: 'The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.'

apprehending state to prosecute in any case of non-extradition.[28] Delinking prosecution from the state with the original or primary jurisdictional link and transferring it to any apprehending state which does not extradite makes clear that the crimes of these conventions concern all states, and may therefore also be prosecuted by any of them. The various jurisdictional principles of the suppression conventions do not stand in a hierarchical order, but rather apply simultaneously. Concurrent jurisdiction of several states for one transnational crime is, therefore, quite likely. A normative hierarchy may be inferred, however, taking into account the legal recognition and strength of the different jurisdictional principles.[29] Thus, territorial jurisdiction, being an expression of state sovereignty and given its compulsory character in the suppression conventions, prevails over the other jurisdictional principles.[30]

During the negotiations regarding the ICC Statute, the possible inclusion of certain treaty-based crimes was discussed, namely drug trafficking and terrorism.[31] The ILC Draft Codes of 1991 and 1994 both contain provisions on treaty-based crimes,[32] however the 1996 Draft Code reduced the list of crimes to the ones now included in the ICC Statute (with an additional crime against UN personnel).[33] The attempt to include terrorism and drug trafficking in the ICC Statute failed because the States Parties could not agree on a definition of these crimes[34] and whether they were serious enough to be dealt with at the international level.[35] Furthermore, there was no consensus on how to deal with situations in which an affected state was not a party to the relevant treaty.[36] The *Kampala* Review Conference did not change this situation, although some states made a proposal to this end.[37] At the present, given the definitional problems and the actual workload of the ICC, it is highly unlikely that further crimes, save the crime of aggression (Article 8*bis*) analysed in the previous chapter, will be included in the ICC Statute in the near future.

This does not preclude, of course, that a treaty-based crime may amount to an international core crime, for example individual acts of torture or terrorism may

[28] Kreß, 'International Criminal Law', in Wolfrum, *MPEPIL* (2008 ff.), mn. 8; Ambos, *LJIL*, 24 (2011), 668–9.

[29] cf. Ambos, *Internationales Strafrecht* (2011), § 4 mn. 10 ff.; considering any hierarchy primarily a question of political negotiations and comity, however, Boister, *Transnational Criminal Law* (2012), pp. 152–3, 248–9.

[30] Boister, *Transnational Criminal Law* (2012), pp. 152–3 (with case law references), 248–9.

[31] cf. Resolution E annexed to the Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, UN Doc. A/CONF.183/10; De Londras, 'Terrorism', in Schabas and Bernaz, *Routledge Handbook ICL* (2011), pp. 177–8.

[32] Articles 24, 25 of the 1991 Draft Code of Crimes against the Peace and Security of Mankind, *YbILC,* ii/2, 94 (1991) and Article 20(e) of the 1994 Draft Statute for an International Criminal Court, *YbILC*, ii/2, 18 (1994).

[33] cf. 1996 Draft Code of Crimes against Peace and Security of Mankind, *YbILC*, ii/2, 15 (1996). See Boister, *EJIL*, 14 (2003), 961.

[34] Wilmshurst, 'Transnational Crimes', in Cryer et al., *Introduction* (2010), p. 349.

[35] Boister, *JArmConfL*, 3 (1998), 36–7; Zimmermann, 'Article 5', in Triffterer, *Commentary* (2008), mn. 5 (regarding drug trafficking).

[36] See Preparatory Committee on the Establishment of an International Criminal Court, Summary of the Proceedings of the Preparatory Committee during the period 25 March to 12 April 1996, UN Doc. A/AC.249/1 (1996), para. 63.

[37] Report of the Bureau on the Review Conference, ICC-ASP/8/43, paras. 15–22 (available at <http://icc-cpi.int/iccdocs/asp_docs/ASP8/ICC-ASP-8-43-ENG.pdf>) accessed 7 May 2013.

amount to war crimes or crimes against humanity if the additional threshold posed by the context element is reached.[38] Apart from that, a treaty-based crime may become a true international crime by way of customary international law.[39]

(2) Deficiencies of multilateral conventions

Suppression conventions are often criticized for their weak or totally lacking enforcement mechanisms.[40] In fact, they often lack supervision, and enforcement depends on the will of the States Parties to implement the respective offences.[41] A backdating of jurisdiction, that is, a prosecution of conduct prior to the creation of the respective national criminal offence, is not possible since the offences do not exist as an international core crime independent of the domestic implementation.[42] It is further argued that a uniform transformation of the provisions into domestic law is barely possible given the differences in the different domestic penal systems, especially as regards general rules, for example the modes of participation and sentencing.[43] It is also noted that transnational criminal law is slow and inflexible and often only reflects Western interests in extending criminalization to certain areas.[44]

Despite these deficiencies and the vast number of different suppression conventions easily creating confusion and ambiguities, it should be kept in mind that the international core crimes themselves started off with normative bases in multinational or regional treaties (e.g. the Genocide Convention, the Hague and Geneva Law) and only evolved into international core crimes over the years. The existence of a suppression convention must thus be understood not only as an expression of the willingness of states to cooperate with each other, but also as a normative recognition of the special significance of certain crimes—the objects of these conventions—which may, sooner or latter, emerge as new international (core) crimes. We will now turn to the criteria which may convert mere transnational offences into true international crimes.

(3) From transnational to international crimes *stricto sensu*: constitutive criteria

Transnational crimes may evolve into international crimes by way of customary law, that is, by an *opinio juris* with concordant state practice.[45] In analysing whether this applies to a given crime, one has to first determine the criteria that are constitutive for

[38] Ambos, *Internationales Strafrecht* (2011), § 7 mn. 275; Wilmshurst, 'Transnational Crimes', in Cryer et al., *Introduction* (2010), pp. 349–52, 357; Boister, *EJIL*, 14 (2003), 972.

[39] See for a discussion regarding terrorism, Ambos, *LJIL*, 24 (2011), 655 ff.

[40] Wilmshurst, 'Transnational Crimes', in Cryer et al., *Introduction* (2010), p. 336; Boister, *EJIL*, 14 (2003), 958.

[41] See *Boister, EJIL*, 14 (2003), 960.

[42] Cryer, 'Drug Crimes', in Schabas and Bernaz, *Routledge Handbook ICL* (2011), pp. 181–2.

[43] *Boister, EJIL*, 14 (2003), 958–9; de Londras, 'Terrorism', in Schabas and Bernaz, *Routledge Handbook ICL* (2011), p. 177.

[44] Boister, *Transnational Criminal Law* (2012), pp. 275, 278.

[45] cf. Article 38(1)(b) Statute of the International Court of Justice ('evidence of a general practice accepted as law'); see also Crawford, *Brownlie's Principles* (2012), pp. 23–7; Stein and von Buttlar, *Völkerrecht* (2012), mn. 122–36.

the transformation of an offence into an international crime *stricto sensu*. Although there is 'no commonly accepted definition' of the concept,[46] one may, from the previously mentioned characteristics of the international core crimes and the criteria developed in the *Tadić* jurisdictional decision,[47] deduce the following requirements that a true international crime must meet:

1. the respective underlying prohibition (primary norm) must be part of international law;[48]
2. a breach of this prohibition must be particularly serious, that is, it must affect important universal values;[49] and
3. the breach must entail individual criminal responsibility[50] in its own right, that is, independently of any criminalization in domestic criminal law.[51]

Accordingly, for any customary rule to constitute an international crime *stricto sensu*, there needs to be a prohibition of a certain conduct with a consented (unambiguous) definition at the international level (first criterion); a breach of this prohibition must entail a serious violation of universal values and produce a collective concern among the international community (second criterion); last but not least, the prohibition must have a direct binding effect on individuals, without state mediation, and it has to be prosecutable either by the ICC or, in a decentralized fashion, by states, independent of specific jurisdictional links (third criterion). The requirement of universal prosecutability, in addition to individual criminal responsibility, results from the fact that only the former allows for prosecution irrespective of national laws (and traditional jurisdictional links), and that this is the only way in which states can express their serious interest in the recognition of a certain conduct as a crime under ICL *stricto sensu*. When

[46] Einarsen, *Universal Crimes* (2012), p. 231. See for the few scholarly contributions addressing this issue Cassese et al., *ICL* (2013), p. 20 (four requirements); Werle, *Principles* (2009), mn. 84; Werle, *Völkerstrafrecht* (2012), mn. 87 (three requirements); too broad, Bassiouni, *Introduction to ICL* (2013), pp. 142–3 (five requirements, but omitting the actual criminal responsibility). See also, implicitly, Cryer and Wilmshurst, 'Introduction', in Cryer et al., *Introduction* (2010), pp. 4–6.

[47] *Prosecutor v Tadić*, No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 94: '(i) the violation must constitute an infringement of a rule of international humanitarian law; (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met; (iii) the violation must be "serious", that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim; (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.'

[48] Werle, *Principles* (2009), mn. 84; Cassese et al., *ICL* (2013), p. 20; Einarsen, *Universal Crimes* (2012), p. 236; on this question of internationalization see previously Ambos, *LJIL*, 24 (2011), 669–70.

[49] cf. Cassese et al., *ICL* (2013), p. 20 (elements 2 and 3); Bassiouni, *Introduction to ICL* (2013), pp. 142–3 (especially peace and security); Werle, *Principles* (2009), mn. 88–91; Kreß, 'International Criminal Law', in Wolfrum, *MPEPIL* (2008 ff.), mn. 10, 11; Cryer and Wilmshurst, 'Introduction', in Cryer et al., *Introduction* (2010), pp. 6–7; Wilmshurst, 'Transnational Crimes', in Cryer et al., *Introduction* (2010), p. 335; Gaeta, 'International Criminalization', in Cassese, *Companion* (2009), p. 66; Einarsen, *Universal Crimes* (2012), p. 236.

[50] Werle, *Principles* (2009), mn. 84; Kreß, 'International Criminal Law', in Wolfrum, *MPEPIL* (2008 ff.), mn. 10; Cryer and Wilmshurst, 'Introduction', in Cryer et al., *Introduction* (2010), p. 8.

[51] Werle, *Principles* (2009), mn. 84; Kreß, 'International Criminal Law', in Wolfrum, *MPEPIL* (2008 ff.), mn. 10; Gaeta, 'International Criminalization', in Cassese, *Companion* (2009), pp. 69–70; Einarsen, *Universal Crimes* (2012), p. 236.

considering whether an originally transnational crime has become an international crime these criteria should be applied carefully and in a strict manner. Concluding prematurely that the respective crime amounts to an international one entails the risk of violating the *nullum crimen* principle and thereby the human rights of the alleged perpetrator.[52] Let us now look at the specific crimes.

B. Terrorism

(1) Definition and current state of codification

The crime of terrorism takes on a special role among the treaty-based crimes. There is no transnational crime of terrorism as such, but rather a patchwork of multilateral treaties[53] aimed at suppressing certain terrorist activities (e.g. hijacking, hostage taking, attacks on diplomats, and bombings).[54] Efforts to draw up an international convention against terrorism date back to 1937 when the League of Nations negotiated the Convention for the Prevention and Punishment of Terrorism[55] which, however, never entered into force.[56] There were considerable efforts to codify a crime of terrorism in the 1970s when the UN GA set up an Ad Hoc Committee on International Terrorism.[57] However, in 1979 the Committee concluded that it was unable to agree on a definition of terrorism.[58] This general disagreement regarding a uniform definition led to the adoption of the multiple instruments mentioned earlier, which prohibit

[52] On the *nullum crimen* principle, see Volume I of this treatise, pp. 88–93.

[53] Kuschnik, *Gesamttatbestand* (2009), pp. 270–1 ('Flickwerk von multilateralen Verträgen').

[54] There is apparently no unanimous opinion on which conventions are true terrorist conventions. See de Londras, 'Terrorism', in Schabas and Bernaz, *Routledge Handbook ICL* (2011), p. 171 (listing twelve international treaties); Wilmshurst, 'Transnational Crimes', in Cryer et al., *Introduction* (2010), p. 339, n. 31 (referring to eleven global agreements that were concluded to fight terrorism by way of state cooperation); the UN lists '14 major legal instruments and additional amendments dealing with terrorism' <http://www.un.org/en/terrorism/instruments.shtml> accessed 19 August 2013.

[55] League of Nations, Convention for the Prevention and Punishment of Terrorism, *LNOJ*, 19 (1938). According to its Article 1(2): '"acts of terrorism" means criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public'. Article 2 imposed the duty to create penal provisions for the following acts, if they constituted acts of terrorism within the meaning of Article 1:

(1) Any wilful act causing death or grievous bodily harm or loss of liberty to:
  (a) Heads of States, persons exercising the prerogatives of the head of the State, their hereditary or designated successors;
  (b) The wives or husbands of the above-mentioned persons;
  (c) Persons charged with public functions or holding public positions when the act is directed against them in their public capacity.
(2) Wilful destruction of, or damage to, public property or property devoted to a public purpose belonging to or subject to the authority of another High Contracting Party.
(3) Any wilful act calculated to endanger the lives of members of the public.
(4) Any attempt to commit an offence falling within the foregoing provisions of the present article.
(5) The manufacture, obtaining, possession, or supplying of arms, ammunition, explosives or harmful substances with a view to the commission in any country whatsoever of an offence falling within the present article.

[56] For an in-depth analysis of the drafting history of the convention, see Saul, *JICJ*, 4 (2006), 79–88.

[57] A/RES/3034(XXVII) (18 December 1972).

[58] See Saul, *JICJ*, 4 (2006), 98–9; Wilmshurst, 'Transnational Crimes', in Cryer et al., *Introduction* (2010), p. 339.

specific terroristic conduct[59] but do not—except implicitly in the Terrorism Financing Convention[60]—contain a general definition of terrorism.[61] Nevertheless, all conventions do have a comparable structure with a common element, namely that the victims of the respective offences are to be hit randomly and arbitrarily—they 'just happened to be in the wrong place at the wrong time'.[62] Thus, ultimately, the victims are depersonalized (individual component).

The search for a comprehensive terrorism definition has, however, been more successful at other levels. The UN General Assembly included a definition in its 'Declaration on Measures to Eliminate International Terrorism' of 9 December 1994[63] and the Supplementary Declaration of 17 December 1996.[64] Both declarations define terrorism as '[i] criminal acts [ii] intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons [iii] for political purposes'.[65] Moreover, since 2000 there have been renewed efforts by a UN Ad Hoc Committee to draft a treaty on the crime of terrorism which is supposed to complement the existing suppression conventions by providing for a comprehensive definition.[66] The current agreement can be inferred from the current version of the UN

[59] Convention on Offences and Certain Other Acts Committed On Board Aircraft, 704 *UNTS* 220, 14 September 1963 ('Aircraft Convention'); Hijacking Convention; Civil Aviation Convention; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 23 September 1971, 1589 *UNTS* 474 ('Airport Protocol'); Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, 14 December 1973, 1035 *UNTS* 168 ('Diplomatic Agents Convention'); Convention on the Physical Protection of Nuclear Material, 26 October 1979, 1456 *UNTS* 125 ('Nuclear Materials Convention'); International Convention against the Taking of Hostages, 17 December 1979, 1316 *UNTS* 206 ('Hostages Convention'); Maritime Convention; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 24 February 1988, 1589 *UNTS* 474 ('Airport Protocol'); Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, 10 March 1988, 1678 *UNTS* 304 ('Fixed Platform Protocol'); Convention on the Marking of Plastic Explosives for the Purpose of Detection, 1 March 1991 ('Plastic Explosives Convention'); Terrorist Bombing Convention; International Convention for the Suppression of the Financing of Terrorism, UN Doc A/RES/54/109 (1999), 39 *ILM* 270 ('Terrorism Financing Convention'); International Convention for the Suppression of Acts of Nuclear Terrorism, UN Doc A/RES/59/290 (2005), 2445 *UNTS* 89 ('Nuclear Terrorism Convention'). All conventions can be found at <http://www.un.org/en/terrorism/instruments.shtml> accessed 19 August 2013.

[60] Article 2(1)(b) defines a terrorist act as: 'Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.'

[61] Saul, *LJIL*, 24 (2011), 686 ('but usually without mentioning the term "terrorism" and never defining a general treaty crime of "terrorism" as such'), 694 ('[i]t is well known that the sectoral approach was adopted precisely because states could not reach agreement on terrorism generally').

[62] cf. the introductory remarks to the website *UN Action to Counter Terrorism* (<http://www.un.org/en/terrorism/index.shtml> accessed 19 August 2013).

[63] UN GA Declaration on Measures to Eliminate International Terrorism, Annex to GA Resolution A/RES/49/60.

[64] UN GA Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism, Annex to GA Resolution A/Res/51/210.

[65] Numbering added.

[66] The committee has been established by the General Assembly by Resolution A/RES/51/210 (17 December 1996), para. 9. The Committee is open to all states members of the United Nations or members of specialized agencies or of the International Atomic Energy Agency.

Draft Comprehensive Terrorism Convention.[67] Accordingly, the *actus reus* of terrorism contains the unlawful causing of (1) death or serious bodily injury to any person; (2) serious damage to public or private property; or (3) damage to public or private property, resulting or likely to result in major economic loss. With regard to the *mens rea*, the terrorist acts have to be committed (1) intentionally, and additionally the perpetrator needs to have (2) a special intent directed at (a) intimidating a population or (b) compelling a government or an international organization to do or to abstain from doing any act.[68] As conduct prior to the actual commission of the crime, the attempt[69] and threat[70] of a terrorist act are declared to be prosecutable and punishable. Finally, the draft only covers transnational offences, excluding those limited to one state's territory.[71]

Despite the apparent consensus with regard to the offence definition, the work on the Draft Convention also indicates that there are still existing areas of disagreement, for example concerning the scope of application of such a convention.[72] Thus, it is highly controversial whether acts of armed forces or groups during armed conflict can ever be qualified as terrorist offences. Given the fact that IHL contains rules for terrorist acts in Articles 51(2) AP I and 13(2) AP II, that is, IHL deals with the situation of terrorist acts during armed conflict, it may well be argued that IHL supersedes the law of peacetime regarding terrorism during armed conflict.[73] This is also in line with

[67] Formally, the Committee works on the basis that nothing is agreed until everything is agreed. While this prevents the premature assumption of any definitions, the parts of the draft convention that were easily agreed upon indicate existing accordance between the states, whereas controversial aspects show the limits of consensus and, therefore, the possible limits of a common *opinio iuris*. Sceptical of whether a uniformly agreed upon definition can be achieved by this method, see Saul, *LJIL*, 24 (2011), 694.

[68] Article 2 Draft Comprehensive Convention (Measures to eliminate international terrorism, Report of the Working Group (3 November 2010), UN Doc. A/C.6/65/L.10, p. 6):

> 1. Any person commits an offence within the meaning of the present Convention if that person, by any means, unlawfully and intentionally, causes:
> – Death or serious bodily injury to any person; or
> – Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or to the environment; or
> – Damage to property, places, facilities or systems referred to in paragraph 1(b) of the present article resulting or likely to result in major economic loss,
>
> when the *purpose* of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act (emphasis added).

[69] cf. Article 2(3) Draft Comprehensive Convention: 'Any person also commits an offence if that person attempts to commit an offence as set forth in paragraph 1 of the present article.'

[70] cf. Article 2(2) Draft Comprehensive Convention: 'Any person also commits an offence if that person makes a credible and serious threat to commit an offence as set forth in paragraph 1 of the present article.'

[71] cf. Article 5 Draft Comprehensive Convention: 'The present convention shall not apply where the offence is committed within a single State, the alleged offender and the victims are nationals of that state, the alleged offender is found in the territory of that State and no other State has a basis [...] to exercise jurisdiction [...].'

[72] Regarding the lack of consensus, see also Zöller, *Terrorismusstrafrecht* (2009), p. 152.

[73] In this sense Coco, *JICJ*, 11 (2013), 433 ff. (criticizing the Court of Appeal of England and Wales which took the different view, that is, applied ordinary terrorism law with regard to a situation of armed conflict). See also the recommendations of the UN Ad Hoc Committee according to which (1) acts under international humanitarian law shall not be encompassed and (2) the objectives and principles of the UN Charter shall remain unaffected (cf. GA Report, A/C.6/65/L.10, 3 November 2010, pp. 17–19).

the general position regarding the relationship between IHL and general public international law defended in Chapter III, namely that IHL is *lex specialis* if it fully regulates the situation concerned.[74] Furthermore, there is no consensus with regard to acts of governmental armed forces in times of peace, especially in cases of 'state terror' against the civilian population.[75] Another controversial point is the treatment of liberation movements:[76] while some members of the Ad Hoc Committee consider freedom fighters as a legitimate expression of the exercise of the right of self-determination, others regard them to be the worst form of terrorism.[77] Given these disagreements it is hardly surprising that there is a broad consensus in scholarly writing that a uniform definition of terrorism is still missing.[78]

Contrary to the majority of legal scholars, the Special Tribunal for Lebanon (STL) Appeals Chamber came to the conclusion that an international crime of terrorism did exist under customary law.[79] According to the Chamber, there is 'a settled practice concerning the punishment of acts of terrorism' and 'this practice is evidence of a belief of States that the punishment of terrorism responds to a social necessity (*opinio necessitatis*) and is hence rendered obligatory by the existence of a rule requiring it (*opinio juris*)'.[80] Regarding the definition of 'terrorism', this rule would provide for three elements: (1) the perpetration or threatening of a criminal act, (2) the intent to spread fear among the population or coerce a national or international authority to take some action or to refrain from taking it, and (3) a transnational element as part of the act.[81] To support its findings the Chamber relied on Resolutions of the General

[74] cf. Chapter III, A. (4)(c)(v).

[75] Pursuant to the recommendations of the UN Ad Hoc Committee, acts of governmental forces are not encompassed, if they are subject to other (particularly national) rules (cf. GA Report, A/C.6/65/L.10, 3 November 2010, pp. 17, 19).

[76] cf. Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996 (A/66/37) (2011), pp. 7–9 paras. 10–20.

[77] cf. Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996 (A/65/37) (2010), p. 5 para. 3; as well as (A/66/37) (2011), p. 5 para. 3.

[78] See, for example, Saul, *Defining Terrorism* (2008), p. 270; Barnidge, 'Terrorism', in Glennon, *Terrorisme et droit international* (2008), pp. 192–3; Williamson, *Terrorism, War, and International Law* (2009), p. 49; Wilmshurst, 'Transnational Crimes', in Cryer et al., *Introduction* (2010), pp. 342–4; de Londras, 'Terrorism as an international crime', in Schabas and Bernaz, *Routledge Handbook ICL* (2011), pp. 169–70; Werle, *Völkerstrafrecht* (2012), mn. 127; David, *Éléments* (2009), pp. 1100–1 (mn. 15.4.1–15.4.2.); Kolb, 'Exercise of Criminal Jurisdiction', in Bianchi, *Enforcing International Law Norms* (2004), pp. 227–32; Zimmermann, 'Article 5', in Triffterer, *Commentary* (2008), mn. 3; Kirsch and Oehmichen, *ZIS*, 10 (2011), 803–5; Kirsch and Oehmichen, *Durham Law Review Online*, 1 (2011), 7–13. For a different view, seeming to believe that such a definition exists, see Young, *BCInt'l&CompLRev*, 29 (2006), 64–6; Cassese et al., *ICL* (2013), pp. 146–52; Cassese, *JICJ*, 4 (2006), 938–41. For a discussion, see also Weigend, *JICJ*, 4 (2006), 912–32.

[79] STL Appeals Chamber, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, No. STL-11-01/I/AC/R176bis, para. 42, 85, 102 (16 February 2011). For a critical analysis of the decision regarding its findings on terrorism, see Saul, *LJIL*, 24 (2011), 677–700; Saul, 'The Special Tribunal for Lebanon and Terrorism as an International Crime: Reflections on the Judicial Function', in Schabas et al., eds., *Research Companion ICL* (2013), pp. 79–80, 84 ff. (arguing, *inter alia*, that the Appeals Chamber exceeded its judicial function and imposed retrospective criminal liability); Ambos, *LJIL*, 24 (2011), 655–75; Kirsch and Oehmichen, *Durham Law Review Online*, 1 (2011), 1–20; Werle, *Völkerstrafrecht* (2012), mn. 126–8.

[80] Interlocutory Decision, No.STL-11-01/I/AC/R176bis, para. 102.

[81] Interlocutory Decision, No.STL-11-01/I/AC/R176bis, paras. 85, 111.

Assembly and the Security Council and the widespread criminalization of terrorism in domestic criminal law.[82] Despite convincing criticism of the Chamber's line of reasoning and its concrete findings,[83] including by this author,[84] one cannot disagree with the fact that a core or *basic* definition of terrorism has emerged in international law. Taking together the different sources providing for elements of such a definition of terrorism, a working definition may in essence run as follows:[85] terrorism requires the commission of any criminal act, which causes death or bodily injury to any person, or severe damage to public or private property; an additional transnational element, consisting of the involvement of at least two countries in terms of territory or perpetrators/victims, may exist. On the subjective side, a general intent is required and, in addition, a special intent, directed at spreading fear, intimidating a population or coercing an entity to do or abstain from doing any act. Of course, such vague and ambiguous terms like 'any criminal act', 'spreading fear', and 'political purpose' raise concerns with regard to the *lex certa* requirement of the principle of legality. While the requirement of a political purpose is not included in the Draft Convention, it seems to better account for the complex phenomenology of terrorism and helps to restrict the otherwise broad definition of terrorism.[86] On the other hand, one must not overlook that the classification of a purpose as political or private has proven to be difficult in other contexts.[87] In any case, the suggested definition can be considered as settled and accepted as a common *opinio juris* for times of peace. It can therefore be concluded that a generally agreed prohibition of terrorism exists in international law.

(2) Legal interests protected

As demonstrated by the preambles of several suppression conventions[88] and various Security Council resolutions declaring acts of terrorism a threat against peace and security,[89] terrorism is unanimously accepted as a threat to important universal values. In the same vein, the preamble of the Draft Convention states that terrorist acts are considered 'a threat to international peace and security, jeopardize friendly relations among States, hinder international cooperation and aim at the undermining of human rights, fundamental freedoms and the democratic bases of society'. Thus, concretely speaking, collective and individual legal interests—peace and security *versus* life, bodily integrity, freedom—are protected.

[82] Interlocutory Decision, No.STL-11-01/I/AC/R176*bis*, para. 104.

[83] cf. Saul, *LJIL*, 24 (2011), 677–700; Kirsch and Oehmichen, *Durham Law Review Online*, 1 (2011), 1–20; Werle, *Völkerstrafrecht* (2012), mn. 126–8.

[84] Ambos, *LJIL*, 24 (2011), 655–75.

[85] For the elements of a potentially emerging international crime of terrorism, see Ambos, *LJIL*, 24 (2011), 671–4.

[86] Cancio Meliá, *GA*, 159 (2012), 12–13; see also Zöller, *Terrorismusstrafrecht* (2009), p. 146.

[87] Piracy requires the perpetrator to pursue private ends, which is sometimes regarded as the distinguishing aspect between piracy and terrorism. See Section D. (1).

[88] See, for example, preamble of the Nuclear Terrorism Convention; preamble of the Hostages Convention; preamble of the Hijacking Convention.

[89] See, for example, S/RES/748 (1992); S/RES/1368 (2001); S/RES/1566 (2004).

(3) Individual responsibility and international prosecutability

Given the fact that terrorism has not been included in the ICC Statute, it can only be prosecuted universally, that is, without the requirement of a jurisdictional link, if the relevant treaties or customary international law provide so. The relevant suppression conventions adhere, as has already been seen, to traditional jurisdictional principles and the principle of *aut dedere aut iudicare*.[90] The General Assembly Declaration of 1994 focuses predominantly on cooperation between states in respect of exchanging information regarding terrorist activities and implementing relevant international laws into national laws,[91] while the 1996 Declaration suggests the *aut dedere aut iudicare* principle.[92] Consequently, one may identify a trend towards broadening states' rights to prosecute terrorist acts and an increased interest in an effective transnational criminal law against terrorism, but this does not change the conservative approach with regard to the jurisdictional requirements. In fact, the 1996 Declaration confirms the principle of territorial sovereignty,[93] thereby making clear that universal jurisdiction and prosecution, independent of any territorial link, is not intended.

The UN Comprehensive Draft Convention provides for individual criminal responsibility—it stipulates the criminalization of perpetration and complicity,[94] as well as organizing or directing others to commit the offence.[95] However, it does not envisage universal jurisdiction. Quite the contrary, it only lists the traditional jurisdictional links,[96] and even explicitly excludes extraterritorial jurisdiction,[97] accepting only the *aut dedere aut iudicare* principle.[98] In any case, the Draft Convention emphasizes territorial sovereignty and the principle of non-intervention.[99] This shows that there is at present no intention nor a general *opinio juris* to make terrorism universally prosecutable.

[90] cf. *inter alia*, Article 4(2) Hijacking Convention; Article 5(2) Civil Aviation Convention; Article 6(4) Maritime Convention; Article 6(4) Terrorist Bombing Convention.

[91] UN GA Declaration on Measures to Eliminate International Terrorism, Annex to GA Resolution A/RES/49/60, paras. 6–8.

[92] UN GA Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism, Annex to GA Resolution A/Res/51/210, para. 5.

[93] UN GA Declaration to Supplement the 1994 Declaration, para. 6.

[94] cf. Article 2(4)(a) UN GA Declaration to Supplement the 1994 Declaration: 'Any person also commits an offence if that person: (a) Participates as an accomplice in an offence as set forth in paragraph 1, 2 or 3 of the present article.'

[95] cf. Article 2(4)(b) UN GA Declaration to Supplement the 1994 Declaration: 'Organizes or directs others to commit an offence as set forth in paragraph 1, 2 or 3 of the present article.'

[96] Article 8 UN GA Declaration to Supplement the 1994 Declaration: obligatory jurisdictional links: territoriality, flag-principle, nationality; facultative links: protective principle.

[97] Article 22 UN GA Declaration to Supplement the 1994 Declaration: 'Nothing in the present Convention entitles a State Party to undertake in the territory of another State Party the exercise of jurisdiction . . . '

[98] cf. Article 8(4), Article 13(1) UN GA Declaration to Supplement the 1994 Declaration.

[99] Article 21 UN GA Declaration to Supplement the 1994 Declaration: 'States Parties shall carry out their obligations . . . in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention . . . '

(4) Conclusion

Given that there does not yet exist a comprehensive convention on the subject, terrorism is at present neither an ordinary transnational, treaty-based offence nor an international crime proper; at best, it is on the verge of becoming a true international crime. This is also confirmed by the special treatment of terrorism by the UN Security Council and the General Assembly, which in any case makes clear that terrorism is a 'special' transnational offence that may come closer to a true international crime than 'ordinary' transnational offences. Also, extreme forms of terrorism may amount to war crimes or crimes against humanity and thus be directly punishable under international law.[100]

A final noteworthy point is that because terrorist offences are typically committed by non-state (i.e. private) actors, their international criminalization would entail a qualitative shift from the hitherto international criminalization of 'crimes of state' to crimes of private individuals. This entails 'a third generational step', moving ICL 'into the area of transnational conflicts between states and destructive private organisations'.[101] The consequences of such a move deserve careful consideration. It highlights that the phenomenon of terrorism must be understood, as persuasively argued by Cancio,[102] taking into account two aspects: on the one hand, it presupposes the existence of a well-organized group, and, on the other, it always constitutes the pursuit of a policy to communicate an extensive threat to peace and security.[103] The term 'terrorism' implies the evocation of a constant state of fear in the population, especially through the incalculability and unpredictability of terrorist acts. This is captured quite accurately by the idea of the communication of a serious threat. The existence of a communication structure, in the sense of an ongoing massive threat, could also make up for the context element of terrorism, which is essential for international crimes. Only a well-organized group can communicate such a state of permanent threat in a credible way.

C. Drug Trafficking

(1) Definition

In 1989, Trinidad and Tobago with the support of other Caribbean states proposed the creation of an international criminal court. This proposal was motivated by the desire to create an international body which would be able to prosecute 'illicit trafficking in

[100] cf. Ambos, *Internationales Strafrecht* (2011), § 7, mn. 275, with further references; see also Wilmshurst, 'Transnational Crimes', in Cryer et al., *Introduction* (2010), pp. 349–52; Cassese et al., *ICL* (2013), pp. 153–8; critical, see Kreß, 'International Criminal Law', in Wolfrum, *MPEPIL* (2008 ff.), mn. 37.

[101] See Kreß, 'International Criminal Law', in Wolfrum, *MPEPIL* (2008 ff.), mn. 37, who sees the first generation of ICL as 'inextricably linked to the existence of a war' (mn. 23), and the second generation as embodying the criminalization of serious violations in non-international armed conflict (mn. 25), as brought about by the *Tadić* jurisdictional decision (No. IT-94-1-AR72) and completed by the codification of aggression (mn. 37). On the three stages of the development of ICL, see Ambos, *Internationales Strafrecht* (2011), § 6 mn. 1–10.

[102] Cancio Meliá, *GA*, 159 (2012), 8–12.

[103] In this vein, see also Zöller, *Terrorismusstrafrecht* (2009), p. 160.

narcotic drugs across national frontiers'.[104] The proposal led to the initiation of a drafting process within the ILC[105] and, indeed, the Draft Code 1991 contained a drug trafficking offence.[106] However, neither the Draft Code 1996 nor the ICC Statute included a drug trafficking offence. As a consequence, at the international level the fight against transnational drug trafficking finds its normative basis exclusively in the three major multilateral conventions, namely the Single Convention of 1961, the Convention on Psychotropic Substances of 1971,[107] and the Vienna Drug Convention of 1988.[108]

These conventions pursue a control approach by listing certain potentially harmful substances and distinguishing between the licit (e.g. for medical and scientific purposes) and the illicit use and supply of these substances.[109] With regard to illicit conduct, the conventions oblige the States Parties to create criminal offences that penalize every intentional conduct from the cultivation to the distribution of illicit substances.[110] In addition to providing for penal provisions, the States Parties 'shall give special attention to and take all practicable measures for the prevention of abuse of drugs and for the early identification, treatment, education, after-care, rehabilitation and social reintegration of the persons involved and shall co-ordinate their efforts to these ends'.[111] It is also possible for the states to impose measures like treatment and rehabilitation instead of conviction and punishment if the offender is himself a substance (ab)user.[112] Given the shortcomings of the 1961 and 1971 Conventions and the persisting increase of drug offences, the Vienna Convention was adopted in 1988 to complement and supplement the previous instruments.[113] It provides for a more detailed normative framework covering, *inter alia*, modes of participation, aggravating factors, offences related to money laundering, confiscation of proceeds, and provisions on extradition and mutual legal assistance.[114]

[104] See the records of the meetings of the 6th Committee UNGAOR 6th Committee 44th Session, UN Doc. A/C.6/44/SR.38–41 (1989).

[105] Boister, *JArmConfL*, 3 (1998), 27.

[106] cf. Article 25 Draft Code of Crimes against the Peace and Security of Mankind (Draft Code 1991), UN Doc. A/CN.4/L.459 (1991) ('Illicit traffic in narcotic drugs').

[107] Convention on Psychotropic Substances of 21 February 1971, 1019 *UNTS* 175.

[108] On the origins of the international drug prohibition, see Boister, *Transnational Criminal Law* (2012), pp. 51–2.

[109] Cryer, 'Drug Crimes', in Schabas and Bernaz, *Routledge Handbook ICL* (2011), pp. 182–3.

[110] Article 36(1)(a) of the Single Convention lists 'cultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation of drugs contrary to the provisions of this Convention, and any other action which in the opinion of such Party may be contrary to the provisions of this Convention' as punishable offences. In a similar vein, see Article 3 of the Vienna Drug Convention.

[111] Article 38(1) Single Convention; cf. Article 20 Convention on Psychotropic Substances and Article 14(4) Vienna Drug Convention. See also Bantekas and Nash, *International Criminal Law* (2007), pp. 242–4.

[112] Article 36(1)(b) Single Convention; Article 3(4)(c) and (d) Vienna Drug Convention.

[113] Cryer, 'Drug Crimes', in Schabas and Bernaz, *Routledge Handbook ICL* (2011), pp 184–5; Boister, *Transnational Criminal Law* (2012), p. 52.

[114] See the very detailed Articles 3, 5, 6, 7 Vienna Drug Convention; see also Cryer, 'Drug Crimes', in Schabas and Bernaz, *Routledge Handbook ICL* (2011), pp. 184–7; Boister, *Transnational Criminal Law* (2012), pp. 58–60.

(2) Legal interests protected

The main concern of the conventions is, as expressed in their preambles, the threat posed by the illicit use of drugs to the health of the individual user and its social and economic effects on society as a whole. There is, of course, a great deal of hypocrisy in the international discourse on the fight against drugs given that other harmful substances, in particular alcohol and nicotine, are not only commercialized freely in Western societies but also constitute an important source of tax income for the respective states. Apart from that, there are heavy secondary effects of (international) drug prohibition in terms of the overcriminalization of drug users (having to finance their acquisition of overpriced drugs by mainly property crime) and the militarization of the so-called 'war on drugs' in producer countries in Latin America or Asia, often ignoring the historical and cultural roots of drug use in these societies (think, for example, of the history and tradition of the coca plant in the Andean region).[115] Considering drug trafficking as a mere crime against public health and social interests overlooks these political, ideological, and cultural dimensions of the international policy of prohibition and criminalization.[116]

In any case, the focus of the here-relevant international instruments lies on the transboundary dimension of drug trafficking which forces states to closely cooperate in their fight against international trafficking networks. Against this background, it is not surprising that the preamble of the Vienna Drug Convention extends the list of protected legal interests to the 'stability, security and sovereignty of States'[117] endangered by the drug-related activities of criminal organizations and the financial profits generated, enabling them 'to penetrate, contaminate and corrupt the structures of government, legitimate commercial and financial business, and society at all its levels'.[118] As these interests are not confined to the territorial boundaries of a nation

[115] The discussion here draws on my doctoral study on drug control in Colombia, Peru, and Bolivia, cf. Ambos, *Drogenkontrolle* (1993), especially pp. 1–27, 146–63, 407–12; for an updated and abbreviated Spanish version, see Ambos, *Control de Drogas* (1998) and for an English version, see Ambos, *Crime, Law & Social Change*, 26 (1997), 125 ff. For a more recent critical account on the international prohibition, see for example Room and Reuter, *The Lancet*, 379 (2012), 84 ff. (arguing that, on the one hand, the 'system has failed to achieve its original goals of elimination of illicit markets and the non-medical use of controlled drugs' [88] and, on the other, 'severely restrict[s] the ability of national governments to experiment with alternative drug control systems by requiring all signatories to criminalise non-medical drug use' [86]); see also Thoumi, *Trends in Organized Crime*, 13 (2010), 75 ff. (arguing, at 80, that the Conventions establish 'a straight jacket that limits the autonomy of any country in managing drug policy'); in a similar vein Report of the Global Commission on Drug Policy, 'War on Drugs' (2011), available at <http://www.globalcommissionondrugs.org/reports> (arguing, *inter alia*, that governments which wanted to pursue 'a more tolerant approach to drug use . . . have faced international diplomatic pressure to "protect the integrity of the Conventions", even when the policy is legal, successful and supported in the country' [p. 8], and that 'the evidence overwhelmingly demonstrates that repressive strategies will not solve the drug problem, and that the war on drugs has not, and cannot, be won' [p. 10]).

[116] In this vein, however, see Bassiouni, *Introduction to ICL* (2013), p. 212, listing drug trafficking as a crime against social and cultural interests and attributing the efficient international collaboration to the fact that 'this type of conduct has no ideological or political dimension'.

[117] Para. 3 of the Preamble of the Vienna Drug Convention.

[118] Para. 5 of the Preamble of the Vienna Drug Convention. The United Nations Office on Drugs and Crime (UNODC) estimates that in 2009 the proceeds from drugs represented one-fifth of global criminal proceeds, UNODC, *World Drug Report* (2012), p. 67.

state, but rather, quite to the contrary, include the fact that the transnational drug trade affects regional or even global stability and security, the respective instruments also protect universal values.

(3) Individual responsibility and international prosecutability

The 1961 and 1971 Conventions oblige the States Parties to establish territorial jurisdiction over the listed offences.[119] Additionally, they provide for the principle of *aut dedere aut iudicare*, 'if extradition is not acceptable in conformity with the law of the Party to which application is made'.[120] The Vienna Drug Convention further imposes the duty on a State Party to establish jurisdiction over crimes committed 'on board of a vessel flying its flag or an aircraft which is registered under its laws at the time the offence is committed'.[121] Additionally, it provides for permissive jurisdiction under the principle of active personality.[122] Jurisdiction according to the principle of *aut dedere aut iudicare* is compulsory if the extradition fails because the offence has been committed on the territory of the apprehending state or on board of a vessel or aircraft flying under this state's flag (i.e., the state itself has jurisdiction for other reasons);[123] jurisdiction is permissive if the State Party does not not extradite the offender for other reasons.[124] Article 2(2) Vienna Convention emphasizes that the States Parties, in carrying out their obligations under the Convention, should respect the principles of sovereign equality, territorial integrity and non-intervention. Moreover, Article 2(3) explicitly prohibits the exercise of extraterritorial jurisdiction, thereby making it plain that the offences under the Convention shall not be subjected to universal prosecution. Thus, notwithstanding the rhetoric of a united fight against illicit drug trafficking, state sovereignty still prevails in this area of transnational criminal law.[125]

(4) Conclusion

Although the relevant suppression conventions list a plethora of prohibited conduct, this does not entail a universal duty to prosecute these offences. The fact that the penal provisions of the 1961 Single Convention and the 1971 Convention on Psychotropic Substances are subject to the constitutional *ordre public* of the States Parties confirms that there is no international consensus regarding a duty to prosecute.[126] Apart from

[119] Article 36(2)(a)(iv) Single Convention and the identical Article 22(2)(iv) Convention on Psychotropic Substances (though both provisions are made '[s]ubject to the constitutional limitations of a Party, its legal system and domestic law').

[120] Article 36(2)(a)(iv) Single Convention and Article 22(2)(iv) Convention on Psychotropic Substances.

[121] Article 4(1)(a)(ii) Vienna Drug Convention.

[122] Article 4(1)(b)(i) Vienna Drug Convention.

[123] Article 4(2)(a)(i) and (ii) Vienna Drug Convention; as the apprehending state has jurisdiction itself, this is not a real case of the *aut dedere aut iudicare* principle.

[124] Article 4(2)(b) Vienna Drug Convention.

[125] Crit. also Cryer, 'Drug Crimes', in Schabas and Bernaz, *Routledge Handbook ICL* (2011), p. 187 (explaining this fact with, *inter alia*, the desire of powerful states to further dominate the drug treaty regime).

[126] Article 36 Single Convention and Article 22 Convention on Psychotropic Substances.

that, there is a more fundamental problem which has to do with the problems of prohibition already mentioned, that is, there is no 'sufficiently broad cosmopolitan moral consensus in regard to the harmfulness of drugs or a sufficiently broad international consensus with regard to the threat of drug trafficking to international peace and security'.[127] In this context it is also disputable whether the severe consequences of drug trafficking, including drug-related secondary offences (e.g. money laundering, corruption, trafficking in arms or human beings),[128] are rather aggravated by (over)criminalization and may be better dealt with by taking alternative, non-punitive approaches.[129]

D. Piracy

(1) Definition

Piracy is the oldest international crime. It was regarded as far back as the era of the Roman Empire as a private war, a private campaign of pillaging which was not only aimed at the direct victims but likewise against all nations.[130] Thus, the criminalization of piracy enjoys broad acceptance in the international community.[131] The present understanding of piracy can be found in Article 15 of the Convention on the High Sea of 1958[132] and with the same wording in Article 101 of the United Nations Convention on the Law of the Sea (UNCLOS).[133] The UNCLOS is regarded as an expression of the current state of customary law.[134] As a result, this definition is also binding for non-state members of the convention which do not persistently object to it.[135] Accordingly, piracy consists of:

> . . . any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed . . . on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft . . .

According to this definition, the *actus reus* of piracy consists of (1) an illegal act of violence, (2) on the high seas, (3) by persons onboard of a private sea vessel or aircraft, (4) against another sea vessel or aircraft. The *mens rea* consists of a general intent, and additionally the pursuit of private ends (e.g. striving for personal gain). According to

[127] Boister, *EJIL*, 14 (2003), 973, referencing the Preparatory Committee on the Establishment of an International Criminal Court, 'Summary of the Proceedings of the Preparatory Committee during the Period 25 March–12 April 1996', UN Doc. A/AC.249/1, paras. 71–2 in n. 102. See also Boister, *JArmConfL*, 3 (1998), 31, 35.

[128] cf. Rao, *Law and Policy on Drug Trafficking* (2003), p. 55.

[129] Regarding alternative methods (e.g. decriminalization) cf. Ambos, *Drogenkontrolle* (1993), pp. 413 ff.; Ambos, *Control de Drogas* (1998), pp. 154 ff.; Ambos, *Crime, Law & Social Change*, 26 (1997), 145 ff.; more recently, see Boister, *Transnational Criminal Law* (2012), p. 61.

[130] Merkel, 'Universale Jurisdiktion', in Lüderssen, *Aufgeklärte Kriminalpolitik*, iii (1998), p. 253; Neubacher, *Kriminologische Grundlagen* (2005), p. 111.

[131] Bantekas and Nash, *International Criminal Law* (2007), p. 176; König et al., *PiraT* (2011), 13.

[132] 450 *UNTS* 11. [133] 1833 *UNTS* 396.

[134] Shearer, 'Piracy', in Wolfrum, *MPEPIL* (2008 ff.), mn. 13; Gardner, *JICJ*, 10 (2012), 815.

[135] On the persistent objector with regard to a customary rule of international law cf. Crawford, *Brownlie's Principles* (2012), p. 28; Boyle and Chinkin, *International* Law (2007) p. 225–7, 234–5.

which law is the *illegality* of the act to be determined? Given that piracy has always been an international crime enforced at the domestic level, the exact definition of 'illegal' can also be found in national law, but varies in different jurisdictions.[136] In any case, the element has to be understood broadly so that prosecution by any state does not fail because of the absence of an illegal act.[137]

An act committed on the *high seas* includes acts in the exclusive economic zone (Article 58(2) UNCLOS), that is, the coastal state's exclusive or primary jurisdiction is limited to its territorial waters.[138] The act has to be committed from a *private* sea vessel. Acts committed from (national) war vessels are only included if the vessel has been taken illegally by the crew (cf. Article 102 UNCLOS). Finally, the act has to be directed against *another* sea vessel. The attacked ship may be a national vessel. Persons already onboard the attacked ship are not considered to form part of the attack since the offence definition strictly distinguishes between the attacking and attacked ship including the respective crews, that is, it requires an attack from one ship (including the crew) against the other ship.[139] The ensuing legal loopholes (especially with regard to aircraft hijacking) have been partly closed by further conventions.[140]

The most controversial element of the piracy definition is the subjective requirement of a *pursuit of private ends*. Some authors consider this to be the crucial criterion by which piracy may be distinguished from terrorism (on the high seas or onboard aircrafts), since terrorism is characterized by the pursuit of political ends.[141] However, this distinction may lead to unexpected or even undesired results since it is not clear-cut. Take the judgment of the Belgium Court of Cassation in the case *Castle John v NV*

[136] Bantekas and Nash, *International Criminal Law* (2007), p. 176; Guilfoyle, *Treaty Jurisdiction* (2009), p. 3 mn. 10.

[137] An indication as to what constitutes an illegal act of piracy can be found in Article 3(1) of the Maritime Convention:

> 1. Any person commits an offence if that person unlawfully and intentionally:
> (a) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or
> (b) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or
> (c) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or
> (d) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or
> (e) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or
> (f) communicates information which he knows to be false, thereby endangering the safe navigation of a ship; or
> (g) injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (f).

[138] For an explanation of the different seazones with regard to criminal jurisdiction, cf. Ambos, *Internationales Strafrecht* (2011), § 3 mn. 16–18.

[139] Accordingly, cases in which the perpetrator pretends to be a passenger in order to forcibly gain control over the ship or aircraft are not included, cf. also Shearer, 'Piracy', in Wolfrum, *MPEPIL* (2008 ff.), mn. 13.

[140] With regard to aircraft hijacking, see especially: Aircraft Convention; Hijacking Convention; Civil Aviation Convention. With regard to sea piracy, see: Maritime Convention.

[141] König et al., *PiraT* (2011), 23; Guilfoyle, *Treaty Jurisdiction* (2009), p. 3 mn. 11.

Mabeco where the attack of a Greenpeace ship against a Dutch vessel, motivated by alleged environmental pollution, was qualified as a pursuit of private instead of political ends[142]—as if Greenpeace would act for purely private reasons like a criminal gang! The proposed replacement of 'political' by 'public/governmental'[143] would make matters worse, since it would entail the criminalization of any private act of protest (like the Greenpeace attack) as piracy given that it is carried out by 'private' actors (i.e. not 'public/governmental' actors), and assuming that these private actors only pursue private ends. In other words, such a definition would be too state-oriented, and would, perhaps, put on an equal footing legitimate social protest by a recognized civil society actor and criminal piracy *à la* Somalia.

(2) Legal interests protected

Pirates have always been considered as '*hostes humani generis*' (enemies of mankind) since they are motivated by their selfish needs and desires and not their loyalty or allegiance to a state, thus posing a threat to all maritime nations.[144] Piracy includes acts against property, and acts of violence and detention which are particularly difficult to prosecute because of their *locus delicti* on the high seas (or international airspace). Primarily, classical legal interests such as life, liberty, physical condition, and property are protected, which do not per se have any international relevance. On top of those interests, however, the safety and efficiency of international air and shipping traffic, as well as international trade, are also protected, turning piracy into an international crime par excellence.[145] Nowadays, pirates act in well-organized groups,[146] and extorted more than US$80 million in ransom in 2008 alone.[147]

(3) Individual responsibility and international prosecutability

Given their status as *hostes humani generis*, pirates can at all times be prosecuted by any state, even if it was not directly affected by the act of piracy.[148] Piracy is the classical crime of universal jurisdiction.[149] According to Article 105 UNCLOS, every state may seize and prosecute any piracy suspects on the high seas (including the exclusive economic zone).[150]

[142] *Castle John and Nederlandse Stichting Sirius v NV Mabeco and NV Parfin*, Belgium Court of Cassation, *ILR*, 77 (1988), 357, 358–9 (19 December 1986).

[143] Kolb et al., *MPYbUNL* (2011), 115–21; Guilfoyle, *ICLQ*, 59 (2010), 143; Gardner, *JICJ*, 10 (2012), 815 with further references.

[144] Bantekas and Nash, *International Criminal Law* (2007), p. 176; Shearer, 'Piracy', in Wolfrum, *MPEPIL* (2008 ff.), mn. 6.

[145] In this vein, see Satzger, '§ 6 StGB', in Satzger, et al., *StGB* (2009), mn. 6.

[146] Dutton, *ChicJIL*, 11 (2010), 216.

[147] Munich Re Group, *Piracy* (2009), p. 20; the International Maritime Bureau listed 120 acts of piracy for the first half of 2013 alone (cf. <http://www.icc-ccs.org/piracy-reporting-centre/piracynewsafigures> accessed 28 June 2013).

[148] Neubacher, *Kriminologische Grundlagen* (2005), pp. 111–12; Grewe, *Epochs* (2000), p. 305.

[149] cf. also Kittichaisaree, *International Criminal Law* (2001), p. 39; Gardner, *JICJ*, 10 (2012), 803.

[150] Article 105 UNCLOS: 'On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons. . . . The courts of the State which carried out the seizure may decide upon the penalties to be imposed . . . '

(4) Conclusion

There can be no serious doubt about the international relevance of acts of piracy, and this status is confirmed by the granting of universal jurisdiction over the respective acts. The definition of the offence is—despite the ambiguity of the element 'illegal act'—precise enough; the special subjective requirement must be interpreted narrowly, excluding private ends of an altruistic character and expressing a form of legitimate social protest. In any case, piracy comes very close to an international crime *stricto sensu*.

It also has to be kept in mind that piracy often occurs in regions—in the seas of South-East Asia, East Africa, and Central and South America—without an effective criminal justice system.[151] Thus, international concern is aggravated by the fact that the crime is often accompanied by impunity of the perpetrators from prosecution. This is difficult to compensate for by the exercise of universal jurisdiction for several practical reasons. The perpetrators have to be pursued and seized on the high seas by a state's vessels, brought to the competent court and convicted there, often without sufficient and reliable evidence.[152]

E. Torture (as an Individual Crime)

(1) Definition

The prohibition of torture is part of human rights law[153] and international humanitarian law.[154] It has attained the status of *ius cogens*[155] and is absolute in the sense that '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' (Article 2 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)[156]).[157] As discussed in Chapter II,[158] as a crime,

[151] See, for example, regarding the situation in Somalia, Guilfoyle, *JICJ*, 10 (2012), 789 ff.; generally Ambos and Wirth, *CLF*, 13 (2002), 13.

[152] On the difficulties in investigating, prosecuting and trying piracy cases, see Dutton, *ChicJIL*, 11 (2010), 228 ff.; regarding the Hamburg piracy trial, see Spiegel, 12 September 2012, An Expensive Farce: Germany's Somali Pirate Trial is Pointless (<http://www.spiegel.de/international/germany/german-trial-of-somali-pirates-turns-into-pointless-and-expensive-farce-a-855252.html> accessed 2 July 2013).

[153] cf. Article 5 Universal Declaration of Human Rights and Article 7 International Covenant on Civil and Political Rights.

[154] cf. Article 3(1)(a) GC I-IV and Article 75(2)(a)(ii) AP I.

[155] Furundžija, No. IT-95-17/1-T, paras. 153–7; UN Human Rights Council, General Comment no. 24, Issues relating to reservations made upon ratification or accession to the Covenant [ICCPR] or the Optional Protocol thereto, or in relation to declarations under Article 41 of the Covenant, (4 November 1994), para. 10 ('the prohibition of torture has the status of a peremptory norm'); see for academic references, Ambos, *JICJ*, 6 (2008), 265 with fn. 15–17.

[156] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, of 10 December 1984, 1465 *UNTS* 85.

[157] The absolute character of the prohibition is confirmed by decisions of the Committee against Torture, for example the decision regarding Belgium of 27 May 2003, CAT/C/CR/30/6, where the Committee recommended that Belgium include a provision in the Penal Code expressly prohibiting the invocation of a state of necessity to justify the violation of the right not to be subjected to torture, available at <http://www.unhchr.ch/tbs/doc.nsf/0/6976cf01cc97ba3ac1256da500438d94?Opendocument> accessed 19 August 2013.

[158] Chapter II, C. (6).

torture has been defined on a universal level in Article 1(1) CAT.[159] We will return to this definition in a moment. At this juncture it is important to note that the definition enjoys nearly universal acceptance, with the Convention having been ratified by 150 states without any reservations.[160]

All international instruments differentiate between torture and other cruel, inhumane, or degrading treatment,[161] without, however, providing for clear distinguishing criteria.[162] Two approaches may be identified in the international practice. On the one hand, in the UN General Assembly's Declaration on Torture,[163] torture is described as a more serious and intentional form of cruel, inhumane, and degrading treatment.[164] In the same vein, the CAT Committee Against Torture[165] opined that inhumane treatment does not have to inflict as much pain and suffering as torture and does not require the special purpose.[166] On the other hand, the ECtHR has applied several different criteria to distinguish torture and inhumane treatment.[167] Given the particular importance and legal recognition of the torture offence, the following analysis will be limited to torture only.

According to Article 1(1) CAT,[168] the *actus reus* of torture consists of (1) an act by which severe physical or mental pain or suffering is inflicted on a person, (2) the act is

[159] There are also definitions in other regional instruments and jurisprudence. For instance, the Inter-American Convention to Prevent and Punish Torture includes a definition in its Article 3, which differs from the UN definition in that it does not require a certain severity threshold of the inflicted pain or suffering. In the jurisprudence of the ICTY and the ECtHR it has been held that under customary international law there is no requirement of participation by a public official or, alternatively, no requirement of a special purpose (cf. *Prosecutor v Delalić et al.*, No. IT-96-21-T, Trial Chamber Judgment, para. 470 (16 November 1998); *Prosecutor v Kunarac et al.*, No. IT-96-23-T & IT-96-23-I-T, Trial Chamber Judgment, para. 486 (22 February 2001); *Prosecutor v Furunžija*, No. IT-95-17/1-T, Trial Chamber Judgment, para. 162 (10 December 1998); ECtHR, *HLR v France*, para. 40 (29 April 1997); ECtHR, *Costello-Roberts v UK*, paras. 27–8 (25 March 1993); ECtHR, *A v UK*, para. 22 (23 September 1998)).

[160] A further six states signed the Convention (Gambia, Guinea-Bissau, Haiti, India, Laos, Sudan).

[161] Article 3(1)(a) GC I–IV: 'violence to life and person, in particular . . . cruel treatment *and* torture'; Article 5 Universal Declaration of Human Rights/Article 7 International Covenant on Civil and Political Rights: 'No one shall be subjected to torture *or* to cruel, inhuman or degrading treatment or punishment'; Article 16 CAT: 'Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1.'

[162] Kretzmer, 'Prohibition', in Wolfrum, *MPEPIL* (2008 ff.), mn. 21.

[163] Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res. 3452 (XXX), annex, 30 UN GAOR Supp (No. 34), 91, UN Doc. A/10034 (1975).

[164] Article 1(2) Declaration on the Protection of All Persons from Being Subjected to Torture: 'Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment'.

[165] Established according to Article 17 CAT and consisting, since 1 January 1988, of ten members elected for a four-year period.

[166] Committee against Torture, General Comment no. 2—Implementation of Article 2 by States parties, UN Doc CAT/C/GC/2 (24 January 2008), para. 10: 'In comparison to torture, ill-treatment may differ in the severity of pain and suffering and does not require proof of impermissible purposes.'

[167] For instance, duration, or purpose of the treatment: ECtHR, *Selmouni v France*, para. 98 (28 July 1999); ECtHR, *Yaman v Turkey*, para. 47 (22 May 2003); ECtHR, *Kemal Kahraman v Turkey*, para. 34 (22 July 2008). See also Ambos, *JICJ*, 6 (2008), 267.

[168] Article 1(1) CAT: 'For the purposes of this Convention, 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

undertaken by a public official or another person acting in an official capacity, (3) and the pain and suffering do not only arise from a lawful sanction. On the subjective side, torture requires (1) general intent and (2) special intent in the form of the pursuit of a specific objective. Despite the wording, the definition is not limited to acts but also includes omissions.[169] Attempt, as well as complicity and participation in torture is also declared criminal.[170]

The exact meaning of the term 'severe physical or mental pain or suffering' is somewhat unclear. Particularly, the inclusion of so-called 'white torture', that is, treatments which do not leave any physical marks (including 'waterboarding'), has often been debated in this context.[171] Yet, the qualification of a particular act as torture cannot depend on physical visibility since this would make it all too easy to exclude sufficiently serious forms of mistreatment, in particular of a psychological nature, from the definition. It is also controversial whether *threats* of torture have to be put on an equal footing with completed acts of torture in their own right.[172] While there is an obvious terminological and temporal difference between a threat and the actual infliction of torture, a threat may affect the victim's free will as much as torture itself would do, in particular if it evokes the impression that noncompliance would directly trigger the actual infliction of torture.[173] In fact, in this case such a threat may be 'sufficiently real and immediate' to itself constitute torture.[174] At any rate, concrete assessment can only be done on a case-by-case basis since it is neither possible nor practical to decide these complex definitional questions *in abstracto*.[175]

The infliction of pain or suffering has to be attributable to the state. This is the case if the perpetrator is a public official or acts in another official capacity, or is a private agent whose acts are instigated or in any other way assisted by a state agent.[176] Pain or suffering directly arising from lawful sanctions is not covered by the definition.[177]

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.'

[169] cf. Nowak, McArthur, and Buchinger, *Commentary* (2008), Article 1, mn. 92.

[170] cf. Article 4(1) CAT: '… The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.'

[171] See the infamous memorandum of 1 August 2002 of the US Justice Department's Office of Legal Counsel, referenced in Bruha and Steiger, *Folterverbot* (2006), p. 42; Sands, *Torture Team* (2008), pp. 75–6; Bassiouni, *The Institutionalization of Torture* (2010), p. 52. Accordingly, '[t]orture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death', that is, 'light torture', for example waterboarding, is excluded from the prohibition. On waterboarding, cf. Wallach, *ColJTransnat'lL,* 45 (2006/2007), 468 ff.

[172] See Ambos, *JICJ*, 6 (2008), 270–1.

[173] Kretzmer, 'Prohibition', in Wolfrum, *MPEPIL* (2008 ff.), mn. 18; contra Stein, *Verbot* (2007), p. 128.

[174] ECtHR, *Campbell and Cosans v UK*, para. 26 (25 February 1982).

[175] Bantekas and Nash, *International Criminal Law* (2007), p. 164; Wilmshurst, 'Transnational Crimes', in Cryer et al., *Introduction* (2010), pp. 354–5.

[176] cf. Cassese et al., *ICL* (2013), p. 133; Nowak, McArthur, and Buchinger, *Commentary* (2008), Article 1, mn. 113.

[177] It is controversial whether generally accepted sanctions, for example imprisonment, which may entail mental suffering, are merely excluded from the torture definition (in this sense N. Rodley, then UN Special Rapporteur on Torture, cf. UN Doc. GenC 20/44, para. 6) or if such sanctions can never fulfill the definition, and therefore the last clause of Article 1(1) CAT (note 168) is redundant (cf. Nowak, McArthur, and Buchinger, *Commentary* (2008), Article 1, mn. 128).

However, the respective sanctions have to meet the minimum standards of humane and fair treatment, and thus cannot legitimize any infliction of torture.[178]

Torture has to be committed intentionally; *dolus eventualis*[179] does not suffice.[180] In addition, the perpetrator must pursue a particular purpose or certain objectives, that is, a special intent is required. While the purposes listed in Article 1(1) CAT only serve as examples, both the drafting history[181] and the wording '*such as*' indicate that only purposes similar to the ones listed are sufficient.[182] In any case, the perpetrator must be aware of his superior position and of his control over the victim. He must consciously use his superiority in favour of governmental or other public interests.[183]

(2) Legal interests protected

Despite the *ius cogens* and absolute character of the torture prohibition, there have been repeated attempts both in politics and doctrine to take a more flexible approach in cases where torture is allegedly applied to save the lives of (many) innocent people (so-called 'ticking bomb scenarios' or '*Rettungsfolter*'), particularly in the context of the 'global war on terror'.[184] However, the prohibition still remains absolute in these cases, notwithstanding a possible exemption of criminal responsibility of the *bona fide*-acting state agent under strictly defined circumstances.[185] In any case, the essence of torture—and thus the rationale of the prohibition—lies in the underlying attack on the victim's human dignity, going beyond the easily tangible attack on physical integrity and free will.[186] In other words, the prohibition is absolute not so much because of the physical injury inflicted but because of the victim's dehumanization and degradation to a mere object which is being used to achieve a particular purpose.

(3) Individual responsibility and international prosecutability

The CAT recognizes the classical jurisdictional links, that is, territoriality, flag principle, active and passive personality (Article 5(1)), and the *aut dedere aut iudicare* principle (Article 5(2)).[187] Thus, States Parties are not obliged to enforce the torture prohibition with the principle of universal jurisdiction; sovereignty considerations as expressed in the traditional jurisdictional links prevail over the call for universal prosecution.

[178] Kretzmer, 'Prohibition', in Wolfrum, *MPEPIL* (2008 ff.), mn. 22.

[179] cf. Volume I of this treatise, p. 276.

[180] cf. Cassese et al., *ICL* (2013), pp. 132–3.

[181] Contrary to the definition of the Inter-American Convention to Prevent and Punish Torture, the CAT does not include a reference to 'any other purpose', even though this was considered during the drafting process, cf. Nowak, McArthur, and Buchinger, *Commentary* (2008), Article 1, mn. 110–5.

[182] See also Wilmshurst, 'Transnational Crimes', in Cryer et al., *Introduction* (2010), p. 356.

[183] Burgers and Danelius, *UN Convention* (1988), pp. 119–20; Ingelse, *UN Committee* (2001), p. 211; Nowak, McArthur, and Buchinger, *Commentary* (2008), Article 1, mn. 113.

[184] cf. Akram and Johnson, 'U.S. Measures', in Benedek and Yotopoulos-Marangpoulos, *Anti-Terrorist Measures* (2004), p. 149; Epping, *Grundrechte* (2012), mn. 729; Miehe, *NJW*, 17 (2003), 1219–20; Grabenwarter, *NJW*, 43 (2010), 3128 ff.; Keller, 'Freiheit', in Kirchschläger et al., *Menschenrechte* (2004), pp. 173 ff.

[185] See for a discussion, Ambos, *JICJ*, 6 (2008), 272 ff.

[186] In this vein, Duffy, *War on Terror* (2005), p. 314; Epping, *Grundrechte* (2012), mn. 611, 729; Hecker, *KJ*, 36 (2003), 210; Stein, *Verbot* (2007), pp. 317 ff.

[187] On the most recent ICJ judgment regarding the scope of this obligation and the rights of non-injured parties to enforce it, see Nielsen, *CLJ*, 72 (2013), 240 ff.

(4) Conclusion

The definition of torture meets the requirements of the principle of legality. While admittedly universal jurisdiction is not included in the relevant instruments, the qualification of torture as a peremptory norm of international law makes it a crime which must be prosecuted universally.[188] However, it is doubtful whether the fact that torture constitutes a dignity violation suffices to make it a true international crime, in particular in light of our second criterion (violation of universal values and collective concern) developed earlier.[189]

To begin with, it has to be kept in mind that torture indeed, as has already been stated,[190] constitutes an international crime in the context of crimes against humanity (cf. Article 7(1)(f) ICC Statute)[191] and war crimes (cf. Article 8(2)(a)(ii) and (c)(i)).[192] However, its international relevance and the ensuing threat to collective interests follow here from the context elements—'widespread or systematic attack' and existence of an armed conflict—of these crimes. Torture as an individual crime or singular act may arguably generate a similar effect, in particular if the torture is especially cruel, but this is not necessarily the case. On the contrary, a singular, isolated act of torture in a prison cell—as much as it may infringe upon personal dignity—does not threaten international peace and security. Thus, isolated incidents of torture do not amount to true international crimes. Of course, in practice, state involvement in torture, implicit in the *actus reus*' reference to a public official, may often entail a policy within the meaning of Article 7(2) ICC Statute[193] and thus make the respective torture a crime against humanity.

[188] In a similar vein, see Wilmshurst, 'Transnational Crimes', in Cryer et al., *Introduction* (2010), p. 356.
[189] Section A. (3). [190] Note 38 and main text. [191] cf. Chapter II, D. (6).
[192] cf. Chapter III, B. (3)(a)(ii). [193] cf. Chapter II, C. (2)(d).

Chapter VI

Concursus Delictorum and Sentencing

*The full chapter bibliography can be downloaded from **http://ukcatalogue.oup.com/product/9780199665600.do.**

A. *Concursus Delictorum*

(1) The problem

The problem of concurrence of norms or offences ('*concursus delictorum*', '*concours de qualifications/d'infractions*', '*concurso de leyes/delitos*', '*Konkurrenzen*') concerns two types of situations: first, where the *same conduct* fulfils different offences at the same time or the same offence various times; secondly, where *different forms of conduct* fulfil different offences. We call the first situation *concours idéal* ('*concurso ideal*', '*Idealkonkurrenz*'), but it may also be treated as a form of merger, or apparent ('false') concurrence as will be explained in a moment. The second situation constitutes a *concours réel* ('*concurso real*', '*Realkonkurrenz*'), or accumulation of offences. A simple example of a *concours idéal* would be the commission of a killing in armed conflict which may amount to both a crime against humanity or a war crime (Article 7(1)(a) as compared to Article 8(2)(a)(i) and (c)(i) ICC Statute). Matters would become more complicated though if the killing had been carried out in a sadistic manner, that is, the victim had been treated inhumanely (Article 7(1)(k), Article 8(2)(a)(ii), (b)(xxi), (c)(ii)), and killed treacherously (Article 8(2)(b)(xi) and (e)(ix)). The *concours idéal* would turn into a *concours réel* if, instead of one attack, a series of killings was committed at different times and/or places. What is clear from these examples is that the international core crimes can be fulfilled simultaneously or in parallel.[1]

The law of concours can be located in the border zones of the general rules of imputation ('general part'), the crimes ('special part'), and the sentencing rules. As it most directly refers to the (international) crimes, it is covered at the end of this second Volume of the treatise, immediately following the discussion of the international core crimes. The law of concours is perhaps the least developed area of ICL,[2] but it is certainly not the least important one. It determines, after all, the crimes which are charged, which crimes may lead to convictions, and which crimes, ultimately, form the basis of sentencing. Thus, for reasons of justice, fairness, and principle, ICL cannot do

[1] *Prosecutor v Kunarac et al.*, No. IT-96-23 & IT-96-23/1-A, Appeals Chamber Judgment, para. 176 (12 June 2002); *Prosecutor v Kordić and Čerkez*, No. IT-95-14/2-A, Appeals Chamber Judgment, paras. 1036 ff. (17 December 2004); Werle, *Völkerstrafrecht* (2012), mn. 726, 1407; Werle, *Principles* (2009), mn. 673, 1305; David, *Principes* (2008), mn. 4.223–4.

[2] In the same vein, see Stuckenberg, 'Concursus Delictorum', in Fischer, Kreß, and Lüder, *Prosecution* (2001), p. 559.

without a system of principles and rules of concours.[3] Unfortunately, such a system does not follow from the current ICL, given the almost total absence of relevant provisions and an under-theorized case law. Thus, it has to be developed by way of a recourse to the general principles of law of the major criminal justice systems within the meaning of Article 21(1)(c).[4]

The situation of concours can become relevant at three stages of the criminal justice process:[5] First, at the *investigation phase*, the Prosecutor must decide how to charge several offences and/or forms of conduct. While in the case of a *concours réel* (different forms of conduct), a separate charging is the only option (if the charges are prosecuted in one single proceeding), in the case of a *concours idéal* (same conduct) the Prosecutor must make a decision between alternative or cumulative charging, that is, a single (limited) or multiple charging of the same conduct. The correct decision, of course, depends on the nature of the concours as a true one (*concours idéal*) or only an apparent one (merger). Secondly, at the *trial phase* the judges must take into account the kind of concours to come to the right verdict. In fact, they have to decide about the concours of the remaining charges: if they amount to a *concours idéal* they must be included in the verdict, in the case of a merger, they can be left out. Finally, the concours becomes relevant at the *sentencing stage* with a view to the final (total) sentence to be imposed. The importance of the rules of concours at the different procedural stages shows that the decisions about correct charging, convicting, and sentencing are just the other (procedural) side of the coin of the theory of concours. Thus, the elaboration of a rational system of rules of concours is not just an academic exercise. Indeed, the rules of concours determine the correct way of charging, convicting, and sentencing, that is, one should first become clear with these rules before taking these decisions.

(2) The rules of concours[6]

As regards the rules of concours, we have already distinguished between a merger, or apparent ('false') concurrence ('*concours apparent*', '*concurso apparente*', '*Gesetzeskonkurrenz/-einheit*'), and a 'true' concurrence ('*concours idéal*', '*concurso ideal*', '*Idealkonkurrenz*').[7] While in the latter situation we deal with one and the same conduct or transaction,[8] the situation is different if we are faced with a series of different criminal conducts taking place at different times and/or locations and perhaps resulting in different offences. Here we speak in civil law systems of a 'real' concurrence ('*concours*

[3] Discussing *nulla poena sine lege* principle and justice as 'good reasons' for a law of concours, see Stuckenberg, 'Concursus Delictorum', in Fischer, Kreß, and Lüder, *Prosecution* (2001), p. 562.

[4] See also Stuckenberg, 'Concursus Delictorum', in Fischer, Kreß, and Lüder, *Prosecution* (2001), pp. 572–3.

[5] See also Walther, 'Cumulation of Offenses', in Cassese et al., *Rome Statute* i (2002), p. 477.

[6] This section draws in part on Ambos and Wirth, 'Sentencing', in Klip and Sluiter, *Annotated Leading Cases*, ii (2001), pp. 701–3.

[7] For an excellent and profound structural analysis, see Stuckenberg, 'Concursus Delictorum', in Fischer, Kreß, and Lüder, *Prosecution* (2001), pp. 559 ff.

[8] On the use of the term 'same transaction' in the case law, see Stuckenberg, 'Concursus Delictorum', in Fischer, Kreß, and Lüder, *Prosecution* (2001), p. 596.

réel', '*Realkonkurrenz*') and in common law systems of an accumulation of offences. The former concept reflects a substantive, not merely procedural, understanding of this phenomenon,[9] while the accumulation focuses on the joint adjudication of the respective offences. In any case, the crucial difference to the other forms of concours lies in the fact that there is not only one single conduct, but various conducts. Thus, for example, if the perpetrator commits several war crimes in different places at different points of time, we have a *concours réel*, or accumulation of offences.[10] This situation is less complex than the one of merger, or *concours idéal*, since the factual basis of the legal evaluation consists of distinct forms of conduct. The following analysis can therefore focus on the more complex (same conduct) situation of merger and *concours idéal*.

(a) Merger or apparent concurrence

Two norms can relate to each other in the form of a smaller circle that lies completely within a larger circle. In such a case, every element of the crime that lies within the smaller circle (the 'smaller' crime) is indispensable to meet the requirements of the other crime that lies in the larger circle (the 'larger' crime).[11] The larger crime obviously requires further elements which are not part of the smaller crime; the smaller crime is the 'lesser included offence'.[12] Think, for example, of the objective elements (*actus reus*) of theft and robbery. In many jurisdictions robbery is understood as theft plus the use of coercion or force.[13] Thus, the offence of theft is completely contained in the offence of robbery, or—the other way round—robbery includes all elements of theft. In general terms, then, in the case of merger, one ('smaller') offence is completely contained in another ('larger') offence.

In cases of merger, the most important rule to be applied is *lex specialis derogat legi generali.*[14] Accordingly, the smaller crime (the 'lesser included' offence) will not be applied if the elements of the larger crime are met. While this is a seemingly logical result, given that it is based on a comparison of the relevant elements of crime, the same result can also be achieved by the—more normatively framed—rule of '*consumption*': the larger crime 'consumes' the smaller crime since it expresses all its wrongfulness, so

[9] This does, of course, not exclude procedural consequences, as for example shown by §§ 460 German *Strafprozessordnung* (Code of Criminal Procedure) which regulates the (retroactive) determination of a unified ('total') sentence for different judgments.

[10] Werle, *Völkerstrafrecht* (2012), mn. 1409; Werle, *Principles* (2009), mn. 1307.

[11] cf. *Prosecutor v Kupreškić et al.*, No. IT-95-16-T, Trial Chamber Judgment, para. 683 (14 January 2000).

[12] For this reason one could also speak of 'inclusion', cf. Stuckenberg, 'Concursus Delictorum', in Fischer, Kreß,and Lüder, *Prosecution* (2001), pp. 563–4.

[13] For example s. 322 (theft) and s. 343 (robbery) together with s. 2 (stealing) CC of Canada (Revised Statutes of Canada, 1985, chapter C-46); § 242 (theft) and § 249(1) (robbery) of German PC (*Strafgesetzbuch*); Article 624 (theft) and 628(1) (robbery) of the Italian CP (*Codice Penale*).

[14] *Kupreškić et al.*, IT-95-16-T, para. 683. This rule was among the examples of general principles of law which were presented during the *travaux préparatoires* of Article 38(1)(c) of the Permanent Court of International Justice (PCIJ) Statute, which is identical to the present Article 38(1)(c) of the International Court of Justice (ICJ) Statute; cf. Cheng, *General Principles* (1953), pp. 25 ff.; see also Stuckenberg, 'Concursus Delictorum', in Fischer, Kreß, and Lüder, *Prosecution* (2001), pp. 587–8, arguing that it is part of ICL.

that the smaller crime, normatively speaking, disappears.[15] This same idea has been formulated in the early days of the ad hoc tribunals by the *Akayesu* TC, holding that it is 'not justifiable to convict an accused of two offences in relation to the same set of facts where (a) one offence is a lesser included offence of the other . . . ',[16] that is, when the *lex specialis* rule applies. The *Kupreškić* TC referred, in contrast, explicitly to the—more normative—principle of consumption.[17] In any case, ultimately, only *one* applicable crime exists.[18] It is for this reason that merger can also be called 'false' or 'fake' concurrence.

Such a false concurrence can also occur with regard to the *iter criminis*, that is, the stage of realization of a crime, and with regard to the forms of participation. A classic example of the former case is the relationship between attempt and consummation of a crime, in that the latter (the actual killing of the victim) supersedes the former (the attempted killing). In other words, each consummated crime contains its attempt, so that the attempt is included in, or encompassed by the consummation. A similar example, bringing us closer to forms of participation, is the relationship between incitement as an inchoate offence,[19] and instigation as a form of participation: an incitement to genocide which does not presuppose the actual commission of the genocide is—notwithstanding the difference between incitement and instigation in the details[20]—superseded or consumed by the instigation if the actual genocide is committed.[21] As to the forms of participation *stricto sensu*, in a differentiated system, when distinguishing between forms of perpetration (direct, indirect, and co-perpetration) and secondary participation (instigation, assistance), indirect perpetration (perpetration through another) supersedes instigation and co-perpetration any kind of assistance.[22]

[15] On its origins in the *ius commune* maxim '*maius delictum absorbet minus*', see Stuckenberg, 'Concursus Delictorum', in Fischer, Kreß, and Lüder, *Prosecution* (2001), p. 591.

[16] *Prosecutor v Akayesu*, No. ICTR-96-4-T, Trial Chamber Judgment, para. 468 (2 September 1998), giving the example of murder and grievous bodily harm, robbery and theft, or rape and indecent assault.

[17] *Kupreškić et al.*, IT-95-16-T, paras. 686 ff. (688); in the same vein, see *Prosecutor v Krstić*, No. IT-98-33-A, Appeals Chamber Judgment, para. 218 (19 April 2004); *Prosecutor v Bisengimana*, No. ICTR-00-60-T, Trial Chamber Judgment and Sentence, para. 96 (13 April 2006); *Prosecutor v Blagojević and Jokić*, No. IT-02-60-T, Trial Chamber Judgment, para. 799 (17 January 2005); *Prosecutor v Gatete*, No. ICTR-2000-61-T, Trial Chamber Judgment and Sentence, para. 652 (31 March 2011); *Prosecutor v Karemera and Ngirumpatse*, No. ICTR-98-44-T, Trial Chamber Judgment and Sentence, para. 1707 (2 February 2012); *Prosecutor v Ndahimana*, No. ICTR-01-68-T, Trial Chamber Judgment and Sentence, para. 844 (30 December 2011); *Prosecutor v Ndindiliyimana et al.*, No. ICTR-00-56-T, Trial Chamber Judgment and Sentence para. 2036 (17 May 2011); *Prosecutor v Popović et al.*, No. IT-05-88-T, Trial Chamber Judgment, para. 2111 (10 June 2010); *Prosecutor v Taylor*, No. SCSL-2003-01-T, Trial Chamber Judgment, paras. 6987 (18 May 2012); *Prosecutor v Fofana and Kondewa*, No. SCSL-04-14-T, Trial Chamber Judgment, para. 974 (2 August 2007).

[18] cf. Walther, 'Cumulation of Offenses', in Cassese et al., *Rome Statute* i (2002), p. 480.

[19] cf. Volume I of this treatise, pp. 132, 170.

[20] cf. Volume I of this treatise, p. 170.

[21] The respective ICTR practice of cumulative charging (cf. Agbor Agbor, *ICLR*, 13 (2013), 467 ff.) is therefore unconvincing (for the same result, apparently, 471).

[22] See on the delimitation between co-perpetration and aiding and abetting, Volume I of this treatise, pp. 134–5.

(b) True concurrence (concours idéal)

The second possible relationship between two offences applicable to the same conduct may be symbolized by drawing two circles which are either completely separate, or which intersect. The two offences then each require at least one element that the other offence does not contain.[23] For example, someone interferes with Jeff's car by cutting the brake cable, and in consequence Jeff is hurt in an accident and the car is destroyed. The person responsible for the modification of the car is punishable for both bodily injury and damage to property. Although these offences apply to the same conduct, namely the interference with Jeff's car, they remain punishable independent of each other. Here, we can speak of a case of 'true' concurrence since the same conduct indeed violates several norms (or the same norm more than once).

It should be added that it is not only two different offences, committed through the same conduct, that can be related by way of concurrence, but also two infringements of the same provision. This is the case if certain fundamental legal values or interests—for example the rights to life, bodily integrity, or freedom—of two or more victims are violated. Given the highly personal nature of these values, each violation must be counted separately in the sense of *concours ideal* with regard to the same kind of acts or offences.[24] Thus, for example, if the same conduct (e.g. one terrorist attack), causes several deaths, every killing must be counted separately. The perpetrator is responsible for all killings separately. Equally, the rules of (true) concurrence apply if the offences in question protect different legal values.[25] The verdict must individualize the accused's conduct with regard to any legal value violated.

(3) Application to international crimes

If the same conduct (e.g. a killing as in our first example), forms part of several international crimes (e.g. as a killing under Articles 6(a), 7(1) (a) and 8(2)(a)(i)/(c)(i) ICC Statute), the question arises as to whether the rules of merger or true concurrence in the sense explained earlier apply. If one analyses this question with regard to the core crimes in their totality, that is, as codified in Articles 5 to 8*bis* ICC Statute, one should first clarify if there exists any abstract hierarchy between them.

[23] cf. *Kupreškić et al.*, IT-95-16-T, paras. 679 ff.; Stuckenberg, 'Concursus Delictorum', in Fischer, Kreß, and Lüder, *Prosecution* (2001), p. 564 speaks of 'interference'.

[24] *Kupreškić et al.*, IT-95-16-T, para. 712; Walther, 'Cumulation of Offenses', in Cassese et al., *Rome Statute* i (2002), p. 479; Gil Gil, *RDPC*, 4 (1999), 788 ff.

[25] *Prosecutor v Kayishema and Ruzindana*, No. ICTR-95–1-T, Trial Chamber Judgment, para. 627 (21 May 1999); cf. also *Akayesu*, ICTR-96-4-T, para. 468. The ICTY held in *Kupreškić et al.*, IT-95-16-T, paras. 694 ff., 704, 711; however, that the criterion of different legal values or interests is of minor importance since in national jurisprudence it is usually only used to corroborate the result already achieved by a comparison of the elements of a crime (but see, on the other hand, the judgment of the German Federal Court [BGH], No. 3 StR 215/98 (30 April 1999), reprinted in *NStZ*, 19 (1999), 402, which holds that the main difference between genocide and murder is the protected legal value). The Chamber's observation on the national jurisprudence is easily explained by the fact that a well-organized national jurisdiction does not usually codify two different crimes which contain exactly the same elements, but protect different values.

(a) Hierarchy of crimes?[26]

The lack of a differentiated sentencing system in the statutes of the international criminal tribunals—in other words, a system that would accord different sentencing ranges to the different crimes, instead of a uniform range for all crimes (see e.g. Article 77 ICC Statute)—seems to indicate that no obvious hierarchy between these crimes exists. Notwithstanding this, the early case law of the ICTY and ICTR indeed discussed the possibility of a ranking between the core crimes—genocide, crimes against humanity, and war crimes—without, however, reaching a unanimous position.[27] A majority of the *Erdemović* Appeals Chamber (AC) held that crimes against humanity 'in their very nature . . . differ in principle from war crimes' and thus constitute more serious crimes.[28] The same position was adopted by several ICTR sentencing decisions, stressing the special gravity of genocide and crimes against humanity,[29] and the unique character of the former 'because of its element of *dolus specialis*' amounting to the 'crime of crimes'.[30] For this reason, the *Kambanda* Trial Chamber (TC) was of the view that crimes against humanity and genocide are more severe than war crimes (in the sense of violations of Common Article 3 GCs and AP II encompassed by Article 4 ICTRS).[31] However, this view was subsequently rejected by the majority of the *Tadić* AC stating:

> . . . there is in law no distinction between the seriousness of a crime against humanity and that of a war crime. The Appeals Chamber finds no basis for such a distinction in the Statute or the Rules of the International Tribunal construed in accordance with customary international law; the authorized penalties are also the same, the level in any particular case being fixed by reference to the circumstances of the case.[32]

[26] The discussion here draws in part on Ambos and Nemitz, 'Commentary', in Klip and Sluiter, *Annotated Leading Cases*, ii (2001), pp. 838–9.

[27] cf. D'Ascoli, *Sentencing* (2011), pp. 39 ff. (40), 146 ff. (147), 303; on the reasons for a comparison/ranking of the international crimes, see Carcano, *ICLQ*, 51 (2002), 591–2, 594. The issue of the 'comparative seriousness of crimes' was secondary in Nuremberg (594–600), but gained importance before the ICTY and ICTR (600 ff.).

[28] *Prosecutor v Erdemović*, No. IT-96-22-A, Appeals Chamber Joint Separate Opinion of Judge Mcdonald and Judge Vohrah, paras. 21, 26 (7 October 1997); Judge Li dissenting, cf. *Prosecutor v Erdemović*, No. IT-96-22-A, Separate and Dissenting Opinion of Judge Li.

[29] *Prosecutor v Kambanda*, No. ICTR-97-23-S, Trial Chamber Judgment and Sentence, para. 14 (4 September 1998), (both 'particularly shock the collective conscience'); concurring, Akayesu, ICTR-96-4-T, para. 7; *Prosecutor v Serushago*, No. ICTR-98-39-S, Trial Chamber Sentence, para. 14 (5 February 1999); concurring also, *Prosecutor v Tadić*, No. IT-94-1-Tbis-R117, Trial Chamber Sentencing Judgment, para. 73 (11 November 1999). With regard to crimes against humanity, *Kambanda*, ICTR-97-23-S, para. 15, adopted, without quoting exactly [sic!], the position of the *Erdemović* TC (*Prosecutor v Erdemović*, No. IT-96-22-T, Trial Chamber Sentencing Judgment, para. 28 (29 November 1996)) holding that 'crimes against humanity . . . transcend the individual because when the individual is assaulted, humanity comes under attack and is negated. It is therefore the concept of humanity as victim which essentially characterises crimes against humanity'.

[30] *Kambanda*, ICTR-97-23-S, para. 16. On this characterization, see Chapter I, A. (1); cf. also Wilmshurst, 'Genocide', in Cryer et al., *Introduction ICL* (2010), p. 203.

[31] *Kambanda*, ICTR-97-23-S, para. 14 ('lesser crimes than genocide or crimes against humanity').

[32] *Prosecutor v Tadić*, No. IT-94-1-A & IT-94-1-Abis, Appeals Chamber Judgment in Sentencing Appeals, para. 69 (26 January 2000); Judge Cassese dissenting (*Prosecutor v Tadić*, No. IT-94-1-A & IT-94-1-Abis, Separate Opinion of Judge Cassese).

In a similar vein, Judge Shahabuddeen argues in his Separate Opinion that while there may be an abstract ranking in terms of seriousness it is, ultimately, a question of the facts of the underlying offence that determine its seriousness, and that, therefore, a war crime 'can be as extensive and as odious as a crime against humanity'.[33] This view, which we could call the *equal treatment approach* of crimes against humanity and war crimes, seemed to have won the day in the subsequent case law of the ICTY and ICTR,[34] where genocide was ultimately seen as the most serious crime.[35]

However, this view is not entirely convincing. It fails to fully grasp the importance of the context element in the determination of the gravity of the respective conduct. The gravity is primarily composed of an objective element, the *actus reus*, that is, the harm or danger caused by the offence, and a subjective element, the *mens rea*, including the culpability of the offender.[36] Both are encompassed by the constituent elements of the underlying offence (e.g. murder) and the contextual elements of a crime against humanity or a war crime, respectively. This means that the inherent (i.e. statutory) seriousness of a murder as a crime against humanity is characterized by the fact that the perpetrator committed an unlawful, intentional killing of a human being as part of a widespread or systematic attack against a civilian population in the knowledge of this attack.[37] A war crime does not possess a comparable context element, for it only requires the jurisdictional threshold of an armed conflict and no specific subjective element.[38] Thus, the context element of war crimes is of a different quality than the systematic or widespread attack necessary for crimes against humanity; it does not increase the wrongfulness of the act, and thereby the culpability of the actor in the same way as the attack element does. Consequently, focusing on the context element, murder

[33] *Prosecutor v Tadić*, No. IT-94-1-A & IT-94-1-Abis, Separate Opinion of Judge Shahabuddeen, p. 37 ff. (41).

[34] cf. *Kunarac et al.*, IT-96-23 & IT-96-23/1-A, para. 860; *Prosecutor v Furundžija*, No. IT-95-17/1-A, Appeals Chamber Judgment, paras. 240–243, 247 (21 July 2000); *Prosecutor v Mrkšić et al.*, No. IT-95-13/1-T, Trial Chamber Judgment, para. 684 (27 September 2007); *Prosecutor v Nahimana, Barayagwiza and Ngeze*, No. ICTR-99-52-A, Appeals Camber Judgment, para. 1060 (28 November 2007); see also Burkhardt, *FYBIL*, 9 (1998), 448 ff.; Bogdan, *MelbJIL*, 3 (2002), 8; D'Ascoli, *Sentencing* (2011), pp. 148–9; Bagaric and Morss, *ICLR*, 6 (2006), 214–17.

[35] cf. D'Ascoli, *Sentencing* (2011), p. 148.

[36] cf. Ambos and Nemitz, 'Commentary', in Klip and Sluiter, *Annotated Leading Cases*, ii (2001), p. 839; see also on the criteria for a comparison of the international crimes, Carcano, *ICLQ*, 51 (2002), 592–4.

[37] For a more detailed discussion of this context element, see Chapter II, B.

[38] For a more detailed discussion of this context element, see Chapter III, A. (3).

[39] In the same vein, see *Tadić*, IT-94-1-A & IT-94-1-Abis, Separate Opinion of Judge Cassese, paras. 11 ff. (16); Bohlander, *CLF*, 11 (2000), 234 ff. (247–8); Danner, *VirginiaLRev*, 87 (2001), 473 ff.; Kreß, *IsYbHR*, 30 (2000), 128 ff.; Wilmshurst, 'Genocide', in Cryer et al., *Introduction ICL* (2010), p. 203; Vest, *Gerechtigkeit* (2006), p. 143; Carcano, *ICLQ*, 51 (2002), 607–8 (arguing in favour of a higher gravity of crimes against humanity as compared to war crimes mainly because of the context element); Olusanya, *Sentencing* (2005), pp. 11 ff.; Olusanya, *ICLR*, 4 (2004), 431 ff. (in favour of a higher punishment for crimes against humanity); Nemitz, *Strafzumessung* (2002), pp. 259–62, 268 (higher inherent gravity of crimes against humanity); similarly but with reservation in light of the 'present stage of evolution in international criminal law', see Frulli, *EJIL*, 12 (2001), 329 ff.; D'Ascoli, *Sentencing* (2011), p. 307. For an equal treatment, see Lattanzi, 'Crimes against Humanity', in Fischer, Kreß and Lüder, *Prosecution* (2001), pp. 497 ff. (503–4); Bogdan, *MelbJIL*, 3 (2002), 6 ff.; Hünerbein, *Straftatkonkurrenzen* (2005), pp. 105–13 (113: rejecting a relationship of subsidiarity or inclusion because of the different wrong); Book, *Appeal and Sentence* (2011), pp. 33, 124.

as a crime against humanity seems to be more serious than murder as a war crime.[39] The same applies, *mutatis mutandis*, to the relationship between genocide and war crimes.[40] The attack on the existence of a protected group, accompanied by the requisite *dolus specialis*, makes genocide a more serious crime than a war crime. On the other hand, genocide is a crime against humanity, and as such possesses *structurally*[41] the same rank as crimes against humanity.[42] However, given its specific purpose of protection with regard to certain groups, its materially distinct elements,[43] and the *dolus specialis*, genocide is a more fundamental, and thus more serious crime against humanity.[44] In any case, the fact that, on the one hand, Article 33(2) ICC Statute considers orders to commit genocide or crimes against humanity as 'manifestly unlawful' and, on the other hand, Article 124 allows for a suspension of the Court's jurisdiction for seven years (only) for war crimes, indicates that the former are considered more serious than the latter. As to the crime of aggression, it stands out since it focuses on a collective attack prepared and carried out by persons in a leadership position.[45]

The fact that the 'authorized penalties' are the same for crimes against humanity and war crimes, as argued by the *Tadić* AC,[46] does not contradict these findings. It merely reflects the perception that the maximum sentence will, as a general rule, be applicable to all crimes, including especially serious war crimes.[47] Indeed, an *abstract* ranking between the crimes does not exclude the same punishment for differently ranked crimes *in concreto* since the abstract hierarchy is, as we will see in the second section of this chapter, only one among several factors determining concrete punishment. Also, concrete punishment will always depend on the single, underlying acts of the respective crime realized. While insofar the law does not establish any ranking,[48] differences between the individual acts certainly exist and entail different kinds of gravity. The criteria to explain these differences are the same ones we use in domestic criminal law, in particular the legal interests violated and the kind of harm caused.[49]

[40] For the same result, see Hünerbein, *Straftatkonkurrenzen* (2005), pp. 113–15.

[41] See on the origins of genocide in crimes against humanity, Chapter I, A. (1) and D. (4) referring to the 'structural congruity' between genocide and crimes against humanity.

[42] In a similar vein, see *Kayishema and Ruzindana*, ICTR-95-1-T, para. 635 (holding that both crimes protect the same values or 'social interest', namely the 'prohibition of the killing of the protected class of people'); dissenting Judge Khan, *Kayishema and Ruzindana*, ICTR-95-1-T, Separate and Dissenting Opinion of Judge Khan, para. 32 (arguing that these crimes are 'intended to punish different evils and to protect different social interests').

[43] See subsection (c).

[44] In a similar vein, for genocide to be accorded a higher rank, see Bogdan, *MelbJIL*, 3 (2002), 7–8; D'Ascoli, *Sentencing* (2011), pp. 305–6 (stressing the *dolus specialis*); in the same vein, see Carcano, *ICLQ*, 51 (2002), 602 ('. . . *dolus specialis* . . . renders this crime per se more serious'), 604 (stressing additionally the importance of the 'discriminatory animus').

[45] For Bassiouni, *Introduction to ICL* (2013), pp. 227, 230 it is the most serious crime; see for a detailed analysis Chapter IV.

[46] cf. note 32.

[47] cf. *Tadić*, IT-94-1-A & IT-94-1-Abis, Separate Opinion of Judge Cassese, para. 6.

[48] cf. D'Ascoli, *Sentencing* (2011), pp. 149–50, 307.

[49] For a first cautious approach regarding ICL, see D'Ascoli, *Sentencing* (2011), pp. 307–8.

[50] For the same result, see D'Ascoli, *Sentencing* (2011), p. 306; Melloh, *Strafzumessung* (2010), pp. 351, 522, 542; Schabas, *ICC Commentary* (2010), p. 119; Akhavan, *Reducing Genocide* (2012), pp. 58 ff.;

Thus, all else being equal, a hierarchy *in abstracto* between international crimes can be established with genocide being the most serious crime, followed by crimes against humanity and war crimes.[50] This ranking, while not following from the Statutes or Rules of Procedure and Evidence (RPE), is confirmed by the sentencing practice of the ICTY and ICTR, punishing genocide more severely than crimes against humanity and war crimes, and the former more severely than the latter.[51] It is therefore misleading for Judge Shahabuddeen to argue that a war crime, all else being equal, can be as serious as a crime against humanity, and that the seriousness of a criminal act is not 'necessarily greater where the same act is charged and proved as a crime against humanity'.[52] Of course, murder as a war crime *may* fulfil the necessary elements of murder as a crime against humanity, namely if it has been committed as part of a widespread or systematic attack against a civilian population. If this is not the case, however, that is, if we have merely a killing in armed conflict, this killing is *inherently* less serious than murder as a crime against humanity. Indeed, the context element of a widespread or systematic attack against a civilian population operates as an aggravating circumstance increasing the wrongfulness of this type of murder.[53]

(b) The different elements (speciality) test

As already mentioned, the *Akayesu* and *Kupreškić* TCs for the first time dealt with the problem of cumulative or multiple convictions for the same conduct.[54] The *Akayesu* TC concluded that a multiple conviction would be possible:

> . . . in the following circumstances: (1) where the offences have different elements; or (2) where the provisions creating the offences protect different interests; or (3) where it is necessary to record a conviction for both offences in order fully to describe what the accused did.[55]

recognizing genocide as the greatest of evil acts, see May, *Crimes Against Humanity* (2005), pp. 158–60, but denying that it is the crime of crimes (May, *Genocide* (2010), pp. 19, 20, 224 ff.). For Bassiouni, *Introduction to ICL* (2013), pp. 227–31 these crimes should be ranked after aggression but placing war crimes before genocide and crimes against humanity because of their 'contextual connections' to aggression. Denying any hierarchy, see Lüders, *Völkermord* (2004), pp. 263–4.

[51] cf. Meernik, and King, *LJIL*, 16 (2003), 734–6 (empirical analysis of the average length of sentences); Meernik, *SocSciQ*, 92 (2011), 601–3 (601, 'defendants are punished according to the severity of their crimes and level of responsibility', 602 'gravity of crimes hierarchy'); D'Ascoli, *Sentencing* (2011), pp. 185, 220 ff. (222, 225), 259 (finding that the average imprisonment at the ICTY for genocide is 35 years, for crimes against humanity 18.7 years and for war crimes 18 years; at the ICTR the respective time for imprisonment is 56, 52, and 23.5 years; D'Ascoli, *Sentencing* (2011), p. 222); Holá, Smeulers, and Bijleveld, *JICJ*, 9 (2011), 422–3, 437 ('empirical ordering of international crimes', 'gravity of crimes in concreto'); Holá, Bijleveld, and Smeulers, *EJCrim*, 9 (2012), 546.

[52] *Tadić*, IT-94-1-A & IT-94-1-Abis, Separate Opinion of Judge Shahabuddeen, p. 41.

[53] cf. similarly Nemitz, 'Sentencing in the ICTY and ICTR', in Fischer, Kreß and Lüder, *Prosecution* (2001), p. 618; Nemitz, *YbIHL*, 4 (2001), 113–14 ('murder as a crime against humanity is inherently more serious . . . gravity of a crime against humanity is greater than that of a war crime'); Frulli, *EJIL*, 12 (2001), 334 ff.

[54] *Akayesu*, ICTR-96-4-T, paras. 461 ff.; *Kupreškić et al.*, IT-95-16-T, paras. 637 ff.

[55] *Akayesu*, ICTR-96-4-T, para. 468.

[56] *Blockburger v US*, 284 U.S. 299, 304 (1932): 'The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offences or only one, is whether each provision requires *proof of an additional fact*

The *Kupreškić* TC deemed a multiple conviction possible basically in two situations. First, referring to the *Blockburger* test of the US Supreme Court,[56] if one 'offence contains an element not required by the other. If so, where the criminal act in question fulfils the extra requirements of each offence, the same act will constitute an offence under each provision'.[57] If this test, compared to the civil law concept of 'reciprocal speciality' by the Chamber,[58] is not met, we have a case of merger where the *lex specialis* rule applies, and (only) the more specific offence shall be applied.[59] The same result of a single conviction follows pursuant to the already mentioned[60] case law in situations of a 'lesser included offence' or 'consumption': 'when all the legal requirements for a lesser offence are met in the commission of a more serious one, a conviction on the more serious count fully encompasses the criminality of the conduct'.[61] In contrast, the case law allows for a multiple conviction if the *lex specialis*, lesser included offence or consumption rules do not apply, and the respective offences protect different legal values.[62]

The subsequent jurisprudence of the ICTY established the 'different elements' or 'reciprocal speciality' test as the exclusive test to decide on the admissibility of multiple convictions. The ICTY *Čelebići* AC held that the same conduct can entail multiple convictions for different crimes 'only if each statutory provision has a materially distinct element not contained within the other'; a materially distinct element is the one which 'requires proof of a fact not required by the other element'.[63] Where this is not the case, that is, where the respective provisions are materially identical, 'only the conviction under the more specific provision will be entered. The more specific offence subsumes the less specific one because the commission of the former necessarily entails

which the other does not' (emphasis added). The test is also called the 'same evidence test'. See thereto, Saltzburg and Capra, *American Criminal Procedure* (2010), 1528–65; Walther, 'Cumulation of Offenses', in Cassese et al., *Rome Statute* i (2002), p. 490; Stuckenberg, 'Concursus Delictorum', in Fischer, Kreß, and Lüder, *Prosecution* (2001), p. 581; Bogdan, *MelbJIL*, 3 (2002), 12; Hünerbein, *Straftatkonkurrenzen* (2005), pp. 48–9; Azari, *RSC*, 1 (2007), 3.

[57] *Kupreškić et al.*, IT-95-16-T, para. 682.

[58] *Kupreškić et al.*, IT-95-16-T, para. 685.

[59] *Kupreškić et al.*, IT-95-16-T, para. 683.

[60] Note 17 and main text.

[61] *Kupreškić et al.*, IT-95-16-T, paras. 686–92 (688).

[62] *Kupreškić et al.*, IT-95-16-T, paras. 693–5 (694: '. . . if an act or transaction is simultaneously in breach of two criminal provisions protecting different values, it may be held that that act or transaction infringes *both* criminal provisions' [emphasis in original]).

[63] *Prosecutor v Delalić et al.*, No. IT-96–21-A, Appeals Chamber Judgment, paras. 202, 412 (20 February 2001). For an analysis see Bogdan, *MelbJIL*, 3 (2002), 20 ff.; Valabhji, *TulaneJIE&CL*, 10 (2002), 191 ff.; Azari, *RSC*, 1 (2007), 4 ff.; Werle, *Völkerstrafrecht* (2012), mn. 724–8; Werle, *Principles* (2009), mn. 670–4.

[64] *Krstić*, IT-98-33-A, para. 218.

[65] *Prosecutor v Jelisić*, No. IT-95-10-A, Appeals Chamber Judgment, para. 82 (5 July 2001); *Prosecutor v Kupreškić et al.*, No. IT-95-16-A, Appeals Chamber Judgment, paras. 385–8 (23 October 2001); *Prosecutor v Musema*, No. ICTR-96-13-A, Appeals Chamber Judgment, paras. 346 ff. (16 November 2001); *Krstić*, IT-98-33-A, para. 218 with further references in nn. 353–5; *Prosecutor v Ntakirutimana*, Nos. ICTR-96-10 & ICTR-96-17-T, Trial Chamber Judgment, para. 864 (21 February 2003); *Prosecutor v Semanza*, No. ICTR-97-20-T, Trial Chamber Judgment, para. 409 (15 May 2003); *Prosecutor v Semanza*, No. ICTR-97-20-A, Appeals Chamber Judgment, para. 315 (20 May 2003); *Blagojević and Jokić*, IT-02-60-T, para. 799; Gatete, ICTR-2000-61-T, para. 652; *Karemera and Ngirumpatse*, ICTR-98-44-T, para. 1707; *Ndahimana*, ICTR-01-68-T, para. 844; *Ndindiliyimana et al.*, ICTR-00-56-T, para. 2036; *Popović et al.*, IT-05-88-T, para. 2111. For a more cautious approach, however, see Bisengimana, ICTR-00-60-T, para. 98 ('not be applied mechanically or blindly' referring to the *Kunarac* AC); in a similar vein, see Werle, *Völkerstrafrecht* (2012), mn. 728 (referring to decisions in nn. 687 and 688 where the test has not been applied mechanically).

the commission of the latter'.[64] This exclusive speciality test has been followed by both the ICTY and ICTR quite strictly,[65] explicitly setting aside any other normative test referring to the legal interests protected[66] and qualifying as an error of law any discretional deviation from the test by a Trial Chamber.[67] It has also been adopted by the ICC.[68]

It must also be noted that the test has only been applied to convictions, leaving the practice of *cumulative charging* unaffected. Insofar, the ad hoc tribunals' jurisprudence has continuously argued that it is too early, at the investigation stage, 'to determine to a certainty which of the charges . . . will be proven'.[69] This is not convincing. While the standard and requirements of proof at the investigation stage, when charges are filled, are certainly lower than at the trial stage, the Prosecutor must at any rate possess a 'sufficient basis' (Article 18(1) ICTYS, Article 53(2) ICC Statute), a '*prima facie* case' (Article 18(4) ICTYS), or 'a reasonable basis' (Article 15(3), 53(1) ICC Statute) to proceed with the charges, that is, the Prosecutor must have, on the basis of the available evidence, taken a decision as to which crimes could be fully proven at a later stage. It is, therefore, already perfectly possible at this procedural stage, as correctly acknowledged by the *Bemba* ICC PTC,[70] to apply the elements test, that is, to 'choose the most appropriate characterization'[71] and omit the charging of crimes already included in the most specific, 'larger' crime. Also, for reasons of logic and procedural economy, it does not make sense to allow for multiple charging if multiple convictions or sentencing would not be allowed anyway.[72] From a fairness perspective it must be recalled that cumulative charging significantly enlarges the prosecution case, entailing an imprecise

[66] *Prosecutor v Stakić*, No. IT-97-24-A, Appeals Chamber Judgment, para. 357 (22 March 2006) ('unnecessary to deal with the peripheral submissions of the parties concerning tests in domestic jurisdictions or the underlying social values and interests reflected in particular crimes').

[67] *Prosecutor v Stakić*, No. IT-97-24-A, Appeals Chamber Judgment, para. 358; concurring, *Prosecutor v Strugar*, No. T-01-42-A, Appeals Chamber Judgment, para. 36 (17 July 2008), para. 324.

[68] *Prosecutor v Bemba Gombo*, No. ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges, para. 202 with n. 277 (15 June 2009); *Prosecutor v Ruto, Kogsey and Sang*, No. ICC-01/09-01/11-373, Pre-Trial Chamber Decision on the Confirmation of Charges, paras. 280–1 (23 January 2012).

[69] *Delalić et al.*, IT-96-21-A, para. 400; *Kupreškić et al.*, IT-95-16-A, para. 385; *Prosecutor v Naletilić and Martinović*, No. IT-98-34-A, Appeals Chamber Judgment, para. 103 (3 May 2006); *Prosecutor v Simba*, No. ICTR-01-76-A, Appeals Chamber Judgment, para. 276 (27 November 2007); concurring, see WCRO, *Cumulative Charging* (2010), pp. 2, 25–6; for an analysis of the case law, see also Hünerbein, *Straftatkonkurrenzen* (2005), pp. 76 ff. The case law follows insofar the US practice, cf. Stuckenberg, *ZStW*, 113 (2001), 159; Bogdan, *MelbJIL*, 3 (2002), 31. The same position in favour of cumulative charging has been adopted by other international criminal tribunals (cf. WCRO, *Cumulative Charging* (2010), pp. 2, 4, 6 ff.; Sácouto and Cleary, *CLF*, 22 (2011), 410, 416, 418 ff. [both agreeing with this position]).

[70] *Bemba Gombo*, ICC-01/05-01/08, Confirmation Decision, paras. 201–2. Critically, insofar, WCRO, *Cumulative Charging* (2010), pp. 4–5, 11 ff., 22 ff. (arguing that nothing prohibits cumulative charging within the ICC framework and that it is critical to make multiple convictions possible); in a similar vein, see Sácouto and Cleary, *CLF*, 22 (2011), 411, 423 ff.

[71] *Prosecution v Bemba Gombo*, No. ICC-01/05-01/08-14-tENG, Decision on the Prosecutor's Application for a Warrant of Arrest, para. 25 (10 June 2008); see also *Prosecutor v Bemba Gombo*, No. ICC-01/05-01/08-532, Decision on the Prosecutor's Application for Leave to Appeal, para. 54 (requiring 'different specific elements not contained in the other') (18 September 2009); *Bemba Gombo*, ICC-01/05-01/08-424, Confirmation Decision, para. 202 with n. 277 ('additional material element').

[72] In a similar vein, see Stuckenberg, 'Concursus Delictorum', in Fischer, Kreß, and Lüder, *Prosecution* (2001), pp. 589–90.

[73] This point was made in Ambos, *LJIL*, 22 (2009), 724.

overcharging, and thereby making it difficult for the defence to adequately prepare its case, as it does not know which allegations warrant a response.[73] In fact, cumulative charging undermines the information and delimitation functions of the indictment.[74] As correctly held by the *Bemba* PTC:

> . . . the prosecutorial practice of cumulative charging is detrimental to the rights of the Defence since it places an undue burden on the Defence. The Chamber considers that, as a matter of fairness and expeditiousness of the proceedings, only distinct crimes may justify a cumulative charging approach and, ultimately, be confirmed as charges.[75]

It is to be noted in this context that under the procedural regime of the ICC the Prosecutor does not have the last word on the *legal* characterization of the charges; that power is, rather, held by the judges who, in line with the *iura novit curia* principle, have a wide 'modification competence' with a view to the legal reclassification of the charges.[76]

While the argumentation of the *Bemba* PTC is in line with a coherent doctrine of concours and its impact on sentencing, as we will see later, the issue of cumulative charging is far from settled. Within the ICC, the Bemba logic was followed by the *Kenya* PTC,[77] however the *Al Bashir* PTC, in its first arrest warrant decision, included murder and extermination as crimes against humanity in the arrest warrant[78] although the latter, as we will see in the next section, fully subsumes the former as *lex specialis*. On the other hand, in a subsequent decision, the Appeals Chamber of the STL largely concurred with the *Bemba* PTC, holding that cumulative charging should only be allowed 'when separate elements of the charged offences make these offences truly distinct'.[79]

(c) Concrete application to international crimes

How does this test play out with regard to the relationship between the core crimes? First of all, one should distinguish the commission of various underlying acts of one and the *same crime* (e.g. genocide), from the commission of different crimes (e.g. genocide and crimes against humanity). In the former case, as a general rule, the

[74] cf. Walther, 'Cumulation of Offenses', in Cassese et al., *Rome Statute* i (2002), p. 477–8.

[75] Bemba Gombo, ICC-01/05-01/08-424, Confirmation Decision, para. 202.

[76] cf. Stahn, *CLF*, 16 (2005), 16–17 (arguing that Regulation 55 only 'crystallize[s] and refine[s]' the Trial Chamber's modification competence which is 'implanted' in Articles 74(2) and 64(6)(f) of the ICC Statute and may be inferred from the Chamber's implied powers); see also Ambos and Miller, *ICLR*, 7 (2007), 359–60 (with a comparative analysis of the question of a judicial *proprio motu* power to amend the indictment on pp. 348 ff.); Ambos, *LJIL*, 22 (2009), 725–6. However, for WCRO, *Cumulative Charging* (2010), pp. 4–5, 26 ff., Regulation 55 does not change the need for cumulative charging.

[77] *Ruto, Kogsey and Sang*, ICC-01/09-01/11-373, paras. 280–1 ('materially distinct elements').

[78] *Prosecutor v Al Bashir*, No. ICC-02/05-01/09-3, Decision on the Prosecution's Application for a Warrant of Arrest, paras. 95 ff. (4 March 2009), and disposition p. 92 Nos. iii. and iv.

[79] *STL*, No. STL-11-01/I, Appeals Chamber Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, para. 298 (16 February 2011). Critically, Critically, Sácouto and Cleary, *CLF*, 22 (2011), 411 ff.

[80] cf. Werle, *Völkerstrafrecht* (2012), mn. 721 (single act in a normative sense regarding genocide and crimes against humanity); Werle, *Principles* (2009), mn. 667; Gil Gil, *ZStW*, 112 (2000), 396 (regarding genocide); Lüders, *Völkermord* (2004), pp. 95–6, 206–7; Hünerbein, *Straftatkonkurrenzen* (2005), pp. 105, 122–3 (regarding genocide).

commission may result in one single crime, provided that the single acts are committed against the same victims (group, civilian population, etc.), and with the same intent.[80] The concrete relationship between the individual acts can be determined with the same elements test. It would only exceptionally impede a multiple charging or conviction since most individual crimes are structurally and materially (as to their elements) distinct.[81] A clear exception constitutes—despite the arrest warrant decision of the ICC *Al Bashir* PTC to the contrary—murder and extermination as a crime against humanity (Article 7(1)(a) and (b)), since the latter amounts to multiple cases of the former, that is, it constitutes *lex specialis*, and as such encompasses several cases of murder.[82] Further, the *Bemba* PTC held that the crime against humanity of torture is 'fully subsumed' by the crime against humanity of rape since the latter is distinct from the former only in that it requires one additional element, namely the act of penetration.[83] Similarly, the war crime of outrages upon personal dignity (Article 8(2)(b)(xxi) and (c)(ii)) is fully subsumed by the war crime of rape (Article 8(2)(b)(xxii) and (e)(vi)) since the latter is fully encompassed by 'the constitutive elements of force or coercion' presented by the Prosecutor.[84] Of course, the abstract relationship of rape and torture is rather one of *concours idéal* than of merger. This follows from the different elements of both crimes—apart from the act of penetration required by rape as acknowledged by the Chamber, torture has also a particular control requirement[85]—and from the different legal interests protected—sexual autonomy versus bodily integrity, and general autonomy.[86]

As regards the commission of *different crimes* we have to recall that there exists, as previously stated, a structural hierarchy between them, given their different context elements and the different legal interests protected. This hierarchy helps cases where the underlying acts of genocide, crimes against humanity, and war crimes objectively overlap to be dealt with correctly.[87] The most obvious example is the crime of killing, which exists as an underlying act of all three crimes (Article 6(a), 7(1)(a), 8(2)(a)(i), or (c)(i)). As to genocide and crimes against humanity, the ICTR *Kayishema* TC even held that the elements of the former crime comprise completely the elements of the latter

[81] See for a detailed analysis, Hünerbein, *Straftatkonkurrenzen* (2005), pp. 122–79, 183–4, concluding that most cases of merger excluding cumulative convictions exist within war crimes (p. 179).

[82] In the same vein, see Hünerbein, *Straftatkonkurrenzen* (2005), pp. 126–7 (abstract inclusion); Hall, *'Article 7', in Triffterer, Commentary (2008),* mn. 25; Schabas, *ICC Commentary* (2010), p. 159; Werle, *Völkerstrafrecht* (2012), mn. 727; Werle, *Principles* (2009), mn. 674.

[83] *Bemba Gombo*, ICC-01/05-01/08-424, Confirmation Decision, paras. 204–5.

[84] *Bemba Gombo*, ICC-01/05-01/08-424, Confirmation Decision, paras. 310, 312.

[85] cf. Chapter II, C. (6).

[86] In the same vein, see Hünerbein, *Straftatkonkurrenzen* (2005), pp. 127–8, 133–4.

[87] cf. regarding genocide and crimes against humanity, see Cassese, 'Genocide', in Cassese et al., *Rome Statute* i (2002), p. 339 ('overlapping circles'); Wilmshurst, 'Genocide', in Cryer et al., *Introduction ICL* (2010), p. 206; Kreß, *JICJ*, 3 (2005), 575–6; Kreß, '§ 6', in Joecks and Miebach, *Münchener Kommentar*, vi/ii (2009), mn. 87 (stressing their distinction despite their 'structural congruity').

[88] *Kayishema and Ruzindana*, ICTR-95-1-T, paras. 627 ff.

[89] *Kayishema and Ruzindana*, ICTR-95-1-T, para. 648.

[90] In a similar vein, see Schabas, 'Genocide in ICTY and ICTR', in Fischer, Kreß, and Lüder, *Prosecution* (2001), p. 463; Palombino, *JICJ*, 3 (2005), 786 ff. (applying the rule of consumption and arguing that the widespread or systematic attack is comprised within the genocidal intent and that therefore crimes against humanity are always subsumed by genocide).

crime,[88] or, in other words, crimes against humanity were 'completely subsumed'[89] by the commission of an act of genocide.[90] The Chamber reached this conclusion after comparing the different elements of each of these crimes, concluding that the same facts may prove them both. Of course, this overlooks the fact that genocide, for both its nature and structure, constitutes an autonomous crime,[91] and that the genocidal intent directed at the destruction of a protected group is the element that differentiates genocide from crimes against humanity, constituting a unique, 'materially distinct' element, not contained within any other crime, and thus a multiple conviction for both genocide and crimes against humanity, based on the same facts, is the rule rather than the exception.[92] Such a multiple conviction may even be necessary, in line with Judge Khan's view, to properly 'reflect the totality of the accused's culpable conduct'.[93] The, perhaps, only underlying act of crime against humanity where the subsumption or consumption thesis fully applies, is (apart from extermination[94]), persecution. The fact that it constitutes the historical basis of genocide,[95] and consists of an attack 'against any identifiable group or collectivity' with a discriminatory intent (Article 7(1)(h)),[96] brings it close enough to genocide to conclude that a genocidal attack on a protected group always constitutes persecution, and thus, the former amounts to a *lex specialis* with regard to the latter, fully subsuming it.

The 'elements approach' leads to the same result with regard to the relationship between genocide/crimes against humanity and war crimes.[97] As argued earlier, war crimes require less with regard to the context element. In addition, as to the underlying crimes, Article 8 ICC Statute contains a series of acts which are not included in Articles 6 or 7. Still, there may be cases where multiple charges, or convictions should be avoided. For example, the *Bemba* PTC's holding with regard to rape (as a crime against humanity and war crime) as compared to torture (as a crime against humanity), and outrages upon personal dignity (as a war crime), as mentioned earlier,[98] entails that rape as a crime against humanity may also subsume outrages upon personal dignity as a war crime, taking into account that crimes against humanity are more severe than war crimes in terms of the respective context elements.[99] Last, but not least, as regards the crime of aggression, it is (again) different, in terms of its structure and elements.

[91] cf. Cassese, 'Genocide', in Cassese et al., *Rome Statute* i (2002), p. 339.

[92] cf. Musema, ICTR-96-13-A, paras. 366–7; Walther, 'Cumulation of Offenses', in Cassese et al., *Rome Statute* i (2002), p. 491–2; Hünerbein, *Straftatkonkurrenzen* (2005), pp. 115–22; Werle, *Völkerstrafrecht* (2012), mn. 726, 837, 1004; Werle, *Principles* (2009), mn. 673, 776, 924. See also previously *Akayesu*, ICTR-96-4-T, para. 470 which did 'not consider that any of genocide, crimes against humanity and violations of article 3 common to the Geneva Conventions and of Additional Protocol II are lesser included forms of each other'.

[93] *Kayishema and Ruzindana*, ICTR-95-1-T, Separate and Dissenting Opinion of Judge Khan, para. 33.

[94] Note 82. [95] cf. Chapter I, A. (2). [96] cf. Chapter II, C. (8).

[97] See also Hünerbein, *Straftatkonkurrenzen* (2005), pp. 105–22 concluding that cumulative convictions are always possible (p. 122).

[98] Notes 83 and 84 with main text; see also on multiple convictions Nemitz, *YbIHL*, 4 (2001), 122–5, who follows the *Blockburger* test but takes into account the context element (124–5), therefore concluding that a multiple conviction for rape as crime against humanity and rape as war crime is possible (125).

[99] cf. subsection (3)(a).

(d) The impact on sentencing

The major difference between merger and concurrence/accumulation of offences lies in their reach with regard to the wrongfulness of the act, and the ensuing culpability of the actor: whereas in cases of merger one offence is sufficient to capture the wrongfulness of the respective conduct, and thus the culpability of the actor, in cases of concurrence (and accumulation) multiple offences are required to adequately express wrongfulness and culpability. This difference has, of course, consequences for sentencing, for the simple fact that the fulfilment of more than one offence definition entails an increase in the sentence finally meted out.

While the difference between merger and concurrence/accumulation seems obvious, it is less clear whether the distinction between *concours idéal* and *concours réel* has a relevant impact on sentencing. Both are similar in that they address a multitude of offences, but differ in that *concours idéal* deals with a single conduct whereas *concours réel* deals with multiple conducts. While this distinction exists in many jurisdictions,[100] it is not always clear how it plays out with regard to sentencing. Generally speaking, the total sentencing range in case of several offences reaches from the complete absorption of all lower sentences by the highest one, to the unrestricted adding up of all individual sentences. Within these extremes, the possibility of an aggravation of the highest individual sentence exists, which then, of course, must always remain below the sum of all individual sentences.

In *German* law, the *concours idéal* results in punishment according to the statutory sentencing range of the gravest offence committed (§ 52(2) StGB, the so-called absorption principle); the fact that the single conduct violated several norms is taken into consideration for the determination of the actual sentence.[101] In cases of *concours réel*, a 'total' sentence ('*Gesamtstrafe*') is to be determined (§ 53(1) StGB). It must be higher than the sentence incurred for the gravest offence, but lower than the sum of all individual sentences (§ 54 StGB, the so-called aggravation principle); in practice, such sentences are usually much lower than the total of the individual sentences.

Similarly, in *French* law the individual sentences may be added up, but only to the maximum sentence range;[102] this also applies to cases of *concours idéal* unless the

[100] For example §§ 52, 53 StGB; Article 71 ff. Italian CP; Article 39 ff. Rwandan CC. The English law is not very clear on this issue but in general also seems to draw the said distinction, applying a 'single transaction' standard; cf. Ashworth, *Sentencing* (2010), pp. 266–7. The French Code Pénal (FCP) recognizes explicitly the '*concours*' or '*cumul réel*' (cf. Article 132–2: '*concours d'infractions*'), but the '*concours idéal*' has only been recognized by the doctrine (cf. Debove, Falletti, and Janville, *Droit Pénal* (2012), p. 90). For the different forms of concours from a comparative perspective, see Hünerbein, *Straftatkonkurrenzen* (2005), pp. 30 ff. (Germany and common law); Walther, 'Cumulation of Offenses', in Cassese et al., *Rome Statute* i (2002), pp. 478 ff. (Germany and Anglo-American approach); Azari, *RSC*, 1 (2007), 14 ff. (France and the United States).

[101] cf. Stree and Sternberg-Lieben,'§ 52', in Schönke and Schröder, *Strafgesetzbuch* (2010), mn. 47.

[102] cf. Pradel, *Droit Pénal Général* (2010), pp. 575, 579–82. This means, for example, that in a case of four accumulated offences of theft—simple theft (three years), theft aggravated by one circumstance (five years), by two circumstances (seven years) and by three circumstances (ten years)—the sentence will not amount to the total of twenty-five years but the '*maximum légal*' will be ten years (cf. Article 311-4 FCP and Pin, *Droit Pénal Général* (2012), pp. 349–50). Generally, on the great diversification and judicial discretion in French sentencing, see Melloh, *Strafzumessung* (2010), pp. 281–2, 389 ff.

[103] Debove, Falletti, and Janville, *Droit Pénal* (2012), p. 91.

offences are merged.[103] *Italian* law is stricter. In the case of *concours idéal*, the most severe sentence can be tripled (Article 81 CP); in the case of *concours réel* the sentences are added up (Articles 72 ff. CP). *Rwandan* law allows, in cases of *concours idéal*, a 50 per cent increase of the maximum penalty provided for the gravest crime, and in cases of *concours réel*, for a doubling of this penalty (Articles 93, 94(2) Rwandan CP).

Anglo-American law does not have a comparable substantive doctrine of concours, but the ensuing problems are similarly solved in procedure, or directly on the sentencing level.[104] *English* law contains inherent restrictions of multiple charging because of a strict understanding of the double jeopardy principle which is seen as part of the common law.[105] As to sentencing, multiple (individual) sentences may be imposed concurrently, that is, the highest sentence absorbs the lower sentences (the highest sentence governs), or consecutively (cumulatively), that is, the individual sentences are added up.[106] As a general rule ('good working rule'), the concurrent execution of the sentences is chosen if they are the result of one single or same transaction.[107] In case of a consecutive execution, the total length of the sentence must not be excessive (totality principle).[108] In *US law*, the Supreme Court originally recognized that multiple convictions for the same conduct or transaction violate the prohibition of double jeopardy found in the Fifth Amendment of the Constitution,[109] but this has later been contested and, instead, it has been argued that the Congress may intend to permit cumulative sentencing in creating distinct offences for the same conduct.[110] As a consequence, the double jeopardy rule has been increasingly replaced by the (more flexible) rule of

[104] cf. Stuckenberg, *ZStW*, 113 (2001), 146 ff.; Hünerbein, *Straftatkonkurrenzen* (2005), pp. 44 ff. (71).

[105] cf. Hünerbein, *Straftatkonkurrenzen* (2005), pp. 57–60 referring to s. 33 Interpretation Act 1889 and *R v Thomas* [1950] 1 KB 26, 31 where it was stated that s. 33 'added nothing and detracted nothing from the common law'.

[106] Ashworth, *Sentencing* (2010), pp. 263–5.

[107] cf. Grossman et al., *Archbold Hong Kong* (2009), § 5–78; Ashworth, *Sentencing* (2010), pp. 265 ff.; Stuckenberg, 'Concursus Delictorum', in Fischer, Kreß and Lüder, *Prosecution* (2001), p. 598; Hünerbein, *Straftatkonkurrenzen* (2005), p. 68. On the identical Canadian law, see Ruby et al., *Sentencing*, (2008), §§ 14.9–14.11.

[108] cf. s. 28(2)(b) Criminal Justice Act 1991 ('in a case of an offender who is convicted of one or more other offences, from mitigating his sentence by applying any rule of law as to the totality of sentences'); see also Grossman et al., *Archbold Hong Kong* (2009), § 5–81; critically, Ashworth, *Sentencing* (2010), pp. 270 ff.; Stuckenberg, 'Concursus Delictorum', in Fischer, Kreß and Lüder, *Prosecution* (2001), p. 601; see on the recent developments regarding new guidelines, note 210 with main text. In Canada the totality principle is codified in s. 718.2(c) CC ('the combined sentence should not be unduly long or harsh'); moreover, s. 718.1 CC provides for the proportionality principle according to which 'a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender'; see thereto Ruby et al., *Sentencing* (2008), § 14.8; Hünerbein, *Straftatkonkurrenzen* (2005), pp. 69–70.

[109] *Whalen v US*, 445 U.S. 684, 689 (1980); Campbell, *Sentencing* (2004), §§ 9:20, 9:21; see also Stuckenberg, *ZStW*, 113 (2001), 151; Hünerbein, *Straftatkonkurrenzen* (2005), pp. 44–7.

[110] cf. *Albernaz v US*, 450 U.S. 333, 341–2, 345 (1981) (341–2: '. . . to be assumed from the congressional silence on this point, it is that Congress was aware of the Blockburger rule and legislated with it in mind') (345: '[w]here Congress intended, as it did here, to impose multiple punishments, imposition of such sentences does not violate the Constitution'); *Garrett v US*, 471 U.S. 773, 793 (1985). For an analysis, see Stuckenberg, *ZStW*, 113 (2001), 152–5; Hünerbein, *Straftatkonkurrenzen* (2005), p. 50.

[111] Stuckenberg, *ZStW*, 113 (2001), 156–8.

[112] Note 56. On the similar 'same-transaction' test, see *Bell v US*, 349 U.S. 81 (1955). On the similar *Kienapple*-Doctrine in Canada, see Hünerbein, *Straftatkonkurrenzen* (2005), p. 56.

[113] Stuckenberg, *ZStW*, 113 (2001), 154–6; Hünerbein, *Straftatkonkurrenzen* (2005), pp. 49–50.

lenity.[111] The legal identity of the fulfilled offences had originally been determined by the *Blockburger* ('same evidence') test,[112] but it is controversial whether it is more than a rule of interpretation,[113] and how it relates to the 'legislative-intent test' mentioned earlier.[114] Interestingly, scholars have proposed normative criteria, focusing on the moral wrongfulness and blameworthiness of the conduct,[115] which resemble the rules of consumption and subsidiarity known in civil law systems.[116] Rules of concours may already become relevant at the stage of pleading, but normally only at the trial or sentencing stage.[117] Section 1.07 Model Penal Code allows for the prosecution of each offence fulfilled by the same conduct, but not for conviction if, *inter alia*, 'one offence is included in the other' (s. 1.07(1)(a)), 'one offence consists only of a conspiracy or other form of preparation to commit the other' (s. 1.07(1)(a)), or one offence is *lex specialis* (s. 1.07(1)(d)).[118] The sentencing practice in cases of multiple convictions for several counts is characterized by a broad judicial discretion.[119] After having determined the respective individual sentences for each count, the judge decides whether these individual sentences will be executed concurrently or consecutively (cumulatively).[120] The practically unfettered judicial discretion has been increasingly limited, first at the state level in the 1970s by the introduction of rules on determinate sentencing,[121] and then also on the federal level by the Sentencing Reform Act 1984.[122] This Act set up the US Sentencing Commission which drafted the US Sentencing Guidelines (USSG), to be updated annually.[123] The Act provides, as a general rule, for the concurrent execution

[114] See references in note 110 and *Prince v US*, 352 U.S. 322, 325 (1957) ('we are dealing with a unique statute of limited purpose and an inconclusive legislative history. [...] The question of interpretation is a narrow one, and our decision should be correspondingly narrow').

[115] Moore, *Act and Crime* (1993/2010), pp. 305 ff. (354–5: 'partial or full identity of those act-types that morality makes, intrinsically or instrumentally, wrong'); Thomas, *Double Jeopardy* (1998), 69, 134 ff.

[116] Hünerbein, *Straftatkonkurrenzen* (2005), pp. 51–2.

[117] Stuckenberg, *ZStW*, 113 (2001), 150.

[118] Section 1.07 (1)(d) reads: 'the offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct'. On this provision, see also Stuckenberg, *ZStW*, 113 (2001), 162–3.

[119] See Campbell, *Sentencing* (2004), §§ 9:21, 9:22; Walther, 'Cumulation of Offenses', in Cassese et al., *Rome Statute* i (2002), pp. 482–3; Stuckenberg, *ZStW*, 113 (2001), 167.

[120] On the federal level, 18 USC § 3584 (a) establishes the basic rule for the execution of multiple sentences: '...the terms may run concurrently or consecutively, except that the terms may not run consecutively for an attempt and for another offence that was the sole objective of the attempt'. See also Walther, 'Cumulation of Offenses', in Cassese et al., *Rome Statute* i (2002), p. 482; Stuckenberg, *ZStW*, 113 (2001), 165; Bogdan, *MelbJIL*, 3 (2002), 3.

[121] Campbell, *Sentencing* (2004), § 4:2; LaFave et al., *Criminal Procedure* (2009), § 26.3 (b).

[122] Pub. L. 98-473, 12 October 1984, 98 Stat. 1837, 2017–2034, codified in 18 USC §§ 3551–3626 and 28 USC §§ 991–998.

[123] cf. 28 USC § 994(a) and USSC Guidelines Manual (1 November 2000), available at <http://www.ussc.gov>. See generally on the US sentencing practice, Reitz, 'U.S. Sentencing Practices', in Tonry and Frase, *Sentencing* (2001), pp. 225 ff.; generally on sentencing guidelines, see Berman, 'Offense—Offender Distinctions', in Robinson, Garvey, and Ferzan, *Conversations* (2009), pp. 613 ff.; LaFave et al., *Criminal Procedure* (2009), § 26.3(e); Campbell, *Sentencing* (2004), § 4.6; Melloh, *Strafzumessung* (2010), pp. 181 ff.; critical of USSG Leinwand, *ColHRLR*, 40 (2008–2009), 845–7, 849 (reasonableness instead of mandatory grid); for a profound critique of the mandatory (minimum) sentencing introduced by US federal sentencing, see Tonry, *Sentencing Matters* (1996), ch. 5, pp. 134–64; see also Ashworth, 'Reducing Sentence Disparity', in von Hirsch, Ashworth, and Roberts, *Principled Sentencing* (2009), pp. 252–3. On sentencing commissions, see Miller and Wright, *Criminal Procedures* (2003), pp. 1266–7.

[124] cf. 18 USC § 3584(a).

of sentences imposed in one trial, and the consecutive execution of sentences imposed in different trials; the Court may, however, determine otherwise.[124] This basic model has been superseded by Chapter 3, Part D ('multiple counts') of the USSG which designs an elaborated system of rules of concours for multiple convictions which, in substance, resembles many principles and rules known from the forms of civil law concours, including the just mentioned rule of consumption.[125] We cannot go into detail here,[126] but it suffices to point out that the USSG propose rules for grouping together closely interrelated offences (which are then treated as one offence for sentencing purposes), and common sentencing ranges which then serve as a basis for a joint sentencing range (of all offence groups 'grouped together'). If the offences are not closely related (*concours réel*), the punishment of the most serious offence will be increased.[127] However, and despite the fact that almost half of the states have either followed the USSG or developed their own sentencing guidelines, judicial discretion still governs in most states, since the US Supreme Court 'recast the Sentencing Guidelines as non-binding', creating a new 'advisory Guidelines system'.[128] In sum, taking all fifty US states together, we are confronted with a range from indeterminate to determinate sentencing.[129] There is, however, with many differences in detail, a certain tendency to prefer concurrent over consecutive sentences.[130]

While in these national jurisdictions accumulated crimes are normally punished more severely than the same crimes fulfilled by the same conduct (*concours idéal*),[131]

[125] This is taken up in the idea of grouping together offences, see main text and Stuckenberg, 'Concursus Delictorum', in Fischer, Kreß, and Lüder, *Prosecution* (2001), p. 592 with n. 144; Walther, 'Cumulation of Offenses', in Cassese et al., *Rome Statute* i (2002), p. 483.

[126] For a good analysis, see LaFave et al., *Criminal Procedure* (2009), § 26.3.; Stuckenberg, *ZStW*, 113 (2001), 168–73; Stuckenberg, 'Concursus Delictorum', in Fischer, Kreß, and Lüder, *Prosecution* (2001), pp. 62–5.

[127] USSG § 3 D 1.4. and ch. 3 D. introductory comment. In fact, this corresponds to the aggravation principle of the German system as explained at note 101 and main text; see also Silverman, 'USA', in Sieber, *Punishment* ii (2004), p. 13.

[128] cf. *US v Booker*, 543 U.S. 220 (2005); see also Berman, 'Offense–Offender Distinctions', in Robinson, Garvey, and Ferzan, *Conversations* (2009), pp. 613 ff. (616); Roberts, 'Sentencing Discretion', in von Hirsch, Ashworth, and Roberts, *Principled Sentencing* (2009), p. 232; Miller and Wright, *Criminal Procedures* (2003), p. 1267; Stuckenberg, *ZStW*, 113 (2001), 174–7; Walther, 'Cumulation of Offenses', in Cassese et al., *Rome Statute* i (2002), pp. 482–3; Hünerbein, *Straftatkonkurrenzen* (2005), pp. 65–7; LaFave et al., *Criminal Procedure* (2009), §§ 26.3, 26.4; on the model Minnesota guidelines (as a model of numerical guidelines), see Frase, 'Sentencing Policy', in von Hirsch, Ashworth, and Roberts, *Principled Sentencing* (2009), pp. 270 ff.; Ashworth, 'Reducing Sentence Disparity', in von Hirsch, Ashworth, and Roberts, *Principled Sentencing* (2009), pp. 249–50; also Melloh, *Strafzumessung* (2010), pp. 288–9; on sentencing practice in Australia, see Chifflet and Boas, *CLF*, 23 (2012), 146.

[129] cf. Saltzburg and Capra, *American Criminal Procedure* (2010), pp. 1438–9; Campbell, *Sentencing* (2004), § 4:1; LaFave et al., *Criminal Procedure* (2009), § 26.3 (f); Silverman, 'USA', in Sieber, *Punishment* ii (2004), pp. 2 ff.; Senna and Siegel, *Criminal Justice* (1999), pp. 416–23. See also Frase 'Sentencing and Comparative Law Theory', in Jackson, Langer, and Tillers, *Crime, Procedure and Evidence* (2008), p. 358 (pointing to the 'highly discretionary prosecutorial screening and charge bargaining' as practical aspects which further contribute to indeterminate sentencing).

[130] LaFave et al., *Criminal Procedure* (2009), §§ 26.3 (a)–(f), 26.4; Stuckenberg, *ZStW*, 113 (2001), 175; Walther, 'Cumulation of Offenses', in Cassese et al., *Rome Statute* i (2002), p. 483.

[131] cf. Stuckenberg, 'Concursus Delictorum', in Fischer, Kreß, and Lüder, *Prosecution* (2001), pp. 598–9; Hünerbein, *Straftatkonkurrenzen* (2005), p. 75; Schabas, 'Penalties', in Cassese et al., *Rome Statute* ii (2002), p. 1530.

[132] cf. § 28 Austrian CC; Article 68 Swiss CC; Article 48 SFRY CC (English translation).

there are also several other jurisdictions, including Austria, Switzerland, and Yugoslavia, that treat *concours idéal* and *réel* equally.[132] This is convincing in cases where the same offence is fulfilled several times by either one single, or multiple acts. Take the example of the killing of five people, either by one terrorist assault carried out using a single bomb, or by shootings taking place over five subsequent days. The motives behind the perpetrator's actions could be more or less evil in either scenario; in any case, there is no plausible reason to privilege one conduct over the other in terms of sentencing.[133]

Be that as it may, the law of the ad hoc tribunals, basically unconcerned with the distinction between *concours idéal* and *réel*, leaves the Trial Chambers a wide discretion in finding the right sentence.[134] Common Rule 87(C) of the ICTY and ICTR (RPE) allows for a sentence to be served consecutively or concurrently unless the respective Trial Chamber 'decides to exercise its power to impose a single sentence reflecting the totality of the criminal conduct of the accused'. The jurisprudence leaves it to the full discretion of a Trial Chamber 'to impose sentences which are either global, concurrent or consecutive, or a mixture of concurrent and consecutive'.[135] The only guiding criterion is the 'totality principle',[136] in other words, the sentence 'should reflect the totality of the culpable conduct' or, in more general terms, 'the gravity of the offences and the culpability of the offender so that it is both just and appropriate'.[137] As to the practice of multiple charging and multiple convictions, this means that they only then 'serve to describe the full culpability of a particular

[133] cf. Stuckenberg, 'Concursus Delictorum', in Fischer, Kreß, and Lüder, *Prosecution* (2001), p. 599.

[134] cf. *Furundžija*, IT-95-17/1-A, para. 238; *Prosecutor v Akayesu*, No. ICTR-96-4-A, Appeals Chamber Judgment, para. 407 (1 June 2001); *Krstić*, IT-98-33-A, para. 242; *Prosecutor v Seromba*, No. ICTR-2001-66-A, Appeals Chamber Judgment, para. 228 (12 March 2008); *Strugar*, No. T-01-42-A, para. 36; *Prosecutor v Martić*, No. IT-95-11-A, Appeals Chamber Judgment, para. 326 (8 October 2008); *Prosecutor v Krajišnik*, No. IT-00-39-A, Appeals Chamber Judgment, para. 734 (17 March 2009); *Prosecutor v Dragomir Milošević*, No. IT-98-29/1-A, Appeals Chamber Judgment, para. 297 (12 November 2009); *Prosecutor v Haradinaj*, No. IT-04-84-A, Appeals Chamber Judgment, para. 321 (19 July 2010); *Prosecutor v Bagosora and Nsengiyumva*, No. ICTR-98-41-A, Appeals Chamber Judgment, para. 419 (14 December 2011); *Prosecutor v Hategekimana*, No. ICTR-00-55B-A, Appeals Chamber Judgment, para. 288 (8 May 2012); *Prosecutor v Kanyarukiga*, No. ICTR-02-78-A, Appeals Chamber Judgment, para. 270 (8 May 2012); see also note 282 and D'Ascoli, *Sentencing* (2011), p. 13; Henham, *JICJ*, 5 (2007), 759; Chifflet and Boas, *CLF*, 23 (2012), 139, 155; with regard to the ICTR, Szoke-Burke, *JICJ*, 10 (2012), 564.

[135] *Delalić et al.*, IT-96-21-A, para. 429; *Prosecutor v Sesay, Kallon and Gbao*, No. SCSL-04-15-T, Trial Chamber Sentencing Judgment, para. 18 (8 April 2009); *Prosecutor v Brima, Kamara and Kanu*, No. SCSL-2004-16-A, Appeals Chamber Judgment, paras. 322 ff. (22 February 2008).

[136] On the limiting function of this principle in common law, see Hünerbein, *Straftatkonkurrenzen* (2005), pp. 69, 71; Piva, *ZIS*, 3 (2008), 146.

[137] *Delalić et al.*, IT-96-21-A, para. 429; *Prosecutor v Blagojević and Jokić*, No. IT-02-60-A, Appeals Chamber Judgment, para. 339 (9 May 2007); *Prosecutor v Baragaza*, No. ICTR-05-86-S, Trial Chamber Sentencing Judgment, para. 42 (17 November 2009); *Bisengimana*, ICTR-00-60-T, para. 199; *Prosecutor v Kajelijeli*, No. ICTR-98-44A-A, Appeals Chamber Judgment, para. 290 (23 May 2005); *Prosecutor v Kalimanzira*, No. ICTR-05-88-T, Trial Chamber Judgment, para. 741 (22 June 2009); *Prosecutor v Kalimanzira*, No. ICTR-05-88-A, Appeals Chamber Judgment, para. 235 (20 October 2010); *Prosecutor v Karera*, No. ICTR-01-74-A, Appeals Chamber Judgment, para. 390 (2 February 2009); *Prosecutor v Setako*, No. ICTR-04-81-T, Trial Chamber Judgment and Sentence, para. 494 (25 February 2010).

[138] cf. *Naletilić and Martinović*, IT-98-34-A, para. 585; *Brima et al.*, SCSL-2004-16-A, para. 215.

[139] See subsection (3)(b). This is apparently overlooked by WCRO, *Cumulative Charging* (2010), pp. 9–10 where it is argued that there is a clear preference for multiple convictions and sentences in all circumstances.

accused or provide a complete picture of his criminal conduct'[138] if this conduct really amounts to a *concours réel* in line with the principles developed earlier (i.e., in particular the different elements test).[139] And even then, it is still a different matter if a multiple conviction necessarily entails the issuing of multiple sentences. In fact, the totality principle—as the overarching principle to ensure that a sentence adequately reflects the gravity of the conduct and the culpability of the perpetrator—may often lead to the imposition of concurrent or single sentences to avoid the aggravating effect of multiple charging. Indeed, the jurisprudence has often imposed concurrent and single sentences for this reason.[140] In contrast, the ICC Statute contains within Article 78(3)[141] a rule that, albeit equally ignoring the distinction between *concours idéal* and *réel*, determines, regarding convictions for 'more than one crime' (i.e., for multiple offences either on the basis of *concours idéal* or *réel*)[142] that 'a sentence for each crime' and, on that basis, 'a joint sentence specifying the total period of imprisonment' be pronounced. This resembles the concept of a joint, or 'total' sentence, as adopted in cases of *concours réel* (e.g., in Germany)[143] and comes, as to the 'joint sentence', down to the totality principle.[144] The rule is certainly an improvement compared to the ICTY/ICTR law and practice, in that it obliges the Court to first establish single sentences, and thus, to provide for a greater transparency.[145] Moreover, the provision establishes 'the highest individual sentence' as the minimum, and thereby supports the argument that, as a rule, a sentence more severe than 'the highest individual sentence' should be imposed. Such an elevated sentence seems to be the most adequate answer to the multiple violations of legal interests in case of multiple offences.

[140] cf. Stuckenberg, 'Concursus Delictorum', in Fischer, Kreß, and Lüder, *Prosecution* (2001), pp. 574, 579, 585, 600 with case law references; Walther, 'Cumulation of Offenses', in Cassese et al., *Rome Statute* i (2002), p. 488; Hünerbein, *Straftatkonkurrenzen* (2005), pp. 89–90, 96; Book, *Appeal and Sentence* (2011), pp. 135 ff. In a more nuanced approach the *Kupreškić* TC imposed a concurrent sentence for two separate counts but aggravated it because the lesser count 'significantly adds to the heinous nature of the prevailing offence…' (*Kupreškić et al.*, IT-95-16-T, para. 718); *Karera*, ICTR-01-74-A, para. 393.

[141] Critically, Walther, 'Cumulation of Offenses', in Cassese et al., *Rome Statute* i (2002), p. 494; *González Cussac and Górriz Royo,* 'Ne Bis in Idem', in Gómez Colomer et al., *La Corte Penal Internacional* (2003), pp. 235–6 (calling for minimum rules on concours, 237, 239 ff.); praising the provision, Nemitz, *YbIHL*, 4 (2001), 126; D'Ascoli, *Sentencing* (2011), p. 319; see also Friman, 'Sentencing and Penalties', in Cryer et al., *Introduction ICL* (2010), pp. 494 ff.; Fronza, 'Le Sanzioni', in Amati et al., *Introduzione* (2010), pp. 292 ff.; Werle, *Völkerstrafrecht* (2012), mn. 734; Scalia, 'Peines', in Kolb, *Droit International Pénal* (2008), pp. 349 ff.; Piva, *ZIS*, 3 (2008), 143–4.

[142] Article 68 of the Swiss CC is very similar to Article 78(3) in that it also imposes an elevated penalty if multiple crimes are committed regardless of whether they concur (ideally) or accumulate (really).

[143] See also Walther, 'Cumulation of Offenses', in Cassese et al., *Rome Statute* i (2002), p. 494.

[144] See also D'Ascoli, *Sentencing* (2011), p. 267 (comparing it to the English law).

[145] In the same vein, see D'Ascoli, *Sentencing* (2011), pp. 129–30, 266–7, 308–9, 319, 322 (critical of the ad hoc tribunals' practice of only imposing a single total sentence); see also Beresford, *ICLR*, 1 (2001), 83–4; Sloane, *JICJ*, 5 (2007), 717–18; Clark, *GeoLJ*, 96 (2008), 1700–1; Werle, *Principles* (2009), mn. 678; Werle, *Völkerstrafrecht* (2012), mn. 733; Book, *Appeal and Sentence* (2011), pp. 43, 138 ff. (141), 271, 307.

(4) Conclusion

The basic rationale of any system of rules of *concours* is to achieve a *just and adequate punishment* in line with the wrongfulness of the incriminated conduct and the culpability of the offender. This presupposes that any double counting by multiple charging, convictions, or sentencing must be avoided, and that the total sentence must never be disproportionate and excessive (which is the flip side of the totality principle).[146] In order to achieve this outcome, current ICL applies the same elements (reciprocal speciality) test, and the ensuing rule of speciality as well as the rule of consumption.[147] If a single conduct fulfils two or more offences, which however do not contain different elements, multiple charging, convicting, and sentencing is prohibited. Rather, the (larger) offence, with more elements encompassing the other offence(s), includes this (smaller or lesser) offence. It constitutes a *lex specialis*, superseding the smaller offence which is to be seen as *lex generalis*.

In opposition to the rather formal-logical elements test, it may also be possible that one offence encompasses another in terms of its wrongfulness, that is, the relationship is not of a mere formal-logical nature, as in the case of speciality, but of a normative one. Thus, the rule of consumption accounts for cases where the wrongfulness of the single conduct, and thus the culpability of the offender, is fully accounted for (consumed) by one offence although the respective offences may contain materially distinct elements. In this context, one may also understand the consumed offence as a 'lesser included offence'.[148] In all other cases, where neither the same elements test with its rule of speciality, nor the rule of consumption apply, we face truly distinct offences which may lead to multiple charging, convictions, and sentences.

As to the punishment for one single conduct, or the 'same transaction' (*concours idéal*)—as compared to several different conducts (*concours réel*)—from these considerations it follows that a *concours idéal* normally entails a lower punishment[149] unless the same offence is violated several times.[150] The true rationale for the—normally—more lenient treatment of *concours idéal* is, however, not the naturalistic fact that one act is less blameworthy than several acts—we have already shown that this is not necessarily the case—but rather because multiple offences fulfilled by one single conduct normally overlap, that is, the perpetrator would be punished twice for the overlapping part of the offences if the sentences were just added up.[151] Thus, while in the case of *concours idéal* the sentence should normally be based on the offence with

[146] For a similar conclusion on the basis of a comparison between the common and civil law approaches, see Hünerbein, *Straftatkonkurrenzen* (2005), p. 73.

[147] On speciality and consumption as part of ICL, cf. Stuckenberg, 'Concursus Delictorum', in Fischer, Kreß, and Lüder, *Prosecution* (2001), pp. 587–8, 594.

[148] See also Hünerbein, *Straftatkonkurrenzen* (2005), p. 74.

[149] Stuckenberg, 'Concursus Delictorum', in Fischer, Kreß, and Lüder, *Prosecution* (2001), pp. 598–9.

[150] Where *concours idéal* and *réel* may be treated equally, cf. note 132 and main text.

[151] cf. Stuckenberg, 'Concursus Delictorum', in Fischer, Kreß, and Lüder, *Prosecution* (2001), pp. 599, 603.

[152] If such an offence-specific maximum exists; this is not the case in ICL as we shall see in Section B. (2).

[153] In a similar vein, see Stuckenberg, 'Concursus Delictorum', in Fischer, Kreß, and Lüder, *Prosecution* (2001), p. 604; see also Hünerbein, *Straftatkonkurrenzen* (2005), p. 75.

the highest sentencing range (the gravest offence), but not exceed its maximum,[152] in the case of *concours réel* the joint or combined sentences of the individual offences (sentences) should normally exceed the maximum sentence for the gravest crime, but—with a view to the totality principle—not exceed the sum of all individual sentences.[153]

B. Sentencing

According to the most recent empirical sentencing analysis regarding the eight international criminal tribunals since Nuremberg,[154] and ending with the *Lubanga* sentencing judgment of March 2012, sentences (leaving aside the death penalty)[155] range from eleven months (Special Panels Dili (East Timor) (SPD)) to fifty-two years (SCSL) with an overall average of 15.3 years.[156] The penalties imposed by the ICTY range from two to forty-six years or life imprisonment (one case),[157] the ones of the ICTR from nine (ten) months to forty-five years or life imprisonment (twenty-one cases).[158]

[154] Smeulers, Holá, and van den Berg, *ICLR*, 13 (2013), 21–5 covering IMT, IMTFE, ICTY, ICTR, ICC, SCSL, SPD, and ECCC. On sentencing for contempt of court, see D'Ascoli, *JICJ*, 5 (2007), 735 ff.

[155] It could only be imposed in Nuremberg and Tokyo. The IMT imposed twelve (out of nineteen) and the IMTFE seven (out of twenty-five) death sentences, see Volume I of this treatise, pp. 5–6.

[156] Smeulers, Holá, and van den Berg, *ICLR*, 13 (2013), 21–2 with Table 9.

[157] cf. *Prosecutor v Orić*, No. IT-03-68-T, Trial Chamber Judgment, para. 783 (30 June 2006), (two years); *Prosecutor v Krstić*, No. IT-98-33-T, Trial Chamber Judgment (2 August 2001), (forty-six years); *Prosecutor v Stakić*, No. IT-97-24-T, Trial Chamber Judgment, (31 July 2003), (life). The convictions for contempt of court are not taken into account.

[158] cf. *Prosecutor v 'GAA'*, No. ICTR-07-90-R77, Trial Chamber Judgment (4 December 2007) (nine months for false testimony) and *Prosecutor v Nshogoza*, No. ICTR-07-91-T, Trial Chamber Judgment (7 July 2009) (ten months); *Kajelijeli*, ICTR-98-44A-A (forty-five years); *Idelphonse Nizeyimana*, No. ICTR-2000-55C-T, Trial Chamber Judgment and Sentence, para. 1598 (19 June 2012); *Prosecutor v Callixte Nzabonimana*, No. ICTR-98-44D-T, Trial Chamber Judgment and Sentence, para. 1822 (31 May 2012); *Idelphonse Hategekimana*, ICTR-00-55B-A, para. 307; *Mathieu Ngirumpatse and Édouard Karemera*, ICTR-98-44-T; *Prosecutor v Pauline Nyiramasuhuko, Arsène Shalom Ntahobali, and Élie Ndayambaje*, No. ICTR-98-42-T, Trial Chamber Judgment and Sentence, para. 2721 (24 June 2011); *Prosecutor v Tharcisse Renzaho*, No. ICTR-97-31-T, Trial Chamber Judgment and Sentence, para. 826 (14 July 2009); *Prosecutor v François Karera*, No. ICTR-01-74-T, Trial Chamber Judgment and Sentence, para. 585 (7 December 2007); *Prosecution v Sylvestre Gacumbitsi*, No. ICTR-2001-64-T, Appeals Chamber Judgment, para. 207 (7 July 2006); *Prosecutor v Emmanuel Ndindabahizi*, No. ICTR-01-71-I, Trial Chamber Judgment and Sentence (15 July 2004); *Athanase Seromba*, ICTR-2001-66-A, para. 240; *Prosecutor v Jean de Dieu Kamuhanda*, No. ICTR-99-54A-T, Trial Chamber Judgment, para. 770 (22 January 2004); *Prosecutor v Eliézer Niyitegeka*, No. ICTR-96-14-T, Trial Chamber Judgment and Sentence, para. 502 (16 May 2003); *Alfred Musema*, ICTR-96-13-A; *Prosecutor v George Rutaganda*, No. ICTR-96-3-T, Trial Chamber Judgment (6 December 1999); *Prosecutor v Clément Kayishema*, No. ICTR-95-1-A, Appeals Chamber Judgment (Reasons), para. 372 (1 June 2001); *Jean Paul Akayesu*, ICTR-96-4-T; *Jean Kambanda*, ICTR-97-23-S; *Prosecutor v Mikaeli Muhimana*, No. ICTR-95-1B-T, Trial Chamber Judgment and Sentence, para. 618 (28 April 2005) (all life). See also Smeulers, Holá, and van den Berg, *ICLR*, 13 (2013), 22 with Table 9 who, however, incorrectly indicate forty years as the maximum ICTY sentence and six years as the minimum ICTR sentence.

[159] Smeulers, Holá, and van den Berg, *ICLR*, 13 (2013), 22. For changes on appeal, see Smeulers, Holá, and van den Berg, *ICLR*, 13 (2013), 24 with Table 10. Of course, these numbers must be corrected in light of the changes mentioned in the previous note. Earlier, taking into account the jurisprudence up to June 2010, Holá, Smeulers, and Bijleveld, *JICJ*, 9 (2011), 420 found average sentences of 15 years (ICTY) and 33.5 years (ICTR).

[160] D'Ascoli, *Sentencing* (2011), pp. 216–17 with Figure 4.2. The high ICTR average is explained by the high number of life imprisonment sentences (eighteen at the time of the study) for which the author calculated—quite arbitrarily—100 years (D'Ascoli, *Sentencing* (2011), p. 212 with n. 13). A lower number, for example fifty-five years (cf. Ewald, *ICLR*, 10 (2010), 393) is more realistic and would have a less distorting effect on the average sentence.

According to one empirical study, covering the sentences up to March 2012, the average trial sentence before the ICTY is 15.9 years imprisonment and before the ICTR, 22.6 years.[159] Another study, taking into account sentences up to August 2010, finds an average of nineteen years before the ICTY and fifty-two [sic!] years before the ICTR.[160] Despite these differences, from both studies it clearly follows that the ICTR has imposed on average harsher sentences than the ICTY.[161] Notwithstanding, both Tribunals have been criticized for 'too lenient' sentences.[162] The ICC, in its first sentencing judgment in the *Lubanga* case, imposed a 'joint' sentence of fourteen years.[163]

In light of these numbers the question arises as to whether there is any consistency in international sentencing, or if it is more appropriate to speak of a 'lawlessness in sentencing' as was famously denounced by Judge Frankel with regard to many US jurisdictions.[164] The question has only recently received more attention with regard to the ICTY and ICTR. Historically, sentencing has always been treated with little attention, rather as a kind of 'afterthought'.[165] In any case, the sentencing practice of the ICTY and ICTR has been criticized as disparate, uncertain, and inconsistent.[166] This criticism is, however, usually based on predominantly normative or qualitative

[161] See for a detailed analysis, D'Ascoli, *Sentencing* (2011), pp. 215 ff., also pp. 187, 197, 259; see also Holá, Bijleveld, and Smeulers, *EJCrim*, 9 (2012), 549; Holá, Smeulers, and Bijleveld, *JICJ*, 9 (2011), 420–1, 422; Ohlin, 'Proportional Sentences at the ICTY', in Swart, Zahar, and Sluiter, *Legacy* (2011), p. 323.

[162] cf. regarding the ICTY, Harmon and Gaynor, *JICJ*, 5 (2007), 684 ff., 711–12; Hoven, *ZStW*, 125 (2013), 138, 159 (calling for life imprisonment as a rule); regarding the ICTR, Szoke-Burke, *JICJ*, 10 (2012), 566 (calling, therefore, for 'cumulative harm-based sentencing' to achieve proportionate punishment in line with retribution, 569); critical from a retributive perspective, see also Glickman, *ColJTransnat'lL*, 43 (2004–2005), 248; D'Ascoli, *Sentencing* (2011), p. 187. This argument is, of course, predicated on the acceptance of retribution as a valid purpose of punishment in ICL; critically Volume I of this treatise, pp. 68–9.

[163] *Prosecutor v Lubanga Dyilo*, No. ICC-01/04-01/06-2901, Trial Chamber Decision on Sentence, para. 107 (10 July 2012). We will return to this judgment in the course of this section.

[164] Frankel, 'Lawlessness in Sentencing', in von Hirsch, Ashworth, and Roberts, *Principled Sentencing* (2009), pp. 237 ff.

[165] Schabas, 'International Sentencing', in Bassiouni, *ICL* iii: *Enforcement* (2008), p. 613; conc. Sloane, *JICJ*, 5 (2007), 713, 716.

[166] cf. Olusanya, *Sentencing* (2005), pp. 55 ff. 139 ff. criticizing the 'cafeteria system' (p. 8, quoting Ashworth, *Sentencing and Criminal Justice*, 2nd edn, 1995, p. 331) and 'lottery system' (p. 139) of sentencing; Sayers, *LJIL*, 16 (2003), 776 ('disparity', 'unpredictable'); Dana, *ICLR*, 4 (2004), 321 taking the Trial Chamber's sentencing decision in the *Blaškić* case as an example; Bagaric and Morss, *ICLR*, 6 (2006), 191 ff. (especially criticizing the insufficient link to the rationales of punishment), 193 ('high degree of discretion and uncertainty'), 208 ('indeterminate'); Drumbl, *Atrocity* (2007), p. 11 ('confusing, disparate, inconsistent and erratic; it gives rise to distributive inequities'); Sloane, *JICJ*, 5 (2007), 715–16 (regarding the ICTR); Clark, *GeoLJ*, 96 (2008), 1687, 1691–5 (1694: 'variety in absolute sentence lengths, individual sentence disparities at the trial and appellate levels, and divergent approaches to aggravating and mitigating circumstances'); Leinwand, *ColHRLR*, 40 (2008–2009), 801; Book, *Appeal and Sentence* (2011), p. 23 ('doctrinal uncertainty'), p. 34 ('considerable uncertainty' regarding concept of gravity), p. 36 (inconsistency regarding aggravating circumstances), pp. 65–6; Scalia, *JICJ*, 9 (2011), 681–2 ('vague'); Chifflet and Boas, *CLF*, 23 (2012), 135 ('incoherence'), 153–6 ('ingrained lack of coherence and inconsistency'), 158–9; see for an excellent summary of the critique, Meernik, and King, *LJIL*, 16 (2003), 725–31; also Ewald, *ICLR*, 10 (2010), 369–70.

[167] Ewald, *ICLR*, 10 (2010), 371; but see also Chifflet and Boas, *CLF*, 23 (2012), 153–4 questioning the explanatory force of the empirical studies and confronting them with concrete examples of incoherent sentencing which 'serve not merely as "ad hoc examples of unequal treatment"'.

[168] Meernik and King, *LJIL*, 16 (2003), 718; Holá, Bijleveld, and Smeulers, *EJCrim*, 9 (2012), 540. See also Sloane, *JICJ*, 5 (2007), 715–16, 733 (speaking with regard to the ICTR of a 'common law of sentencing' and

considerations, and lacks a solid empirical basis. It is, in the words of perhaps the most analytical counter-critique, 'more related to the discourse on sentencing than based on a thorough analysis of the reality of sentencing practice'.[167] Against this background, it is not surprising that the few empirical evaluative studies offer a more nuanced picture, identifying general patterns and trends which suggest 'a fair degree of consistency'.[168] A consistency so understood has at least three dimensions, that is, 'consistency in approach' (following the same underlying principles), 'consistency in outcome (predictability)' (similar offences and offenders should be sentenced similarly in order to achieve predictability) and 'systemic consistency' (similarity between the tribunals).[169] In an in-depth study, Silvia D'Ascoli, while criticizing the practice as unsettled and largely inconsistent, especially with regard to the application of aggravating and mitigating factors, acknowledges 'general patterns of consistency'.[170] James Meernik claims that judges seek consistency by taking recourse to the traditional rationales of punishment.[171] Barbora Holá, Catrien Bijleveld, and Alette Smeulers find consistency to a different degree in all of the three dimensions that have been mentioned.[172] In particular, as to 'consistency in outcome', they find international sentences 'as statistically predictable as sentences in domestic legal systems with more detailed legal regulation of sentence determination'.[173] This rightly draws a comparison with national sentencing which, as already set out,[174] usually suffers, due to broad sentencing ranges and large judicial discretion, from similar problems to international sentencing, such as of lack of certainty and predictability—and international sentencing is not necessarily worse at dealing with such problems.[175] International sentencing offers, at least, an 'arbitrary coherence' in that the first relatively arbitrary sentences serve as an 'anchor value' for future sentences which will then be coherent vis-à-vis the first sentences.[176] Of course, the 'emerging penal regime', referred to by the *Furundžija*

admitting that 'several patterns have emerged'). Also Book, in his predominantly normative study, claims to demonstrate that a 'coherent approach' and an underlying basic sentencing structure can be derived from the case law in order to thereby establish a basis for a reasonable appellate review (Book, *Appeal and Sentence* (2011), pp. 64 ff. (158–9), 306; concurring, Nemitz, *JICJ*, 11 (2013), 284). He even argues that this structure amounts to principles of international law within the meaning of Article 21(1)(b) ICC Statute (Book, *Appeal and Sentence* (2011), 294, 298, 310).

[169] cf. Holá, *International Sentencing* (2012), pp. 10–13; summarizing summarizing Holá, Bijleveld, and Smeulers, *EJCrim*, 9 (2012), 540.

[170] D'Ascoli, *Sentencing* (2011), p. 260; see also pp. 12–13, 54, 196, 198, 203–4 (here with various references in nn. 1 ff.).

[171] Meernik, *SocSciQ*, 92 (2011), 588 ff. (concluding, 588, that 'judges sentence in a consistent manner premised on domestic and international rationales'). Contra Bagaric and Morss, *ICLR*, 6 (2006), 191 ff., 240 ff. who criticize the case law for insufficiently explaining their sentences with regard to the purposes of punishment.

[172] Holá, Bijleveld, and Smeulers, *EJCrim*, 9 (2012), 548–9. See also previously with regard to the ICTR's punishment of genocide Holá, Bijleveld, and Smeulers, *ICLR*, 11 (2011), 745 (finding that 'ICTR judges appear in most cases to follow the main principles emphasized in their case law, with sentences gradated in line with the increasing seriousness of defendants' crimes and their culpability'); and 769 ('patterns . . . could be identified').

[173] Holá, Bijleveld, and Smeulers, *EJCrim*, 9 (2012), 548.

[174] Section A. (3)(d).

[175] In the same vein, see also Ewald, *ICLR*, 10 (2010), 372.

[176] Ewald, *ICLR*, 10 (2010), 387–8.

[177] *Furundžija*, IT-95-17/1-A, para. 237.

[178] Sloane, *JICJ*, 5 (2007), 715 (arguing that this applies 'with equal, if not greater, force to the sentencing practices of the ICTR'); concurring, Chifflet and Boas, *CLF*, 23 (2012), 159.

AC, 'and the coherence in sentencing practice that this denotes',[177] did not exist at the time of this judgment, nor does it exist today.[178]

Thus, there is room for improvement, and indeed improvement is needed since the sentencing decision is the most important decision in any criminal trial from the perspective of the defendant. Indeed, 'consistency in punishment' is, as correctly asserted by the *Delalić et al.* AC, one 'of the fundamental elements in any rational and fair system of criminal justice'.[179] From a principled perspective, the *nulla poena* principle with its in-built demands of fairness and foreseeability calls for a clarification and systematization of sentencing criteria and penalties. It will therefore be examined more closely in the next section. If, further, the inconsistent sentencing practice of the ad hoc tribunals can be explained as due to 'the lack of guiding principles and categorization of factors relevant in sentencing',[180] the systematization and the development of guiding principles is also necessary for practical reasons.[181] It will assist the Trial Chambers in determining their sentences more precisely and provide for the necessary gradations,[182] and thereby enabling them to impose more just sentences. Of course, it is important not to overlook the 'humane factor', that is, the extra-legal considerations which 'infiltrate', and, thus, influence sentencing decisions by way of the attitudes and personal preferences of the judges.[183] As sentencing will always have a large ingredient of judicial discretion and thus remain 'a complex psychological human process',[184] empirical research can never fully reveal the underlying reasons and factors for concrete sentencing decisions, nor sentencing rules fully guide judicial discretion. Notwithstanding this, a more uniform sentencing regime and practice will enhance the legitimacy and credibility of the international criminal tribunals and perhaps even serve their collective function of maintaining peace and security.[185]

In order to take account of these considerations, one must first take a closer look at the *nulla poena* principle—as the fundamental guideline for a sentencing regime in a

[179] *Delalić et al.*, IT-96-21-A, para. 756. This view is generally shared in the literature, see for example Meernik and King, *LJIL*, 16 (2003), 717–50, at 718 ('crucial' that sentences be 'proportionate, fair, and understandable'); Bagaric and Morss, *ICLR*, 6 (2006), 209–11 (consistency as a prerequisite of fairness); Henham, *JICJ*, 5 (2007), 769.

[180] D'Ascoli, *Sentencing* (2011), p. 261.

[181] In favour, D'Ascoli, *Sentencing* (2011), pp. 284–5, 287, 294, 318–20, 321.

[182] cf. *Prosecutor v Aleksovski*, No. IT-95-14/1-T, Trial Chamber Judgment, para. 243 (25 June 1999): '. . . in order to implement the Tribunal's mandate, it is crucial to establish a gradation of sentences'; *Prosecutor v Aleksovski*, No. IT-95-14/1-A, Appeals Chamber Judgment, para. 178 (24 March 2000); *Prosecutor v Elizaphan and Gérard Ntakirutimana*, Nos. ICTR-96-10-A and ICTR-96-17-A, Appeals Chamber Judgment, paras. 550–1 (13 December 2004); Krstić, IT-98-33-A, para. 254; *Kalimanzira*, ICTR-05-88-A, para. 236; *Kanyarukiga*, ICTR-02-78-A, para. 280; *Prosecutor v Muvunyi*, No. ICTR-00-55A-T, Trial Chamber Judgment and Sentence, para. 532 (12 September 2006); *Karera*, ICTR-01-74-T, para. 572; *Nahimana, Barayagwiza and Ngeze*, ICTR-99-52-A, paras. 1059–60; see also Sloane, *JICJ*, 5 (2007), 724 (regarding the ICTR); Holá, Bijleveld, and Smeulers, *ICLR*, 11 (2011), 752–4; Melloh, *Strafzumessung* (2010), pp. 370–1.

[183] cf. Ewald, *ICLR*, 10 (2010), 384, 386–7, 389; Ashworth and Roberts, 'Sentencing', in Maguire, Morgan, and Reiner, *Handbook of Criminology* (2012), p. 879; Tonry, *Sentencing Matters* (1996), p. 177; Reitz, 'Sentencing', in Tonry, *Crime and Punishment* (1998), p. 543 ('reflect the idiosyncrasies of the judge'); Kaplan, Skolnick, and Feeley, *Criminal Justice* (1991), p. 557.

[184] Ewald, *ICLR*, 10 (2010), 389.

[185] cf. *Kambanda*, ICTR-97-23-S para. 58: 'Just sentences contribute to respect for the law and the maintenance of a just, peaceful and safe society.'

Rechtstaat—and the way in which it has been understood in the case law. Secondly, the applicable law of the international criminal tribunals from Nuremberg to The Hague must be examined. Last, but not least, the different sentencing factors employed by the case law must be clarified and systematized. On this basis, some guidelines for the future sentencing regime of the ICC may be suggested.

(1) *Nulla poena sine lege*: a fundamental but uncertain principle in international criminal law[186]

Punishment is predicated on the existence of crimes, that is, a punishment ('*poena*') presupposes a crime ('*crimen*'). Thus, the *nulla poena* principle is predicated on the *nullum crimen* principle.[187] Also, it is generally agreed that the *nullum crimen* principle provides for a stricter standard than the *nulla poena* principle,[188] but it is unclear what exactly the *nulla poena* principle requires. It is argued here that the punishment must be generally foreseeable and for this reason it must be laid down in a statute. While this, in turn, means that punishment outside a statute regularly suffers from unacceptable imprecision and uncertainty, the fact that it is included in a statute does not guarantee, quasi-automatically, sufficient precision. Thus, as already mentioned in the first Volume of this treatise,[189] it is highly questionable whether the general sentencing range of Article 7(1) ICC Statute complies with a reasonably understood *nulla poena* principle, that is, one which goes beyond a mere reference to the statutory framework, as provided for by Article 23 ICC Statute.[190]

The *nulla poena* principle is recognized more or less explicitly in all general human rights instruments, that is, in Article 11 second clause of the Universal Declaration of Human Rights, Article 15(1) second clause International Covenant on Civil and Political Rights (ICCPR), Article 7(1) second clause European Convention on Human Rights (ECHR), and Article 9 second clause ACHR. From these provisions, it follows that the penalty imposed must not exceed the maximum penalty available at the time of commission of the act.[191] Article 15(1) second clause ICCPR complements the prohibition of a retroactive (heavier) penalty with the right of the offender to benefit from a lighter penalty if one is provided for by law after the commission of the

[186] This part draws on Ambos, 'Nulla Poena', in Haveman and Olusanya, *Sentencing* (2006), pp. 23–32.

[187] On the historical development of the principle and the not always clear distinction from the *poena* principle, see Ambos, 'Nulla Poena', in Haveman and Olusanya, *Sentencing* (2006), pp. 17–23.

[188] cf. Ambos, 'Nulla Poena', in Haveman and Olusanya, *Sentencing* (2006), pp. 32–3.

[189] Volume I of this treatise, p. 93.

[190] Note that a more detailed Mexican proposal was not accepted, see 'Mexico: proposal regarding article 21 bis or article 74 bis' (1 July 1998) UN Doc. A/CONF.183/C.1/WGP/L.4: 'No penalty shall be imposed on a person convicted of a crime within the jurisdiction of the Court, unless such penalty is expressly provided for in the Statute and is applicable to the crime in question.'

[191] It explicitly rules out a 'heavier penalty . . . than the one that was applicable at the time when the penal/criminal offence was committed'. See also *Coëme and others v Belgium*, Application Nos. 32492/96 et al., Judgment, para. 145 (22 June 2002).

[192] The *lex mitior* rule was not accepted by the USA since 'U.S. law generally applies . . . the penalty in force at the time the offence was committed'. (Reservation to Article 15 para. 1 ICCPR, see <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en> accessed 19 August 2013.)

[193] Concurring, D'Ascoli, *Sentencing* (2011), p. 17 with n. 23. Therefore, the view taken by Niehoff, *Normen* (1999), pp. 10–11, that these provisions imply a '*konkrete Strafdrohung*' ('concrete threat of punishment') is not convincing.

offence. Thus, these provisions contain the *lex praevia* rule with regard to the penalty applicable at the time of commission, complemented by the *lex mitior* rule.[192] The provisions are silent, however, as to the *lex certa*, that is, as to the certainty, nature, or degree of the penalties. In particular, the mere reference to a 'heavier penalty' cannot be interpreted as a requirement for precise penalties.[193] The absence of a requirement for precise penalties is confirmed by para. 2 of Article 15 ICCPR and Article 7 ECHR since these provisions do not refer to a penalty at all.[194] There is only a more precise guideline with regard to the *death penalty*: while it is not absolutely prohibited,[195] it may only be applied 'for the most serious crimes in accordance with the law in force at the time of the commission' (Article 6(2) ICCPR, Article 2(1) ECHR), that is, the death penalty must be specifically prescribed by law.[196]

Against this human rights background, it is hardly surprising that the *lex certa* component of *nulla poena* is practically ignored in ICL. International conventions, be it in the area of IHL or regarding specific crimes (e.g. terrorism, drug trafficking, torture),[197] neither contain specific sanctions nor determine the penalties applicable to the offences.[198] The main explanation for this conspicuous absence of sentencing standards is that these treaties follow the indirect enforcement model, and thus leave the prosecution *and* punishment to the States Parties.[199] Of course, this does not justify imprecise and/or overly broad sentencing ranges within the framework of the direct enforcement model, that is, with regard to international criminal tribunals. It would certainly improve the legitimacy of these tribunals if the offences within their jurisdiction were equipped with concrete sentencing ranges, or, at least, the jurisprudence of these tribunals was consistent. The absence of concrete sentencing ranges may only be explained by the highly divergent sentencing practice of national criminal justice systems[200] which makes it impossible for states to agree on concrete penalties. Even the ILC, supposedly a group of international law experts, was not able to specify precise penalties in its various Draft Codes of Crimes against the Security and Mankind or its

[194] Article 15(2) ICCPR reads: 'Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations'; similarly Article 7(2) ECHR. See also Niehoff, *Normen* (1999), p. 11.

[195] Except in the European system of human rights where it is definitely abolished by Additional Protocols VI (28 April 1983) and XIII (3 May 2002) to the ECHR (the latter abolishing the death penalty 'in all circumstances', i.e., also in times of war).

[196] See, more detailed, Dana, *JCL&Crim*, 99 (2009), p. 874–5, 877.

[197] On these crimes, see Chapter V.

[198] See Bassiouni and Manikas, *Law of the ICTY* (1996), p. 269: 'none of the 315 international criminal law instruments' provides for specific penalties.

[199] Haveman, 'Legality', in Haveman, Kavran, and Nicholls, *Supranational Criminal Law* (2003), p. 54. See also Chapter V, A. (1) and *passim* of this volume.

[200] See, from a comparative perspective, Frase, 'Comparative Perspectives', in Tonry and Frase, *Sentencing* (2001), pp. 272 ff.; Frase, 'Sentencing and Comparative Law Theory', in Jackson, Langer, and Tillers, *Crime, Procedure and Evidence* (2008), pp. 359 ff. (comparing it to Damaška's procedural models); see also for a comparison of national sentencing practice regarding serious crimes the study prepared by the Max Planck Institute for Foreign and International Criminal Law on behalf of the ICTY, Sieber, ed., *Punishment* ii (2004); see also for Italy, Spain, England/Wales, France, Germany, and the USA, D'Ascoli, *Sentencing* (2011), pp. 77 ff.

[201] See Schabas, 'Article 23', in Triffterer, *Commentary* (2008), mn. 2.

Draft Statute for the ICC, although it recognized that such precise sentences would be necessary.[201] The situation is no better with the ICTY, ICTR, and ICC, as we shall see in the next section.

Thus, it is fair to say that international practice rather indicates that states do *not* feel obliged—by reason of the *nulla poena* principle—to impose precise sentences for offences within the subject matter jurisdiction of international criminal tribunals.[202] In a way, this is confirmed by the international human rights instruments in that they only contain the *lex praevia* attribute of *nulla poena* complemented by the *lex mitior* rule. While the ICC Statute explicitly recognizes *nulla poena* in Article 23, this provision does not change the international practice since it only reaffirms that the ICC must not apply penalties that are not provided for in the Statute, that is, it contains the *lex praevia* and, additionally, the *lex scripta* components of *nulla poena*, but not a *lex certa* rule.[203] Also, it does not result in substantially more precise penalties, as we will see in the next section. It follows that a customary rule as to the *lex certa* component of *nulla poena* in terms of precise penalties has not (yet) emerged and will most probably never emerge.

Such a rule cannot be deduced as a general principle of law within the meaning of Article 38 para. 1(c) ICJ Statute either. Although comparative law recognizes—apart from the *lex praevia* attribute—the *lex certa* element of *nulla poena*,[204] this does not automatically entail that precise penalties for *international* crimes are required. First of all, *lex certa* can be understood in a fairly strict form. If one reduces it to accessibility and foreseeability, as the ECtHR[205] and most common law jurisdictions do, it implies a certain flexibility and does not necessarily require precise penalty ranges for individual crimes.[206] In fact, as already stated,[207] national jurisdictions markedly differ with regard to the precision of their sentences: most civil law jurisdictions provide for—normally quite broad—sentencing ranges (just take a look in the 'Special Parts' of their

[202] See, previously, Triffterer, *Dogmatische Untersuchungen* (1966), p. 131 concluding that the *nulla poena* principle in ICL does not require a '*nach Art und Höhe bestimmte Strafdrohung*'. See also Mettraux, *Crimes* (2005), p. 357 ('almost ethereal existence') and Ferdinandusse, *Direct Application* (2006), p. 255 ('principle of legality . . . does not preclude the prosecution of the core crimes in the absence of specified penalties . . . no court has declared punishment of a core crime inadmissible on the basis of the nulla poena principle. . . .').

[203] In the same vein, see D'Ascoli, *Sentencing* (2011), p. 275.

[204] Ambos, 'Nulla Poena', in Haveman and Olusanya, *Sentencing* (2006), pp. 22–3.

[205] cf. *Achour v France*, Application No. 67335/01, Judgment, para. 33 (10 November 2004); *Camilleri v Malta*, Application No. 42931/10, Judgment, paras. 39 ff. (22 January 2013). See also Schabas, *EJIL*, *11* (2000), 538; Haveman, 'Legality', in Haveman, Kavran, and Nicholls, *Supranational Criminal Law* (2003), p. 50; Ferdinandusse, *Direct Application* (2006) pp. 267–8; see also Volume I of this treatise, p. 75.

[206] In the same vein, see D'Ascoli, *Sentencing* (2011), pp. 18, 290–1; apparently stricter, Scalia, *JICJ*, 9 (2011), 681–4, 687 (arguing that the Tribunals' sentencing regime violates the *lex certa* requirement).

[207] Notes 119 ff. and 200 with main text.

[208] Prior to 3 December 2012, particularly 'dangerous offenders' could be sentenced for an indeterminate period 'for a specified violent offence or specified sexual offence' under the Criminal Justice Act 2003, s. 224–36. Under s. 225 subs. 4, '[a] sentence of imprisonment for public protection is a sentence of imprisonment for an indeterminate period'. These provisions have now been repealed and replaced by a determinate sentencing scheme under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) s. 122–8.

[209] cf. Ashworth and Roberts, 'Sentencing', in Maguire, Morgan and Reiner, *Handbook of Criminology* (2012), pp. 874–9; Hooper, *Blackstone's 2011* (2010), pp. 2110 ff.; Melloh, *Strafzumessung* (2010), pp. 283, 395; Roberts, *CLF*, 23 (2012), 319, 332 ff.

Penal Codes), while common law jurisdictions, traditionally especially England and Wales, opt for maximum sentences (statute offences), or no fixed sentence at all (common law offences),[208] leaving the judges a wide discretion.[209] More recently, however, England and Wales have moved towards structured sentencing, adopting a comprehensive and relatively binding set of statutory guidelines, replacing the largely ineffective guideline judgments of the Court of Appeal.[210] Thus, the US model has been followed, where 'Sentencing Guidelines' have been increasingly introduced at the Federal and State level;[211] in contrast, Canada has retained its traditional, highly discretionary, approach to sentencing.[212] As to the international core crimes, only a few jurisdictions have incorporated them fully into their domestic law, mostly as a consequence of their adherence to the ICC Statute.[213] Among those jurisdictions considerable differences as to the penalty ranges exist, often merely referring to the respective international treaties, especially the ICC Statute.[214] Secondly, even if precise penalties were required in the major criminal justice systems, it is an entirely different question as to whether this national rule would also apply to international crimes. The only supranational judicial pronouncement in this regard comes from the ECtHR and it only requires, as already mentioned, 'accessibility' and 'foreseeability' both for *nullum crimen* and *nulla poena*.[215] With regard to Article 23 ICC Statute, this means that it is perfectly in line with the existing (flexible) *nulla poena* principle.[216]

Against this background it is not surprising that the *case law* follows a *minimalist approach*, that is, it either—in its extreme form—sets aside the penalty requirement at all and considers the mere indication of criminality as sufficient, or—in its moderate form—accepts the penalty requirement, but reduces it to a general recourse to the heaviest or most severe penalties.[217] The extreme view is characteristic of post-World War II case law. In the famous Dutch case of *Rauter* (1949) the Special Appeals Court

[210] cf. Roberts, *CLF*, 23 (2012), 319, 334 ff.; Roberts, *LCP*, 76 (2013), 11 ff.; Melloh, *Strafzumessung* (2010), pp. 180–1, 283–4. For the recent guideline on the 'overarching principles of allocation, offences taken into consideration and totality' see also <http://sentencingcouncil.judiciary.gov.uk/about/totality.htm> accessed 2 July 2013.

[211] See note 123 with main text.

[212] cf. Roberts, *CLF*, 23 (2012), 319, 322 ff., 343 ff.

[213] cf. from a comparative law perspective, Kreicker, 'Völkerstrafrecht im Ländervergleich', in Eser, Sieber, and Kreicker, *Nationale Strafverfolgung*, vii (2006), pp. 261 ff. (266–7), 362; See, by way of example, the German Code of International Criminal Law ('*Völkerstrafgesetzbuch*'), available in various languages at <http://www.department-ambos.uni-goettingen.de/index.php/Forschung/uebersetzungen.html> accessed 3 September 2013.

[214] On the implementation status of the ICC Statute, see the information available at <http://www.coalitionfortheicc.org/?mod=romeimplementation> accessed 19 August 2013. See also Kreicker, 'Völkerstrafrecht im Ländervergleich', in Eser, Sieber and Kreicker, *Nationale Strafverfolgung*, vii (2006), pp. 55–7 (genocide), 100–4 (crimes against humanity), 149–50 (war crimes), 168–9 (aggression); for Italy, Spain, England/Wales, France, Germany, and the USA; cf. D'Ascoli, *Sentencing* (2011), pp. 96–108; for France, see Rebut, *Droit Pénal International* (2012), mn. 1109; for Canada, Crimes Against Humanity and War Crimes Act (CAHWCA) (24 June 2000) (<http://laws-lois.justice.gc.ca/PDF/C-45.9.pdf> accessed 23 June 2013); see also note 238 and main text.

[215] See note 205. The Court applies this ruling to both *nullum crimen* and *nulla poena* since it refers to them in the sense of *Feuerbach's* formula (on this formula see Ambos, 'Nulla Poena', in Haveman and Olusanya, *Sentencing* (2006), pp. 17 ff.).

[216] In the same vein, see D'Ascoli, *Sentencing* (2011), p. 291.

[217] For a good overview of the different approaches, see Ferdinandusse, *Direct Application* (2006), pp. 248–56, who in total distinguishes between four views, two respectively belonging here to the so-called minimalist and maximalist approach.

discarded the *nulla poena* argument with regard to the death penalty because of important interests of justice:

> . . . do not permit that extremely serious violations of generally accepted principles of international law (the criminal character of which was already established beyond doubt at the time they were committed) should not be considered punishable solely [sic!] on the ground that a previous threat of punishment was absent.[218]

Despite this explicit position and other similar jurisprudential statements,[219] it must not be overlooked that the main post-World War II trials did not actually address the *nulla poena* principle separately.[220] Rather, they followed the precedent laid down by the IMT where the Tribunal referred to the *nullum crimen*, *nulla poena* principle as a whole and characterized it as a principle of justice which basically requires knowledge of the punishability of the acts in question: 'in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished . . . '.[221] Thus, the Nuremberg precedent completely ignored the *nulla poena* aspect of the principle and laid all its emphasis on the justice aspect of the punishment of a certain conduct. In fact, this precedent did not only prepare the ground for the understanding of the *nullum crimen* principle as a principle of justice already noted in Volume I of this treatise,[222] but also for the reduction of the relevance of the *nulla poena* principle in general.

Another, *moderate approach* can be found in national case law, but, more importantly, in the jurisprudence of the ICTY. The ICTY relied, originally in *Erdemović*, on 'the general principles of law internationally recognized by the community of nations whereby the *most severe penalties* may be imposed for crimes against humanity'.[223] The Appeals Chamber ratified this view in various decisions and expanded the argumentation. In *Delalić et al.* it held quite bluntly that the Rules provide for life imprisonment and therefore:

> . . . any sentence up to this, does not violate the principle of *nulla poena sine lege*. There can be no doubt that the accused must have been aware of the fact that the crimes for which they are indicted are the most serious violations of international humanitarian law, punishable by the most severe penalties.[224]

[218] *In re Rauter*, Special Court of Cassation (*Bijzondere Raad van Cassatie*) (12 January 1949), *Annual Digest*, 16 (1949), 543; reprinted in UNWCC, *LRTWC*, xv (1949), p. 169; also quoted in Schabas, *EJIL*, *11* (2000), 530; Ferdinandusse, *Direct Application* (2006), p. 252.

[219] cf. Ambos, 'Nulla Poena', in Haveman and Olusanya, *Sentencing* (2006), pp. 29–30.

[220] cf. Boister and Cryer, *Tokyo* (2008), p. 248 (stating regarding the IMFE that the *nulla poena* argument 'does not seem to have arisen at Tokyo').

[221] *US et al. v Göring et al. (Nuernberg Trial)*, in IMT, *Trial*, xxii (1947), p. 462 (30 September 1946).

[222] Volume I of this treatise, pp. 88–9.

[223] *Erdemović*, IT-96-22-T, para. 40.

[224] *Delalić et al.*, IT-96–21-A, para. 817; concurring, *Kupreškić et al.*, IT-95-16-A, para. 424; *Prosecutor v Blaškić*, No. IT-95-14-A, Appeals Chamber Judgment, para. 681 (29 July 2004); see also *Prosecutor v Brđanin*, No. IT-99-36-T, Trail Chamber Judgment, para. 1144 (1 September 2004); *Prosecutor v Galić*, No. IT-98-29-A, Appeals Chamber Judgment, para. 441 (30 November 2006); *Prosecutor v Zelenović*, No. IT-96-23/2-S, Trial Chamber Sentencing Judgment, para. 57 (4 April 2007); *Prosecutor v Krajišnik*, No. IT-00-39-T, Trial Chamber Judgment, para. 1170 (27 September 2006).

[225] *Delalić et al.*, IT-96–21-A, para. 817 with notes 1400–1. See on the ECtHR's position with regard to life imprisonment as inhuman treatment within the meaning of Article 3 ECHR, Scalia, *JICJ*, 9 (2011), 684–6.

In fact, the Appeals Chamber relied on the accessibility and foreseeability doctrine of the ECtHR and international and national case law, which has frequently imposed custodial sentences up to life imprisonment for international crimes.[225] However, while this Chamber remained silent on the content of the *nulla poena* principle—it even seemed to conflate it with *nullum crimen*[226]—the *Kunarac* AC took an explicit stance in this regard:

> the . . . principle . . . requires that a person shall not be punished if the law does not prescribe punishment. It does not require that the law prescribes a precise penalty for each offence depending on the degree of gravity. Be it a common law system or a civil law system, it is not the case that national legislation anticipates every possible offence with a prescribed sentence. On the contrary, it is a fact that a penal code frequently prescribes a range for sentencing with regard to an offence; that is, it often sets out both the maximum and the minimum sentences. Within the range judges have the discretion to determine the exact terms of a sentence, subject, of course, to prescribed factors which they have to consider in the exercise of that discretion.[227]

In the view of the Appeals Chamber, the ICTY law complies with this standard, since, although it does not set forth precise sentencing ranges, it provides for the maximum sentence of life imprisonment in Rule 101(A) RPE.[228] The ICTR also endorsed this view, albeit less explicitly.[229]

Similar (minimalist) positions are adopted by those authors who consider that, given the application of the death penalty in international prosecutions since World War II, no accused can argue that a 'heavier penalty' (Article 15(1) ICCPR) was imposed.[230] Accordingly, the fact that the most severe penalties have always been imposed precludes an accused from claiming that such a penalty was not accessible or foreseeable.[231] Clearly, this argumentation rests on the assumption that *nulla poena* does not require the setting forth of precise penalties, but only the *expectation* of the most severe penalties. Thus, it is, in the words of the ILC, not necessary for the accused 'to know in advance the precise punishment so long as the actions constitute a crime of extreme gravity for which there will be severe punishment'.[232] This position goes hand in hand

[226] *Nullum*, not *nullem crimen*, as mistakenly stated by the *Delalić et al.* AC, see *Delalić et al.*, IT-96-21-A, para. 817; the same mistake can be found in *Kunarac et al.*, IT-96-23 & IT-96-23/1-A, para. 373.

[227] *Kunarac et al.*, IT-96-23 & IT-96-23/1-A, para. 372.

[228] *Kunarac et al.*, IT-96-23 & IT-96-23/1-A, para. 373; see also *Prosecutor v Dragan Nikolić*, No. IT-94-2-A, Appeals Chamber Judgment on Sentencing Appeal, para. 83 (4 February 2005); *Stakić*, IT-97-24-A, para. 398; *Galić*, IT-98-29-A, paras. 397–8; *Blagojević and Jokić*, IT-02-60-T, para. 827.

[229] *Akayesu*, ICTR-96-4-T, para. 11 ('Rwanda like all States which have incorporated crimes against humanity or genocide in their domestic legislation has envisaged the most severe penalties in its criminal legislation for these crimes'). See also *Semanza*, ICTR-97-20-A, para. 377; *Prosecutor v Nchamihigo*, No. ICTR-2001-63-A, Appeals Chamber Judgment, para. 391 (18 March 2010); *Prosecutor v Niyitegeka*, No. ICTR-96-14-A, Appeals Chamber Judgment, para. 267 (9 July 2004); *Gatete*, ICTR-2000-61-T, para. 43; *Muhimana*, ICTR-95-1B-T, paras. 592, 595 and 617; *Karera*, ICTR-01-74-A, para. 390.

[230] Schabas, *EJIL*, *11* (2000), 523; concurring, D'Ascoli, *Sentencing* (2011), p. 19.

[231] Schabas, *EJIL*, *11* (2000), 538.

[232] ILC, Report of the International Law Commission on the Work of its Forty-Eighth Session (6 May–26 July 1996), UN Doc. A/51/10, in *YbILC*, ii, 2 (1996), p. 30. In the same vein, see Zappalà, *Human Rights* (2003), p. 196; Ferdinandusse, *Direct Application* (2006), pp. 257, 267.

[233] See also Schabas, *EJIL*, *11* (2000), 539; Zappalà, *Human Rights* (2003), p. 195.

with the relativization, noted earlier, of the *nulla poena* principle to a mere principle of justice in the sense of a *nulla poena sine iure*.[233]

A *maximalist position* defines *nulla poena* in relation to *nullum crimen*. It argues that *nulla poena* protects similar interests as *nullum crimen*, and possesses the same four attributes: *lex praevia*, *lex certa*, *lex scripta*, and *lex stricta*.[234] The fact that states did not reach agreement on more concrete penalties was not due to a lack of interest or the absence of the respective *opinio iuris*, but to political factors underlying the negotiations.[235] This stricter approach of *nulla poena* places special emphasis on the *lex certa* requirement. Accordingly, penalties for international crimes must be distinguished according to the specific crime and the form of participation.[236] Ultimately, these penalties must have the same precision as the ones for domestic crimes. In a way, the recourse to national law, provided for in the relevant statutes of international criminal tribunals,[237] also speaks in favour of a stricter understanding of *nulla poena*.[238] The idea of this approach is to allow recourse to national ordinary crimes in force at the time of the offence in order to 'borrow' their more precise sentencing ranges. While an automatic transfer is problematic given the structural differences between national and international crimes, the ICC implementing legislation now makes it possible to make recourse to national ICL for specific sentencing ranges, especially in civil law countries.[239]

(2) The applicable law

The history of the sentencing rules in the law of the international criminal tribunals since Nuremberg is the history of a constant improvement of these rules in terms of their precision and foreseeability. The Nuremberg and Tokyo Tribunals still left the sentences completely within the discretion of the judges, only providing for '*death* or such other *punishment* as shall be determined . . . to be *just*' (Article 27 IMT(S), Article 16 IMTFE(S), similar, Article II(3) CCL 10). It is not surprising therefore that the IMT has been criticized for a lack of 'a framework or heuristic to account for the exercise of discretion'.[240] Regarding the IMTFE, Neil Boister and Robert Cryer, perhaps offering the most detailed analysis of the Tribunal's (sentencing) practice,[241] critically conclude that it 'had a discretionary sentencing structure, entitling the judges to impose any

[234] Dana, 'Reflections', in Klip et al., *Liber Amicorum Prakken* (2004), pp. 350 ff.
[235] Dana, *JCL&Crim*, 99 (2009), 914–15.
[236] Haveman, 'Legality', in Haveman, Kavran, and Nicholls, *Supranational Criminal Law* (2003), pp. 67–8, 72; Dana, *JCL&Crim*, 99 (2009), 921.
[237] cf. Article 24(1) ICTYS and Article 23(1) ICTRS; see also notes 283 ff. and main text.
[238] But see also the critical remarks in UN-GA 'Report of the Preparatory Committee on the Establishment of an International Criminal Court', Volume I (Proceedings of the Preparatory Committee during March–April and August 1996) (13 September 1996), UN Doc. A/51/22, para. 308.
[239] See note 213 with references.
[240] Drumbl, *Atrocity* (2007), p. 50; also critical, D'Ascoli, *Sentencing* (2011), p. 12 ('unlimited discretion').
[241] Boister and Cryer, *Tokyo* (2008), pp. 247 ff.
[242] Boister and Cryer, *Tokyo* (2008), p. 248.
[243] Boister and Cryer, *Tokyo* (2008), p. 249.
[244] Boister and Cryer, *Tokyo* (2008), p. 270; also critical, D'Ascoli, *Sentencing* (2011), p. 12 ('unlimited discretion').

sentence for any crime'.[242] They consider the absence of sentencing rules as 'problematic'[243] and 'not a positively regarded precedent'.[244] Kevin Heller, in the perhaps most important study on the US-run Nuremberg Tribunals, similarly criticizes the fact that the Tribunals 'never explained how they determined the sentences they imposed—even when the sentence was death'.[245] He finds 'dramatically different approaches to culpability' which raise 'serious questions about the ability of the tribunals to sentence defendants consistently across cases . . . '.[246] He quite harshly concludes that '[r]eading the judgments with regard to sentencing is an exercise in frustration'.[247] The tribunals 'never adopted a consistent set of sentencing principles, and they rarely explained their sentencing decisions in detail'.[248] Uwe Ewald, referring to both the Nuremberg and Tokyo trials, identifies a 'heterogenous picture' and concludes that 'disparity and diversity in international sentencing appears to be the standard' from the outset.[249]

As to the ad hoc tribunals,[250] the Statutes only contain one article (Article 24 ICTYS, Article 23 ICTRS) which provides for some general guidelines, which are that the main penalty is limited to imprisonment and that, additionally, the return of property and proceeds may be ordered (paras. 1 and 3 respectively).[251] As to sentencing factors, the general sentencing practice in the Former Yugoslavia, the gravity of the offence, and the individual circumstances of the convicted person will be taken into account (paras. 1 and 2 respectively). In the RPE (Rules 100–106 ICTY RPE, Rules 99–106 ICTR RPE), only common Rule 101 provides for some more concrete guidelines, although not going much beyond the Statute. Accordingly, life imprisonment is the maximum punishment (Rule 101(A))—albeit not provided for in the law of the Former Yugoslavia[252]—and aggravating/mitigating circumstances (including cooperation with the Prosecutor), the general sentencing practice in the Former Yugoslavia, and any possible previous punishment for the same act (in line with the *ne bis in idem* principle of Article 10 ICTYS/9 ICTRS) will be taken into account (Rule 101(B)). Apart from

[245] Heller, *Nuremberg Tribunals* (2011), pp. 313–14.
[246] Heller, *Nuremberg Tribunals* (2011), p. 314.
[247] Heller, *Nuremberg Tribunals* (2011), p. 330.
[248] Heller, *Nuremberg Tribunals* (2011), p. 330.
[249] Ewald, *ICLR*, 10 (2010), 373–6.
[250] See also Clark, *GeoLJ*, 96 (2008), 1687 ff.; D'Ascoli, *Sentencing* (2011), pp. 109 ff.; regarding the ICTY, see Meernik, and King, *LJIL*, 16 (2003), 719–21.
[251] The latter rules on return of property and proceeds have never been applied.
[252] The *Tadić* AC invoked an *a maiore ad minus* argument: if the law of the Former Yugoslavia allowed for the imposition of the death penalty, it could not be a violation of the legality principle if the ad hoc tribunals imposed a sentence of more than twenty years of imprisonment, although the maximum term of imprisonment under the laws of the Former Yugoslavia was limited to twenty years (*Tadić*, IT-94-1-A & IT-94-1-Abis, paras. 21, 73; concurring, *Delalić et al.*, IT-96-21-A, para. 813; *Prosecutor v Serushago*, No. ICTR-98-39-A, Appeals Chamber Reasons for Judgment, para. 30 (6 April 2000)). See also Schabas, *EJIL*, 11 (2000), 528 ff. (531, 532) and D'Ascoli, *Sentencing* (2011), pp. 118 ff. (arguing that life imprisonment can be considered a substitute for the death penalty which originally existed in Yugoslav law, pp. 120–1). For the same argument with regard to the *lex mitior* rule of Article 15(1) ICCPR, see note 230 and main text.
[253] cf. *Furundžija*, IT-95-17/1-A, para. 238; Blaškić, IT-95-14-A, para. 680; *Prosecutor v Kvočka et al.*, No. IT-98-30/1-A, Appeals Chamber Judgment, paras. 668–9 (28 February 2005); *Simba*, ICTR-01-76-A, para. 5; *Prosecutor v Simić*, No. IT-95-9-A, Appeals Chamber Judgment, para. 234 (28 November 2006). See also Sayers, *LJIL*, 16 (2003), 757–8; Henham, *JICJ*, 5 (2007), 764–5; Chifflet and Boas, *CLF*, 23 (2012), 144–5.
[254] Beresford, *ICLR*, 1 (2001), 51; D'Ascoli, *Sentencing* (2011), pp. 123–4, 276–7.
[255] cf. Rule 85 (A)(vi) (relevant information on sentencing to be presented at trial) and Rule 86 (C) (sentencing matters to be addressed in closing arguments); critically, D'Ascoli, *Sentencing* (2011), pp. 124–5

that, more concrete sentencing guidelines have always been rejected by the Appeals Chamber.[253] Any pre-trial detention will be deducted from the final sentence (Rule 101 (C)). In procedural terms, initially separate sentencing hearings were held,[254] but in July 1998 the RPE was amended, and the trial and sentencing process unified.[255]

The ICC Statute provides for an 'appropriate sentence' (Article 76(1)) and, as main penalty, sentences of up to thirty years or life (Article 77(1)).[256] Interestingly, during the negotiations various delegations made the case for more precise penalties on the basis of the *nulla poena* principle,[257] but agreement was not reached.[258] The death penalty is not provided for. It is for this reason that some states (e.g., Trinidad and Tobago and many Arab states), insisted on Article 80, according to which the statutory rules shall not affect the national law on the matter, which may provide for the death penalty.[259] As to life imprisonment, it may only be imposed if 'justified by the extreme gravity of the crime,[260] and the individual circumstances of the convicted person' (Article 77(1)(b) ICC Statute).

As to the concrete determination of sentence, Article 78(3) states that the Court is to form a cumulative sentence on the basis of the individual sentences for each crime, that is, a 'joint sentence' which may not exceed thirty years or life imprisonment.[261] On the basis of this rule, the *Lubanga* TC meted out three individual sentences for conscripting, enlisting, and using children within the meaning of Article 8(2)(e)(vii)

(arguing that 'separate sentencing hearings better serve the need for more detailed and comprehensive submissions on sentencing, aggravating and mitigating factor' and are therefore to be preferred from a human rights perspective); in a similar vein previously, Beresford, *ICLR*, 1 (2001), 51–2; favouring a 'monophase procedure', Henham, *JICJ*, 5 (2007), 767–9.

[256] See for a detailed analysis, Dana, 'Reflections', in Klip et al., *Liber Amicorum Prakken* (2004), pp. 353 ff.; Martini, 'Nulla Poena', in Cassese, Chiavario, and De Francesco, *Problemi* (2005), pp. 233 ff., 241 ff.; Melloh, *Strafzumessung* (2010), pp. 298 ff.; Peglau, *HuV-I*, 14 (2001), 247 ff.; critically, D'Ascoli, *Sentencing* (2011), p. 265 ('vagueness of criteria'); Glickman, *ColJTransnat'lL*, 43 (2004–2005), 259 ff.

[257] UN-GA 'Report of the Ad Hoc Committee on the Establishment of an International Criminal Court' (6 September 1995), UN Doc. A/50/22, para. 187; also UN-GA 'Report of the Preparatory Committee' (13 September 1996), UN Doc. A/51/22, para. 308; D'Ascoli, *Sentencing* (2011), p. 263.

[258] See Fife, 'Article 77' in Triffterer, *Commentary* (2008), mn. 8 ff. and Fife, 'Penalties', in Lee, *ICC* (2001), pp. 558 ff.; also Schabas, *EJIL*, *11* (2000), 537.

[259] cf. D'Ascoli, *Sentencing* (2011), pp. 267–8.

[260] cf. Scalia, *JICJ*, 9 (2011), 686 (referring to the human rights concerns during the negotiations); critically, Glickman, *ColJTransnat'lL*, 43 (2004–2005), 259 (considering this limitation, from a strict retributivist position, as 'superfluous'); Hoven, *ZStW*, 125 (2013), 156–7. The application of 'extreme' gravity has been convincingly denied by Lubanga Dyilo, ICC-01/04-01/06-2901, para. 96.

[261] See notes 141 ff. and main text.

[262] Lubanga Dyilo, ICC-01/04-01/06-2901, paras. 98–9 (thirteen, twelve, and fourteen years respectively). Dissenting Judge Odio Benito punishing all three conducts equally with fifteen years, thus coming to a joint sentence of fifteen years (Lubanga Dyilo, ICC-01/04-01/06-2901, Dissenting Opinion of Judge Odio Benito, paras. 25–7).

[263] I have argued earlier that Article 8 (2)(e)(vii) contains 'three alternative forms of conduct', but not, as suggested by the TC, three 'separate offences' (cf. Ambos, *ICLR*, 12 (2012), 133). While Judge Odio Benito correctly spoke of 'three criminal conducts' in her dissent to the Judgment (*Lubanga Dyilo*, ICC-01/04-01/06-2901, Dissenting Opinion of Judge Odio Benito, para. 6), she later also confusingly speaks of 'separate and distinct crimes' (*Lubanga Dyilo*, ICC-01/04-01/06-2901, Dissenting Opinion of Judge Odio Benito, para. 25).

[264] For a concrete application see *Lubanga Dyilo*, ICC-01/04-01/06-2901, paras. 100–4 where the Chamber, however, did not deduct the time Lubanga spent in detention in the Democratic Republic of Congo (DRC) for other offences.

ICC Statute, resulting in a joint sentence of fourteen years;[262] however this begs the question whether 'crime' in the sense of Article 78(3) also encompasses different conducts within one offence.[263] Time spent in pre-trial detention will be deducted (Article 78(2)).[264] The temporal term of imprisonment may be reviewed after serving two-thirds of the full sentence, in case of life imprisonment after twenty-five years (Article 110(3)).[265] In addition, a fine and/or confiscation of the proceeds of the crime can be imposed (Article 77(2)). The Court may further order that money or other property is transferred to a trust fund established for the benefit of the victims and their families (Article 79). As far as concrete sentencing factors are concerned, the Statute also refers to the seriousness of the offence, and the individual circumstances of the convicted person (Article 78(1) ICC Statute).[266] In procedural terms a separate sentencing hearing may be held at the discretion of the Chamber or upon request of the Prosecutor or accused (Article 76(2) ICC Statute).[267] This possibility, taken together with the Chamber's power to consider all the evidence 'relevant to the sentence' (Article 76(1)), entails that a Chamber may take into account additional evidence going beyond 'the facts and circumstances set out in the Confirmation Decision, provided that the defence has had a reasonable opportunity to address them'.[268]

Among the RPE on penalties (Rules 145 to 148), the centrally important Rule 145 contains a series of sentencing factors, and a further qualification of the conditions of life imprisonment.[269] As to the former, para. 1 reminds the judges that the sentence 'must reflect the culpability of the convicted person' and that they must consider 'all relevant factors', in particular mitigating and aggravating factors, the circumstances regarding the convicted person and the crime and, *inter alia*, some specific aspects.[270] Para. 2 lists a series of mitigating and aggravating circumstances, namely—mitigating (subpara. (a))—'circumstances falling short of constituting grounds for exclusion of criminal responsibility' (e.g., diminished mental capacity), the perpetrator's conduct after commission (especially any effort to compensate the victim and cooperation with the Court) and—aggravating (subpara. (b))—prior criminal convictions, abuse of

[265] See also Rules 223–4 RPE.

[266] Borsari, *Diritto Punitivo* (2007), pp. 456 ff.; Scalia, 'Peines', in Kolb, *Droit International Pénal* (2008), pp. 352–3.

[267] Critically, D'Ascoli, *Sentencing* (2011), pp. 276–7, arguing that it should be compulsory for appeal as well.

[268] cf. *Lubanga Dyilo*, ICC-01/04-01/06-2901, para. 29.

[269] On the negotiations, see D'Ascoli, *Sentencing* (2011), pp. 268–9; see also Melloh, *Strafzumessung* (2010), pp. 310 ff.

[270] Rule 145 (1)(c) lists in this regard 'the extent of the damage caused, in particular the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location; and the age, education, social and economic condition of the convicted person'. This part of the Rule is explicitly quoted by the *Lubanga* TC (*Lubanga Dyilo*, ICC-01/04-01/06-2901, para. 44) and further developed (paras. 45 ff.).

[271] For the first application, see *Lubanga Dyilo*, ICC-01/04-01/06-2901, paras. 57 ff. (rejecting any aggravating circumstance and admitting as mitigating circumstance Lubanga's 'respectful and cooperative' behaviour 'throughout the proceedings, notwithstanding some particular onerous circumstances' caused by the Prosecution; para. 91).

power, attack of a particularly defenceless victim, particular cruel commission, production of multiple victims, discriminating motives.[271] The formulation 'such as' in subpara. (a) and the reference to 'similar' circumstances in subpara. (b) make clear that the list is not exhaustive. While this adds an element of uncertainty to the list, it is still in line with the here defined flexible *nulla poena* principle.[272] There is no explicit reference to national practice as known from the ad hoc tribunals (consensus was impossible),[273] but this practice may be taken into account if it amounts to a general principle within the meaning of Article 21(1)(c) ICC Statute.[274] As to life imprisonment, para. 3 of Rule 145 confirms Article 77(1)(b) ICC Statute in stating that it may only be imposed as a result of 'the extreme gravity of the crime' and 'one or more aggravating circumstances'.

The remaining Rules 146 to 148 regulate the imposition of fines, orders of forfeiture and the Trust Fund's participation with regard to orders under Article 79(2) ICC Statute. As to fines, it is important to note that they shall only be imposed if imprisonment alone does not suffice, and taking into account the perpetrator's financial capacity as well as his (financial) motivation (Rule 146(1)). As to the amount, the Court must consider the 'damage and injuries caused' and, if applicable, 'proportionate gains derived from the crime by the perpetrator' (Rule 146(2)). The total amount must not exceed 75 per cent of the perpetrator's entire assets (Rule 146(2)). If the convicted person refuses to pay the fine, it cannot be enforced against his will. The imprisonment term may be increased as a result, but not by more than a quarter of the total sentence or five years ((Rule 146(5)). The person concerned must be informed of this possibility in advance (Rule 146(7)).

Summing up the sentencing norms of the ICTY, ICTR, and ICC, it is fair to say that the legal regime of the ICC, especially by way of Rule 145, has produced more specific and concrete guidelines than the law of ICTY and ICTR and in this sense constitutes an improvement.[275] Also, the mechanism for the mandatory review of sentences (Article

[272] This flexibility is apparently overlooked by D'Ascoli, *Sentencing* (2011), p. 270 when she criticizes this clause for its lack of certainty but at the same time accepts a flexible reading of the *nulla poena* principle (pp. 18, 20, 290–1).

[273] cf. Schabas, *EJIL*, *11* (2000), 537, quoting the chairman of the working group on penalties.

[274] On these general principles in the traditional sense, see Volume I of this treatise, pp. 76–8.

[275] In the same vein, D'Ascoli, *Sentencing* (2011), pp. 267, 270; Glickman, *ColJTransnat'lL*, 43 (2004–2005), 262.

[276] Dana, 'Reflections', in Klip et al., *Liber Amicorum Prakken* (2004), pp. 358–9.

[277] Article 24 ICTYS/Article 23 ICTR (merely stating 'limited to imprisonment') and common Rule 101 are silent on the matter. Article 77(1)(a) ICC Statute speaks in its English version of 'a specified number of years' and in the Spanish version of 'número determinado de años' (the French version is silent in this respect). If one takes the plain wording seriously, this means that the minimum punishment is two years; imprecise, D'Ascoli, *Sentencing* (2011), p. 265 ('number of years'); incorrect, Fife, 'Article 77' in Triffterer, *Commentary* (2008), mn. 23 ('less than one year'). The *travaux*, however, indicate that the drafter did not want to fix a minimum, since it was not included in the final version of Article 77 ICC Statute (cf. mn. 12: '…agreed to leave this to the discretion of judges…'; see also Bassiouni, *Legislative History*, ii (2005), pp. 552 ff.; Schabas, 'Penalties', in Cassese et al., Rome Statute ii (2002), pp. 1508–11; Schabas, *ICC Commentary* (2010), p. 893: 'if a minimum sentencing provision were to be included').

[278] For a much more positive assessment, see Triffterer, 'Command Responsibility', in Triffterer, *GS Vogler* (2004), p. 221, considering that 'there is only a small step' to national systems like the Austrian one. Also positive, Jescheck, *JICJ*, 2 (2004), 54: 'excellent example of reasonable, measured and sufficiently differentiated solution on penalties'.

110) and the rules on multiple convictions (Article 78 para. 3) promise greater certainty.[276] However, both regimes suffer from overly broad sentencing ranges—in fact ranging from an unspecified minimum[277] to life imprisonment—which makes the final sentence highly uncertain and unforeseeable.[278] Indeed, the ICC Statute still contains the same compromising characteristics of the Statutes of the ICTY and ICTR: *generality and ambiguity*.[279] As to the former, the maximum sentences provided for in the ICC Statute apply for all crimes without distinguishing between them *in abstracto* with regard to their wrongfulness and gravity. The gravity standard comes into play as a criterion to guide judicial discretion with regard to the distinction between temporal and life imprisonment in the form of 'extreme gravity' (cf. Article 77(1)(a) with (b)) and with regard to the concrete determination of the sentence (Article 78(1)). However this standard is, as we will see in more detail later,[280] especially in its 'extreme' form, highly ambiguous and gives the judges a wide discretion which is, in fact, only limited by the maximum sentence and the exclusion of the death penalty. In the practice of the ICTY and ICTR these loose legal regulations have led, as

[279] cf. Dana, 'Reflections', in Klip et al., *Liber Amicorum Prakken* (2004), pp. 360 ff. For a critical view, see also Vidales Rodríguez, 'El Principio de Legalidad', in Gómez Colomer, González Cussac, and Cardona Lloréns, *La Corte Penal Internacional* (2003), pp. 213 ff. who, however, does not analyse *nulla poena* from an international perspective. Critically also Martini, 'Nulla Poena', in Cassese, Chiavario and De Francesco, *Problemi* (2005), pp. 243 ff. 249 ('*discrezionalità eccessiva*').

[280] Subsection (3)(b).

[281] Section A. (3)(d) (analysing the rules of concours and their impact on sentencing).

[282] See also *Kambanda*, ICTR-97-23-S, paras. 23, 25, 30; *Akayesu*, ICTR-96-4-A, paras. 17, 21; *Prosecutor v Rugambarara*, No. ICTR-00-59-T, Trial Chamber Sentencing Judgment, para. 53 (16 November 2007); *Serushago*, ICTR-98–39-S, paras. 18, 22; *Kvočka et al.*, IT-98-30/1-A, paras. 668–9; *Prosecutor v Rutaganira*, No. ICTR-95-1C-T, Trial Chamber Judgment and Sentence, para. 167 (14 March 2005); *Bisengimana*, ICTR-00-60-T, para. 109; *Prosecutor v Bikindi*, No. ICTR-01-72-A, Appeals Chamber Judgment, para. 141 (18 March 2010); *Karera*, ICTR-01-74-A, para. 385; *Nchamihigo*, ICTR-2001-63-A, para. 387; *Prosecutor v Renzaho*, No. ICTR-97-31-A, Appeals Chamber Judgment, para. 606 (1 April 2011); see also note 134 and Harmon and Gaynor, *JICJ*, 5 (2007), 690–1.

[283] Schabas, *EJIL*, *11* (2000), 525; Book, *Appeal and Sentence* (2011), p. 39; for a violation of *nulla poena* by Rule 101 Bassiouni and Manikas, *Law of the ICTY* (1996), pp. 701–2; see note 238 and main text.

[284] This is the consolidated jurisprudence of the ICTY and ICTR, see for example *Erdemović*, IT-96-22-T, para. 39; *Kunarac et al.*, IT-96-23 & IT-96-23/1-A, para. 349; *Prosecutor v Miodrag Jokić*, No. IT-01-42/1-A, Appeals Chamber Judgment on Sentencing Appeal, paras. 37–8 (30 August 2005); *Krajišnik*, IT-00-39-A, paras. 749–50; *Bikindi*, ICTR-01-72-A, para. 148; *Prosecutor v Hadžihasanović and Kubura*, No. IT-01-47-A, Appeals Chamber Judgment, para. 335 (22 April 2008); *Prosecutor v Mrkšić et al.*, No. IT-95-13/1-A, Appeals Chamber Judgment, para. 363 with note 1210 (5 May 2009); *Prosecutor v Boškoski and Tarčulovski*, No. IT-04-82-A, Appeals Chamber Judgment, para. 220 (19 May 2010). For a detailed and critical discussion see Schabas, *EJIL*, 11 (2000), 528 ff.; Haveman, 'Legality', in Haveman, Kavran, and Nicholls, *Supranational Criminal Law* (2003), pp. 68 ff.; Melloh, *Strafzumessung* (2010), p. 365; Leinwand, *ColHRLR*, 40 (2008–2009), 812 ff.; recently, Shany, *JICJ*, 11 (2013), 20–3; generally critical of the non-binding nature of the national sentencing practice, Clark, *GeoLJ*, 96 (2008), 1696; stressing the relevance of the domestic practice, Bagaric and Morss, *ICLR*, 6 (2006), 212–14; Leinwand, *ColHRLR*, 40 (2008–2009), 803, 840.

[285] cf. Keller, *IndianaI&CLR*, 12 (2001–2002), 53–74; Penrose, *AmUIntLRev*, 15 (2000), 381–7; Beresford, *ICLR*, 1 (2001), 48 ('not determinative'); Sayers, *LJIL*, 16 (2003), 760 (not 'particularly influential'); Sloane, *JICJ*, 5 (2007), 719–22 (although recognizing the ICTR's recourse to Rwandan practice but considering the effect 'negligible' and making 'little practical difference'); Leinwand, *ColHRLR*, 40 (2008–2009), 812 ff. (finding an 'ambiguity' regarding the ICTY, at 821–2); Book, *Appeal and Sentence* (2011), p. 42 ('mere assertions', no 'significant impact'); Holá, Smeulers, and Bijleveld, *JICJ*, 9 (2011), 414 ('minimal impact'); Scalia, *JICJ*, 9 (2011), 683–4. For an analysis of the mixed tribunals (SCSL, SPD), see Leinwand, *ColHRLR*, 40 (2008–2009), 832 ff. (concluding, 840, that 'international tribunals, with varying degrees of transparency, rely on domestic sentencing norms and cultural practices to craft sentences').

already discussed,[281] to a (too) broad sentencing discretion of the Trial Chambers.[282] It is neither limited by recourse to national practice (albeit inspired by concerns about *nulla poena*[283]) since this practice is not binding,[284] and, in any case, has often only been invoked as mere lip service,[285] nor is it limited by any case law precedents, since while providing for a general guidance in case of similar circumstances, the *concrete* determination of the sentence normally depends on the particularities of each case.[286] In fact, the overarching criterion has always been the already mentioned '*totality principle*' according to which the sentence 'should reflect the totality of the culpable conduct', or, in more general terms, 'the gravity of the offences and the culpability of the offender, so that it is both just and appropriate'.[287] In fact, this idea has been taken up by the ICC law, which refers to 'the culpability of the convicted person' (Rule 145(1)(a)) and, in several provisions, to the gravity of the offence (e.g., Article 78(1) ICC Statute). In any case, greater certainty may only be achieved by a more precise definition of the gravity concept and a systematization and harmonization of the multiple mitigating and aggravating circumstances employed in the ICTY/ICTR case law[288] and included in Rule 145(1) and (2) ICC RPE. This presupposes a closer analysis of these aspects, to be undertaken in the next section.

[286] *Dragan Nikolić*, IT-94-2-A, para. 19; concurring, *Prosecutor v Limaj et al.*, IT-03-66-A, Appeals Chamber Judgment, para. 135 (27 September 2007); see also *Delalić et al.*, IT-96-21-A, para. 758 ('. . . comparisons with sentences imposed in other cases will be of little assistance unless the circumstances of these cases are substantially similar'); *Krajišnik*, IT-00-39-A, para. 783; *Simić*, IT-95-9-A, para. 238; *Bikindi*, ICTR-01-72-A, para. 203; *Dragomir Milošević*, IT-98-29/1-A, paras. 326–7; *Prosecutor v Muvunyi*, No. ICTR-2000-55A-A, Appeals Chamber Judgment, para. 72 (1 April 2011); *Prosecutor v Sesay, Kallon and Gbao*, No. SCSL-04-15-A, Appeals Chamber Judgment, para. 1317 (26 October 2009); see also Melloh, *Strafzumessung* (2010), pp. 368–9.

[287] Note 137.

[288] Dana, *ICLR*, 4 (2004), 332 ff.; Schabas, *The UN ICT's* (2006), pp. 563 ff.; Bagaric and Morss, *ICLR*, 6 (2006), 225 ff.; Mettraux, *Crimes* (2005), pp. 350 ff.; Klann and McKenzie, 'Five Cases', in Decaux, Dieng, and Sow, *Human Rights* (2007), pp. 52–3; Friman, 'Sentencing and Penalties', in Cryer et al., *Introduction ICL* (2010), pp. 500–2; Harmon and Gaynor, *JICJ*, 5 (2007), 699 ff. (ICTY); Sloane, *JICJ*, 5 (2007), 724 ff.; Mugwanya, *Genocide* (2007), pp. 256 ff.; Borsari, *Diritto Punitivo* (2007), pp. 438–9; Scalia, 'Peines', in Kolb, *Droit International Pénal* (2008), pp. 369 ff.; Piva, *ZIS*, 3 (2008), 144 ff.

[289] I refer in particular—in chronological order—to the monographs (doctoral dissertations) of Melloh, *Strafzumessung* (2010), D'Ascoli, *Sentencing* (2011), and Book, *Appeal and Sentence* (2011). Melloh undertakes a profound and detailed analysis of the foundations (pp. 74 ff.), mechanisms (pp. 157 ff.) and (historical) sources (pp. 194 ff.) of international sentencing and on this basis examines the current law of the ICC (pp. 297 ff.), focusing on the Statute and the Rules (pp. 297 ff.), customary law (pp. 330 ff.), and general principles (pp. 380), studying for the latter the sentencing law of Germany, Sweden, France, England/Wales, US/Minnesota, and Australia/Victoria (pp. 276 ff., 380 ff.). D'Ascoli analyses the ICTY/ICTR jurisprudence up to 31 August 2010, that is, more than 100 cases and 150 judgments (p. 184 with note 330). Book examines the case law up to December 2010 with a special focus on the control function of the Appeals Chamber (pp. 14 ff., 20; for a positive review, see Nemitz, *JICJ*, 11 (2013), 282). For a previous, albeit slightly systematic and rather descriptive treatment of aggravating and mitigating circumstances, see Beresford, *ICLR*, 1 (2001), 54 ff., 64 ff. and Bagaric and Morss, *ICLR*, 6 (2006), 225 ff. (advocating for their abolition, except guilty plea, since they cannot be reconciled with the gravity criterion and the ensuing proportionality [194, 250–1], and cannot be justified with the purposes of punishment [194, 253–4]).

(3) Sentencing factors

The case law employs a series of sentencing factors to determine concrete sentences. While a complete primary analysis of this case law would go beyond the limits of one chapter of a book, a secondary analysis can be undertaken, relying on the existing research on sentencing[289] including the jurisprudential treatment and definition of the individual sentencing factors.[290] On this basis it is possible to systematize the sentencing practice and analyse more closely the most important sentencing factors.

D'Ascoli identifies in the ICTY/ICTR case law three types of 'influential factors on the decision-making process in sentencing', namely 'general influential factors', 'case-related factors', and 'proceeding-related factors'.[291] Within the first group she examines the purposes of punishment, national sentencing practice, and the principle of proportionality.[292] The case-related factors are divided into those referring to the gravity of the offence and to the individual circumstances of the accused (including individual characteristics such as hierarchical level, good character, personal and family status, criminal record, and state of health.[293] The proceeding-related factors encompass circumstances related to the procedure, such as voluntary surrender,[294] cooperation with the prosecution, and a guilty plea.[295] Jan Philipp Book structures the sentencing practice along the lines of three categories, that is, mitigating factors, aggravating factors, and the gravity of the offence.[296] Understanding the gravity concept in a narrow sense,[297] Book subsumes all remaining sentencing factors under mitigating or aggravating circumstances, systematizing these in turn. We will come back to this systematization later. Florian Melloh derives from the ICC and customary law (i.e., the law of the ICTY and ICTR)[298] two general sentencing factors as laid down in both Articles 24(2) ICTYS and 23(2) ICTRS,[299] and in Article 78(1) ICC Statute: the gravity of the crime and the personal circumstances of the convicted person.[300]

[290] cf. Melloh, *Strafzumessung* (2010), pp. 310 ff., 349 ff., 520 ff.; Book, *Appeal and Sentence* (2011), pp. 66 ff.; D'Ascoli, *Sentencing* (2011), pp. 135 ff.

[291] D'Ascoli, *Sentencing* (2011), pp. 130 ff., 205 and Figure 4.1, p. 206.

[292] D'Ascoli, *Sentencing* (2011), pp. 131–2, 135 ff.

[293] D'Ascoli, *Sentencing* (2011), pp. 133–4, 145 ff.

[294] On voluntary surrender see also Dana, *ICLR*, 4 (2004), 332 ff.

[295] D'Ascoli, *Sentencing* (2011), pp. 134, 174 ff.

[296] Book, *Appeal and Sentence* (2011), pp. 65 ff.

[297] cf. Book, *Appeal and Sentence* (2011), pp. 127–9, 307. We return to this at subsection (b).

[298] On the customary law character of this case law, see also Nemitz, *YbIHL*, 4 (2001), 104–7.

[299] Note 250 and main text; see also Holá, Smeulers, and Bijleveld, *JICJ*, 9 (2011), 415.

[300] Melloh, *Strafzumessung* (2010), pp. 349, 376, 521–3.

[301] Meernik, and King, *LJIL*, 16 (2003), 736 (on the basis of a comparison of sentences acknowledging the 'critical role of the severity of the crime'); Meernik, *SocSciQ*, 92 (2011), 601–2; D'Ascoli, *Sentencing* (2011), pp. 146, 185; Holá, Bijleveld and Smeulers, *EJCrim*, 9 (2012), 546; see also Beresford, *ICLR*, 1 (2001), 54; Nemitz, *YbIHL*, 4 (2001), 108 ff.; Nemitz, *Strafzumessung* (2002), pp. 245, 266, 277; Sayers, *LJIL*, 16 (2003), 755; Book, *Appeal and Sentence* (2011), pp. 31 ('most significant'), 122–3 ('crucial metric'); Carcano, *ICLQ*, 51 (2002), 589, 609; Henham, *JICJ*, 5 (2007), 761; Melloh, *Strafzumessung* (2010), pp. 173, 347–8, 376, 469, 504, 512, 519 (on the basis of an analysis of the case law and six major national jurisdictions); regarding the ICTR, see Holá, Bijleveld, and Smeulers, *ICLR*, 11 (2011), 745, 750 ff., 771 (concrete gravity), 772; generally, see Council of Europe, The Committee of Ministers to Member States Concerning Consistency in Sentencing, Recommendation No. R (92) 17, Appendix, A. no. 4. (referring to the 'seriousness of the offence') and Hallevy, *The Right to be Punished* (2013), p. 104 (offence as a 'starting point').

D'Ascoli's model is certainly innovative and helpful with a view to the necessary systematization of sentencing factors, but their categories sometimes overlap and do not sit well with the written law and existing sentencing practice. Insofar, Book's approach is more convincing and certainly easier to handle for practitioners. In any case, the *gravity of the crime* proves to be the most important sentencing factor in the actual sentencing practice of the tribunals.[301] The jurisprudence has called it the 'litmus test for the appropriate sentence'[302] and 'the touchstone of sentencing'.[303] While this may be an overstatement[304]—the *Lubanga* TC speaks more cautiously of 'one of the principal factors'[305]—the gravity concept serves in any case as the starting point for any attempt to develop a more structured sentencing system. Depending on its (narrow or broad) interpretation (subsection (b)) there is a fair amount of room for additional sentencing circumstances with a mitigating or aggravating effect (subsection (c)). Before turning to the concrete circumstances we must however take a look at some general, overarching factors (subsection (a)).

(a) General factors, especially proportionality and culpability

While theories on the purposes of punishment are indispensable to explain the rationales of sentencing,[306] and indeed are often invoked by the international jurisprudence to give their sentencing decisions the appearance of a theoretical

[302] *Prosecutor v Delalić et al.*, No. IT-96-21-T, Trial Chamber Judgment, para. 1225 (16 November 1998); conc. *Delalić et al.*, IT-96-21-A, para. 731; *Blaškić*, IT-95-14-A, para. 683; *Krajišnik*, IT-00-39-A, para. 787; *Mrkšić et al.*, IT-95-13/1-A, para. 375; *Prosecutor v Nikolić*, No. IT-94-02-A, Appeals Chamber Judgment on Sentencing Appeal, para. 18 (4 February 2005); *Stakić*, IT-97-24-A, para. 375; *Popović et al.*, IT-05-88-T, para. 2134.

[303] *Delalić et al.*, IT-96-21-T, para. 1260.

[304] But too critical, Sloane, *JICJ*, 5 (2007), 722 ('fiction', 'minimal' role, and 'largely rhetorical'); see also Ohlin, 'Proportional Sentences at the ICTY', in Swart, Zahar, and Sluiter, *Legacy* (2011), pp. 328, 337 (arguing that the ICTY in fact has been 'implicitly prioritizing defendant-relative proportionality over offence-gravity proportionality', i.e., given more weight to offender-related factors, especially rank and role in the crime, than its actual gravity).

[305] *Lubanga Dyilo*, ICC-01/04-01/06-2901, para. 36 (characterizing child recruitment as a 'very serious' crime, para. 37).

[306] See in particular Bagaric and Morss, *ICLR*, 6 (2006), 191 ff., 240 ff.; also Nemitz, *YbIHL*, 4 (2001), 120 (evaluating mitigation with regard to sentences purposes); concurring, Galbraith, *LJIL*, 25 (2012), 810; Hoven, *ZStW*, 125 (2013), 154–7; see generally also Council of Europe, Recommendation No. R (92) 17, Appendix, A. nos. 1–6 (declaring and prioritizing rationales) and Explanatory Memorandum, s. III. A.; Roberts, 'Sentencing Discretion', in von Hirsch, Ashworth, and Roberts, *Principled Sentencing* (2009), p. 231; Hallevy, *The Right to be Punished* (2013), pp. 59–60, 103, 110–11.

[307] cf. D'Ascoli, *Sentencing* (2011), pp. 135 ff., 186–8; Melloh, *Strafzumessung* (2010), pp. 170–2, 333 ff.; Leinwand, *ColHRLR*, 40 (2008–2009), 804 ff.; Chifflet and Boas, *CLF*, 23 (2012), 139 ff.; Nemitz, *YbIHL*, 4 (2001), 92 ff.; Nemitz, *Strafzumessung* (2002), pp. 146 ff.; see also Volume I of this treatise, pp. 68 ff.; Meernik and King, *LJIL*, 16 (2003), 722–4; Bagaric and Morss, *ICLR*, 6 (2006), 217 ff. (but criticizing the case law for insufficiently linking the sentences with the purposes of punishment); for a similar criticism with regard to the ICC Statute, Henham, *JICJ*, 5 (2007), 773–4; Henham, *ICLQ*, 52 (2003), 85 ff., 97.

[308] Critical of the ambivalent reference to purposes of punishment in the ICC Statute (Preamble para. 4, 5, 11, Article 110 (4), Rule 223 (b) RPE) Melloh, *Strafzumessung* (2010), pp. 305–7. In contrast, stressing the rationales of punishment to explain and infer consistency of sentences, see Meernik, *SocSciQ*, 92 (2011), 588 ff.

[309] *Lubanga Dyilo*, ICC-01/04-01/06-2901, para. 16.

underpinning,[307] they do not, *quasi*-automatically, entail fixed sentences, or even set sentencing ranges, given their ambivalence and in-built imprecisions.[308] Thus, for example, the *Lubanga* TC's laconic reference to the Court's overall goal to 'put an end to impunity' as 'purposes of punishment'[309] does, in no way, explain the final (joint) sentence of fourteen years' imprisonment for the accused.

Justice in sentencing calls for *equality*, that is, the equal treatment of equal cases and the unequal treatment of unequal ones.[310] Thus, just sentencing requires differentiation and individualization and this in turn requires *proportionality* and *gradation*.[311] The latter is achieved by a 'penalty structure',[312] involving different sentencing ranges for different offences, established either by statute, sentencing guidelines, or case law (guideline judgments).[313] The comparative experience indicates that gradation by normative decree (statute, binding guidelines) guarantees more certainty than gradation by judge-made law. In fact, the move from judge-made, often arbitrary gradation to normative gradation in common law jurisdictions[314] is a stark reminder of this claim.

Proportionality operates with regard to different charges within one offence (vertical proportionality), and between various offences (horizontal proportionality).[315] Proportionality in sentencing means that a sentence must adequately reflect the wrong caused by the criminal conduct, and the culpability of the perpetrator. Understood in this way, a broad or positive *principle of proportionality* calls for a correlation between the seriousness or gravity of the crime (objective factor) and the penalty imposed in the sense of a just or fair balance or compensation ('*Ausgleich*'),[316] taking into account, in

[310] cf. Melloh, *Strafzumessung* (2010), pp. 158–60, 167, 189; generally for equality as a prerequisite of uniformity in sentencing, see Roberts, 'Sentencing Discretion', in von Hirsch, Ashworth, and Roberts, *Principled Sentencing* (2009), p. 231; Hallevy, *The Right to be Punished* (2013), pp. 107 ff.

[311] Melloh, *Strafzumessung* (2010), pp. 160–2, 189, 191. On gradation as recognized by the case law, see note 182 and main text.

[312] Council of Europe, Recommendation No. R (92) 17, Appendix, B. (proposing, *inter alia*, maximum and minimum penalties [no. 1], 'grading of offences into degrees of seriousness' [no. 2], 'sentencing orientations' and 'starting points' [no. 3] and, for implementation of the latter, different means, especially legislation and guidelines [no. 4b]).

[313] See also Council of Europe, Recommendation No. R (92) 17, 19 October 1992, Appendix, B. no. 4. b. accepting guideline judgments as 'orientations or starting points' for sentencing.

[314] See note 210 and main text.

[315] cf. Melloh, *Strafzumessung* (2010), pp. 161, 167, 190, 513, 530–2, 539 ff.; see on ordinal (in the sense of 'horizontal'), and cardinal ('vertical') proportionality in this regard, von Hirsch, *Past or Future Crimes* (1986), pp. 40–3 (ordinal: 'how a crime should be punished compared to similar criminal acts, and . . . to other crimes of a more or less serious nature'), pp. 43–6 (cardinal: 'anchoring the penalty scale by fixing the absolute severity levels for at least some crimes'); von Hirsch, *Censure and Sanctions* (1993), pp. 18–19, 36–46, 57 ff.; see in our context, Bagaric and Morss, *ICLR*, 6 (2006), 252; Ohlin, 'Proportional Sentences at the ICTY', in Swart, Zahar, and Sluiter, *Legacy* (2011), p. 324 with nn. 10–2 (speaking of 'offence-gravity proportionality' and 'defendant-relative proportionality').

[316] In a similar vein, see D'Ascoli, *Sentencing* (2011), pp. 21–2, 292; see also Melloh, *Strafzumessung* (2010), pp. 177, 192, 539; Nemitz, *Strafzumessung* (2002), p. 248.

[317] D'Ascoli, *Sentencing* (2011), pp. 293, 321. See also *Kambanda*, ICTR-97-23-S, para. 58 ('A sentence must reflect the predominant standard of proportionality between the gravity of the offence and the degree of responsibility of the offender'). See generally on the relationship between proportionality and culpability, Frisch, *NStZ*, 33 (2013), 249 ff. (arguing that the proportionality principle cannot replace the culpability principle as a standard for sentencing).

[318] cf. Volume I of this treatise, pp. 93 ff.

[319] Notes 136–7 and main text.

addition, the concrete *culpability* of the accused (subjective factor).[317] It thus reconnects the sentencing with one of the fundamental pillars of individual responsibility in ICL.[318] It also refers back to the totality principle according to which the 'culpability of the offender' is, together with the gravity of the offence, the basis for meting out a 'both just and appropriate' sentence.[319] While the meaning of 'culpability' is controversial and varies in different jurisdictions,[320] sentencing practice shows that it is mainly determined by the accused's involvement in the commission of the crime, his rank and social status, and the overall harm caused.[321]

The principle of proportionality is firmly embedded in national and international law.[322] In our context it suffices to refer to Article 67 GC IV,[323] Articles 76(1) and 81(2)(a) ICC Statute,[324] and the particularly clear, albeit regional, provision of Article 49(3) EU Charter of Fundamental Rights.[325] In addition, its recognition by the sentencing law of most important jurisdictions[326] makes it a general principle of law

[320] cf. Volume I of this treatise, pp. 94–5.

[321] The jurisprudence has defined 'culpability' with regard to the second element of the gravity concept, that is, 'the form and degree of participation of the accused in the crime' (cf. *Prosecutor v Milutinović et al.*, No. IT-05-87-T, Trial Chamber Judgment, Volume 3 of 4, para. 1147 (26 February 2009) and note 370 and main text). Holá, Bijleveld, and Smeulers, *ICLR*, 11 (2011), 770 find (regarding ICTR) that the culpability is 'determined primarily by a combination of three indicators: (i) the defendant's position in the overall society . . . ; (ii) the extent of involvement in atrocities . . . , and (iii) overall harm . . . '. On the importance of the rank or position within the state hierarchy for the determination of culpability see Holá, Smeulers, and Bijleveld, *JICJ*, 9 (2011), 418, 438.

[322] cf. D'Ascoli, *Sentencing* (2011), pp. 22–4.

[323] According to Article 67 GC IV courts 'shall apply only those provisions of law . . . in accordance with general principle of law, in particular the principle that the penalty shall be proportionate to the offence'.

[324] Article 76(1) ICC Statute requires an 'appropriate sentence' while Article 81(2)(a) allows for an appeal 'on the ground of disproportion between the crime and the sentence'. In a similar vein, see Council of Europe, Recommendation No. R (92) 17, Appendix A. no. 4 ('disproportionality between the seriousness of the offence and the sentence should be avoided'); see also no. 5 ('to avoid undue severity') and no. 8 ('avoid unusual hardship'). Critical of this negative proportionality, see Melloh, *Strafzumessung* (2010), pp. 176–7, 192 but acknowledging (pp. 319, 530) the positive proportionality of Article 76(1).

[325] According to Article 49(3) EU Charter the 'severity of penalties must not be disproportionate to the criminal offence'. The Charter has been made binding upon the EU member states with the Lisbon Treaty (see Article 6(1) EU Treaty).

[326] See for the EU member states, Manacorda, *RSC*, 1 (2000), 107, 111–13; for Germany, Sweden, France, England/Wales, US/Minnesota, and Australia/Victoria, Melloh, *Strafzumessung* (2010), pp. 470 ff.; for the USA, see LaFave, *Criminal Law* (2010), § 3.5 (g); for England/Wales and Canada, see Roberts, *CLF*, 23 (2012), 320; see also for England/Wales, Ashworth, *Principles* (2009), p. 20; for France, Pradel, *Droit Pénal Général* (2010), pp. 126, 464; Debove, Falletti, and Janville, *Droit Pénal* (2012), p. 234; Pin, *Droit Pénal Général* (2012), pp. 283–4; for Spain, Núñez Fernández, 'Aplicación y Determinación', in Gil Gil et al., *Derecho Penal—Parte General* (2011), pp. 861–2, 875; Muñoz Conde and García Arán, *Derecho Penal* (2010), p. 533; for Italy, Garofoli, *Diritto Penale—Parte Generale* (2008), p. 979; Pulitanò, *Diritto Penale* (2007), pp. 177–8; for Finland and Sweden, Ashworth, 'Reducing Sentence Disparity', in von Hirsch, Ashworth, and Roberts, *Principled Sentencing* (2009), pp. 249–50.

[327] On this see Volume I of this treatise, p. 77.

[328] The term 'commensurate' instead of 'proportionate' is also used in the English law of sentencing, cf. s. 80 Powers of Criminal Courts (Sentencing) Act 2000. In this context, both terms have the same meaning, cf. Ashworth, *Sentencing* (2010), p. 101.

[329] *Prosecutor v Blaškić*, No. IT-95-14-T, Trial Chamber Judgment, para. 808 (3 March 2000).

[330] *Prosecutor v Kordić and Čerkez*, IT-95-14/2-T, Trial Chamber Judgment, para. 852 (26 February 2001); cf. also *Erdemović*, IT-96-22-T, para. 41; *Prosecutor v Dragan Nikolić*, No. IT-94-2-S, Trial Chamber Sentencing Judgment, para. 21 (18 December 2003); *Muhimana*, ICTR-95-1B-T, para. 594; see also Bagaric and Morss, *ICLR*, 6 (2006), 224–5; critical of the case law, Henham, *JICJ*, 5 (2007), 769 ff., 775–6.

in the traditional sense.[327] The case law of the ad hoc tribunals has invoked the principle several times, calling for 'punishment commensurate[328] with the serious violations of IHL[329] or 'sentences of commensurate severity'.[330]

Proportionality operates in two directions: regarding the lower end, it ensures a minimum punishment (negative function, '*Untermaßverbot*'); regarding the higher end, excessive punishments are to be avoided (positive, liberal function, '*Übermaßverbot*').[331] This reference to both extremes of punishment makes clear that proportionality does not serve to distinguish more precisely between degrees of responsibility.[332] Of course, one must not overlook that proportionality in its traditional sense is linked to retribution ('just deserts'),[333] but, as already said in Volume I of this treatise[334] a 'just deserts' approach has, with regard to international crimes, natural limits since a full balance of the suffered wrong is plainly unthinkable.[335] Thus, in the ICL context, a modern understanding of proportionality is required, focusing on the punishment as, on the one hand, a fair balance for the wrong represented by the offence and the culpability of the offender, and, on the other, as part of a holistic, integrated approach that combines punishment with the broader, collective goals of ICL (reconciliation, peace, etc.).[336]

A proportional punishment also presupposes that incriminating factors are not counted twice. Thus, as stated earlier, the imposition of a just and adequate sentence

[331] In a similar vein, see D'Ascoli, *Sentencing* (2011), pp. 22–3. In the Anglo-American discussion the focus is on the prohibition of grossly excessive sentences, cf. von Hirsch, 'Proportionate Sentences', in von Hirsch, Ashworth, and Roberts, *Principled Sentencing* (2009), pp. 118–20. Crit., especially with regard to the imprecise '*Untermaßverbot*' Frisch, *NStZ*, 33 (2013), 250, 256.

[332] cf. Gardner, 'In Proportion and in Perspective', in Ashworth and Wasik, *Sentencing Theory* (1998/2004), p. 48 (pointing out 'the limitations of the proportionality principle . . . for scaling criminal sentences' due to its dependence 'on the court's ability to discern . . . the wrongful action in the crime, and then . . . to compare this action with other . . . '); Ashworth, *CLR*, 36 (1989), 346 (arguing that finding agreement on what 'the scale of proportionality should take into account', 'distinquish[ing] degrees of responsibility', and 'quantifying harms' constitutes 'a complex . . . enterprise' and complaining 'a general deficiency in theories of State punishment'); Ashworth, *Sentencing* (2010), pp. 89–90, 154 (p. 89: 'the concept of proportionality cannot be made sufficiently precise to indicate rankings of offences and punishments'; p. 154: 'no system of sentencing guidelines can be expected to give adequate coverage to all variations of all offences'); von Hirsch, 'Proportionate Sentences', in von Hirsch, Ashworth, and Roberts, *Principled Sentencing* (2009), pp. 119–20; concurring, Henham, *ICLQ*, 52 (2003), 93, 99.

[333] cf. Ashworth, *Principles* (2009), pp. 17, 20; see also Bagaric and Morss, *ICLR*, 6 (2006), 249 (retribution as 'embodiment of the proportionality principle').

[334] Volume I of this treatise, p. 68.

[335] In a similar vein, see Nemitz, *YbIHL*, 4 (2001), 97; Bagaric and Morss, *ICLR*, 6 (2006), 251–2; D'Ascoli, *Sentencing* (2011), p. 292; Holá, Bijleveld, and Smeulers, *ICLR*, 11 (2011), 772; Hoven, *ZStW*, 125 (2013), 144.

[336] cf. Volume I of this treatise, pp. 71–2; in a similar vein, see Ewald, *ICLR*, 10 (2010), 382.

[337] Section A. (4). On the practice, see Nemitz, *YbIHL*, 4 (2001), 115; Nemitz, *Strafzumessung* (2010), p. 250; D'Ascoli, *Sentencing* (2011), pp. 190–1.

[338] For this more narrow approach, see, for example, *Prosecutor v Milan Babić*, No. IT-03-72-S, Trial Chamber Sentencing Judgment, para. 58 (29 June 2004) ('. . . same element not be assessed once as a constitutive element of the crime and a second time as an aggravating factor'); in a similar vein, see Stakić, IT-97-24-T, para. 904 ('element of the offence').

[339] cf. *Prosecutor v Deronjić*, No. IT-02-61-A, Appeals Chamber Judgment on Sentencing Appeal, para. 106 (20 July 2005) ('. . . factors which a Trial Chamber takes into account as aspects of the gravity of the crime cannot additionally be taken into account as separate aggravating circumstances, and *vice versa*'.); in a similar vein, *Dragomir Milošević*, IT-98-29/1-A, para. 309 ('. . . said facts only be taken into consideration once . . . '); *Lubanga Dyilo*, ICC-01/04-01/06-2901, paras. 35, 51; concurring, D'Ascoli, *Sentencing* (2011),

is predicated on the *prohibition of double counting*.[337] 'Double counting' is hereby understood in a broad sense, that is, any factor—not merely a constituting element of the offence[338]—already taken into account with regard to the definition of the offence must not be considered ('counted') again as an aggravating circumstance in the course of sentencing.[339] Such a broad understanding is demanded by considerations of fairness. While the prohibition is also recognized in comparative law,[340] there is considerable uncertainty as to the precise delimitation between factors belonging to the 'gravity of the crime' and factors to be considered as mere sentencing circumstances.[341] This uncertainty means that circumstances which actually establishing the 'gravity' of a certain offence may be considered (again) as aggravating circumstances.[342] Take for example the *Tadić* TC's consideration of Tadić's 'awareness of, and enthusiastic support for, the attack on the non-Serb population of opština Prijedor by Bosnian Serb forces and the Republika Srpska authorities' as an aggravating circumstance,[343] although the awareness of the attack is a statutory requirement of every crime against humanity.[344] In this sense, the *Todorović* TC correctly held that 'the fact that the crime was committed against civilians will not generally be accepted as an aggravating circumstance' with regard to the sentencing of a crime against humanity.[345] Also, the *Lubanga* TC rightly dismissed the Prosecution's suggestion that the young age of the children recruited by Lubanga's armed group should be treated as an aggravating factor, since it already constituted an element of the respective offence under Article 8(2)(e)(vii) ICC Statute.[346] In any case, the scope and practical impact of the prohibition depends on the determination of the ambiguous concept of 'gravity of the crime' with a view to aggravating circumstances. We will therefore return to the issue later.

The sentencing practice may also be structured or harmonized by way of a stringent *appellate review*.[347] In the academic literature, the appeals process has been invoked, in

pp. 310–11, 322; Book, *Appeal and Sentence* (2011), pp. 35–6, 100–1; see also Melloh, *Strafzumessung* (2010), pp. 363–4, 529.

[340] cf. § 46(3) StGB and Jescheck and Weigend, *Strafrecht—Allgemeiner Teil* (1996), § 83 VII; Chapter 29 §§ 2, 3 of the Swedish CC ('*Brottsbalken*', BrB) and Žila, *Det straffrättsliga påföljdssystemet* (1998), pp. 44 ff.; Articles 64 and 67 of the Spanish CP ('*Código Penal*') and Calderón Cerezo and Choclán Montalvo, *Derecho Penal*, i: *Parte general* (2005), pp. 463–4; see also Melloh, *Strafzumessung* (2010), pp. 444 (Germany), 446 (Sweden).

[341] Critical, see also Nemitz, *YbIHL*, 4 (2001), 116 ff.; Nemitz, *Strafzumessung* (2002), pp. 251–3 (regarding personal and aggravating circumstances), 254–5 (regarding mitigating circumstances); Sloane, *JICJ*, 5 (2007), 723 (regarding the ICTR's conflation of gravity with aggravating circumstances).

[342] cf. Book, *Appeal and Sentence* (2011), pp. 32–3, 35–7, 101.

[343] *Tadić*, IT-94-1-T*bis*-R117, para. 20.

[344] cf. Chapter II, B. (2)(e).

[345] *Prosecutor v Todorović*, No. IT-95-9/1, Trial Chamber Sentencing Judgment, para. 57 (31 July 2001); cf. also *Krstić*, IT-98-33-T, para. 707.

[346] *Lubanga Dyilo*, ICC-01/04-01/06-2901, paras. 77–8.

[347] cf. *Aleksovski*, IT-95-14/1-A, para. 187; Serushago, ICTR-98-39-A, paras. 21–31; *Prosecutor v Zelenović*, No. IT-96–23/2-A, Appeals Chamber Judgment on Sentencing Appeal, paras. 9 ff. (31 October 2007).

[348] Book, *Appeal and Sentence* (2011), pp. 13 ff.; for a more nuanced view, see Melloh, *Strafzumessung* (2010), pp. 188–9, 193, but also stressing the importance of the appellate procedure with regard to the ICC (pp. 324–6, 536–7); for a more critical view see Henham, *JICJ*, 5 (2007), 762–3.

[349] Book, *Appeal and Sentence* (2011), p. 271.

[350] Clark, *GeoLJ*, 96 (2008), 1686–7, 1694–5, 1695 ff. (1695).

particular by Book, to improve certainty and consistency in sentencing.[348] He concludes that 'the appellate system is particularly well suited' to review sentencing decisions.[349] Previously, Jennifer F. Clark has similarly argued that the Appeals Chamber is 'uniquely situated to further the aim of sentencing uniformity' and, indeed, it is the only organ which can achieve this goal.[350] More realistically, for Stuart Beresford the Appeals Chamber may contribute to greater sentencing uniformity by 'guideline judgments'.[351] Given the wide sentencing discretion of the Trial Chambers, the Appeals Chamber has only limited powers to intervene[352] and, indeed, has revised sentences only exceptionally.[353] In fact, it can only reverse or revise a trial sentence if there is a 'discernible error' in the exercise of this discretion,[354] or the Trial Chamber failed to take into account a circumstance, or took into account one that it should not have, and that this erroneous exercise resulted in a miscarriage of justice.[355] As long as a Trial Chamber 'does not venture outside its "discretionary framework" in imposing sentence, the AC will not intervene'.[356] Thus, the effectiveness of appellate review depends on both the sentencing framework at trial level and the scope and standard of appellate review. The more regulated and structured the former, the easier it is for an Appeals Chamber to identify errors and revise the sentence. This is the reason that Book, to prove his point that an appellate system is 'well suited' to review sentencing decisions, pretends to find an underlying basic sentencing structure in the ICTY/ICTR case law[357] which can then be more easily reviewed by the Appeals Chamber. This comes close to a *petitio principii*, though, since Book presupposes coherent sentencing, which is what

[351] Beresford, *ICLR*, 1 (2001), 85.

[352] See generally on the powers of the AC in this regard and in particular the reluctance to remit cases for a new trial Book, *Appeal and Sentence* (2011), pp. 256 ff., 309.

[353] Clark, *GeoLJ*, 96 (2008), 1703 ff. shows, on the one hand, that the AC has revised sentences for one of three reasons (either because of changes in convictions, acquittals, or the applicable mode of participation; or because of factual error related to an aggravating or mitigating circumstance; or because of improper weight given by the TC to an aggravating or mitigating factor or to the gravity of the offence; see also the table, 1719 ff.) but on the other hand admits that the large discretion of the Trial Chamber makes appellate review difficult (1714: 'identifying Trial Chamber error is more challenging in a largely discretionary system where all crimes are considered equally serious and where the decisionmaker can select any sentence from an extraordinarily broad range of options, free from other sentencing constraints') and concludes that this discretion is 'inconsistent both with the goal of uniformity and with appellate sentence review' (1718). It is for this reason that the Appeals Chamber practice has not contributed to uniformity in sentencing (1718). In a similar vein, stressing the broad discretion of Trial Chambers, Sayers, *LJIL*, 16 (2003), 773–4; sceptical with regard to intervention of the Appeals Chamber, see also Henham, *JICJ*, 5 (2007), 762–3; Sloane, *JICJ*, 5 (2007), 732–3.

[354] *Tadić*, IT-94-1-A & IT-94-1-Abis, para. 22; concurring, *Aleksovski*, IT-95-14/1-A, para. 187; Galić, No. IT-98-29-A, para. 393; *Bikindi*, ICTR-01-72-A, para. 193; *Prosecutor v Ntawukulilyayo*, No. ICTR-05-82-A, Appeals Chamber Judgment, para. 232 (14 December 2011); *Bagosora and Nsengiyumva*, ICTR-98-41-A, para. 419; *Boškoski and Tarčulovski*, IT-04-82-A, para. 204; *Dragomir Milošević*, IT-98-29/1-A, para. 297; *Prosecutor v Gatete*, No. ICTR-00-61-A, Appeals Chamber Judgment, para. 268 (9 October 2012); *Haradinaj*, IT-04-84-A, para. 321; *Hategekimana*, ICTR-00-55B-A, para. 288; *Prosecutor v Setako*, No. ICTR-04-81-A, Appeals Chamber Judgment, para. 19 (28 September 2011); *Sesay, Kallon and Gbao*, SCSL-04-15-A, paras. 35, 1202; Renzaho, ICTR-97-31-A, para. 143; *Kanyarukiga*, ICTR-02-78-A, para. 52; *Muvunyi*, ICTR-2000-55A-A, para. 63.

[355] *Serushago*, ICTR-98-39-A, para. 23; see also *Furundžija*, IT-95-17/1-A, para. 37; *Delalić et al.*, IT-96-21-A, para. 780; *Kajelijeli*, ICTR-98-44A-A, para. 291; *Prosecutor v Milan Babić*, No. IT-03-72-a, Appeals Chamber Judgment on Sentencing Appeal, para. 6 (18 July 2005); *Deronjić*, IT-02-61-A, para. 6; *Martić*, IT-95-11-A, paras. 334 ff.

[356] *Delalić et al.*, IT-96-21-A, para. 725.

[357] cf. note 166.

needs to be proved in the first place or which would, at best, be the result of an effective appellate review which itself can only be effective if coherent sentencing exists.

In any case, the 'discernible error' standard presupposes that errors can be 'discerned' which, in turn, presupposes that a Trial Chamber produces a *reasoned opinion* setting out its sentencing criteria in the most transparent and consistent manner possible.[358] Article 74(5) ICC Statute explicitly calls for a 'reasoned statement' with regard to the 'findings on the evidence'. This also refers to the evidence to be taken into account for the sentencing decision (Article 76(1)).[359] More concretely, 'giving reasons' means indicating the 'motivation which relates the particular sentence to the normal range of sentences for the type of crime, and to the declared rationales for sentencing'.[360] In addition, only legal issues are subject to a full appellate review[361]—which again, from an appeals perspective, underscores the importance of a maximum 'legalization' of the sentencing process—while the factual findings underlying a sentencing decision are only subject to a limited review of reasonableness.[362] Thus, for example, in the first judgment of the *Tadić* AC, the judges held that a Trial Chamber acts beyond its discretionary powers if it comes to 'a conclusion which no reasonable person could have reached'.[363] This standard, however, is of dubious value for a proper determination of a Trial Chamber's scope of discretion. It reminds one of the decision of the English Court of Appeal in *R v Cox* where the Court applied the so-called 'right-thinking members of the public' test in order to determine whether or not the seriousness of an offence required the imposition of a prison sentence.[364] This test, however, did not provide much assistance in the process of meting out the sentence. Therefore, only a few years later, the Court of Appeal abandoned the test and stated that the judges would necessarily follow their own views, as they could not ask all those right-thinking members of the public for their opinion.[365] In a similar vein, it seems as if the 'reasonable person' test applied by the Appeals Chamber is not of much use for determining the discretionary powers of the Trial Chambers, since the decision reached will always reflect the subjective views of the judges.

[358] See on the reasoned opinion requirement and its consequences, Book, *Appeal and Sentence* (2011), pp. 230 ff., 309; in the same vein, Council of Europe, Recommendation No. R (92) 17, Appendix, E. and Explanatory Memorandum, s. III. E. no. 1 ('giving of reasons' as 'essence of proper judicial decision making' with regard, *inter alia*, to appellate review); see also Clark, *GeoLJ*, 96 (2008), 1700; Melloh, *Strafzumessung* (2010), pp. 186–8, 193, 323–4.

[359] See also Melloh, *Strafzumessung* (2010), pp. 323, 535.

[360] Council of Europe, Recommendation No. R (92), Appendix, E. no. 2.

[361] cf. Book, *Appeal and Sentence* (2011), pp. 162 ff. (199), 270, 308.

[362] cf. Book, *Appeal and Sentence* (2011), pp. 61, 182 ff. (200), 270, 308.

[363] *Prosecutor v Tadić*, No. IT-94-1-A, Appeals Chamber Judgment, para. 64 (15 July 1999).

[364] *R v Cox*, *CLR*, 40 (1993), p. 152.

[365] *R v Howells*, *CLR*, 45 (1998), pp. 837, 839.

[366] See Section B. (2).

[367] In a similar vein, see Sloane, *JICJ*, 5 (2007), 723 ('not one concept but many'); see also Scalia, *JICJ*, 9 (2011), 683–4 (arguing that the concept is so imprecise that it violates the legality principle); generally critical on the concept's ambiguity and thus role in promoting ICL to the detriment of state sovereignty and defendants' rights, Deguzman, *ColJTransnat'lL*, 51 (2012), 22, 24–5, 30, 36 ff. (reading, however, too much into the concept with regard to the alleged restriction of defendants' rights and the alleged intentions of the drafters of the ICC Statute).

(b) The gravity of the crime

The written law refers to the gravity concept[366] but does not define it. This is understandable since the concept is too complex to be defined in a few words in a legal document. In fact, gravity is determined by a complex set of factors which themselves need to be defined and are interrelated.[367] One empirical study identifies five sets of factors which the ICTY has taken into account with regard to gravity and aggravating circumstances.[368] The ICTY/ICTR refer to the 'nature, magnitude and the manner in which they [the crimes] were committed, the number of victims . . . and the degree of suffering';[369] 'the particular circumstances of the case, as well as the form and degree of the participation of the accused'.[370] It was further held that 'the closer a person is to actual participation in the crime, the more serious [is] the nature of his crime'.[371] The SCSL has largely followed the ICTY's position.[372] Within the ICC regime, gravity is already relevant at the stage of the preliminary examinations as an admissibility threshold within the framework of the complementarity test (cf. Article

[368] These factors are: (1) abuse of superior position/position of authority or trust (accepted in thirty-five cases); (2) special vulnerability of victims (thirty-one cases); (3) extreme suffering or harm inflicted on victims (twenty-five cases); (4) large number of victims (fifteen cases); and (5) cruelty of the attack (fourteen cases); cf. Holá, Smeulers, and Bijleveld, *LJIL*, 22 (2009), 86 (analysing sixty-three sentences up to August 2008, 83 with n. 27). See also Melloh, *Strafzumessung* (2010), pp. 351 ff.

[369] *Kordić and Čerkez*, IT-95-14/2-T, para. 847; similarly *Popović et al.*, IT-05-88-T, para. 2134.

[370] *Kupreškić et al.*, IT-95-16-T, para. 852; similarly *Prosecutor v Ruggiu*, No. ICTR-97-32-I, Trial Chamber Judgment and Sentence, paras. 48–9 (1 June 2000); *Furundžija*, IT-95-17/1-A, para. 227; *Milan Babić*, IT-03-72-A, para. 39; *Blaškić*, IT-95-14-A, para. 683; *Galić*, IT-98-29-A, para. 443; *Kanyarukiga*, ICTR-02-78-A, para. 281; *Miodrag Jokić*, IT-01-42/1-A, para. 67; *Mrkšić et al.*, IT-95-13/1-A, para. 400; *Nikolić*, IT-94-02-A, para. 18; *Prosecutor v Nshogoza*, No. ICTR-2007–91-A, Appeals Chamber Judgment, para. 98 (15 March 2010); *Sesay, Kallon and Gbao*, SCSL-04-15-A, para. 1229; *Prosecutor v Rukundo*, No. ICTR-01-70-A, Appeals Chamber Judgment, para. 243 (20 October 2010); *Prosecutor v Serugendo*, ICTR-2005-84-I, Trial Chamber Judgment and Sentence, para. 39 (12 June 2006); *Semanza*, ICTR-97-20-A, para. 385; *Stakić*, IT-97-24-A, para. 380; *Karemera and Ngirumpatse*, ICTR-98-44-T, para. 1721; *Prosecutor v Đorđević*, No. IT-05-87/1-T, Trial Chamber Judgment, Volume I of II, para. 2207 (23 February 2011); *Nzabonimana*, ICTR-98-44D-T, para. 1803; *Popović et al.*, IT-05-88-T, para. 2134; *Prosecutor v Zelenović*, IT-96-23/2-S, para. 38.

[371] *Furundžija*, IT-95-17/1-A, para. 227. For a summary of the case law, see Meernik and King, *LJIL*, 16 (2003), 733–6.

[372] cf. *Prosecutor v Brima, Kamaraand Kanu (AFRC)*, No. SCSL-2004-16-T, Trial Chamber Sentencing Judgment, paras. 11, 19 (19 July 2007); *Prosecutor v Fofana and Kondewa (CDF)*, No. SCSL-04-14-T, Trial Chamber Judgment on the Sentencing, para. 33 (9 October 2007); *Prosecutor v Taylor*, No. SCSL-03-01-T, Trial Chamber Sentencing Judgment, para. 19 (30 May 2012).

[373] Regulations ICC-OTP, ICC-BD/05-01-09 (23 April 2009); see also ICC-OTP, *Prosecutorial Strategy 2009–2012* (2010), para. 20; ICC-OTP, *Report on Preliminary Examination Activities* (13 December 2011), para. 7; ICC-OTP, *Report on Preliminary Examination Activities 2012* (November 2012), para. 7; for a more detailed analysis see Ambos, *Complementarity* (2010), pp. 45–6; Stegmiller, *Pre-Investigation Stage* (2011), pp. 319 ff., 336 ff. (with a profound analysis of Article 17(1)(d), pp. 316 ff.).

[374] *Prosecutor v Lubanga Dyilo*, No. ICC-01/04-01/06-8-US-Cor, Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58, paras. 42 ff. (46, 50–4, 63) (24 February 2006), proposing as criteria the nature and social impact ('social alarm') of the crimes (systematic or large-scale?), the manner of commission (e.g. particular cruelty), and the status and role of the suspects (who is most responsible?).

[375] *Prosecutor v Lubanga Dyilo*, No. ICC-01-04-169, Judgment on the Prosecutor's Appeal against the Decision of PTC I entitled 'Decision on the Prosecutor's Application for Warrant of Arrest, Article 58', paras. 54 ff. (68 ff.) (13 July 2006), reclassified as public on 23 September 2009; conc. Al Bashir, ICC-02/05-01/09-3, para. 48 with note 51; see for a discussion and further references, Ambos, *Complementarity* (2010), pp. 46–7; Stegmiller, *Pre-Investigation Stage* (2011), pp. 322 ff., 335–6.

17(1)(d) ICC Statute). The gravity of 'situations' is here defined by the OTP with regard to 'various factors, including their scale, nature, manner of commission and impact'.[373] However, the concept remains unsettled at the judicial level after the PTC I's broad definition[374] was declared incorrect and flawed by the Appeals Chamber, revoking the relevant decision without, however, providing an alternative definition.[375] In a subsequent decision the *Kenya* PTC adopted a quantitative and qualitative approach, focusing not only on the number of victims but also on the 'aggravating or qualitative factor attached to the commission of crimes'.[376] It further referred to the sentencing factors of the RPE,[377] stressing the scale of the alleged crimes, the nature of the unlawful behaviour, the means employed for commission, and the impact on the victims.[378] It must also be recalled in this context that the ICC Statute provides for two forms of gravity with regard to sentencing, namely a 'normal' (simple or ordinary) gravity for imprisonment up to thirty years, and an 'extreme gravity' for life imprisonment (Article 77(1)(b) ICC Statute, Rule 145(3) RPE).[379] Thus, ICC judges must not only determine the normal gravity of an offence, but also reflect upon the difference which turns it into an 'extreme' gravity justifying life imprisonment.

The approaches in the literature are more systematic and structured. D'Ascoli defines gravity with regard to the actual perpetration in a broad sense (seriousness of the crime and accused's participation in it) and the 'victimisation' (its effects on victims and survivors).[380] Similarly, Book refers to the specific circumstances of the case and the accused's form and degree of participation.[381] Melloh focuses—taking into account not only the case law but also the law of six major national jurisdictions[382]—on the degree of harmfulness and the degree of responsibility of the accused.[383] The former is to be determined by the relevance of the legal interest affected and the kind of attack on the object protected by the respective offence. The latter refers to the method of commission and its normative weight according to a given legal system. This understanding of the gravity concept corresponds to views in national law and doctrine, according to which gravity should be seen as referring to the harm or damage caused by the offence (objective element, *actus reus*) and the culpability of the offender as expressed in the commission of the act (subjective element, *mens rea*).[384] Thus, gravity

[376] *Situation in Kenya*, No. ICC-01/09-19, Pre-Trial Chamber Decision Pursuant to Article 15, para. 62 (31 March 2010).

[377] Note 255 and main text.

[378] *Situation in Kenya*, ICC-01/09-19, para. 62.

[379] See note 260 and main text.

[380] D'Ascoli, *Sentencing* (2011), p. 133.

[381] Book, *Appeal and Sentence* (2011), pp. 32, 123 ff.

[382] For the jurisdictions, see note 289.

[383] Melloh, *Strafzumessung* (2010), pp. 469, 504–5, 512, 519–20, 540–1.

[384] cf. Ashworth, *Sentencing* (2010), p. 105 (England); Jareborg, *Straffrättsideologiska Fragment* (1992), p. 156 (Sweden); Calderón Cerezo and Choclán Montalvo, *Derecho Penal*, i: *Parte general* (2005), pp. 481–2 (Spain); Núñez Fernández, 'Aplicación y Determinación', in Gil Gil et al., *Derecho Penal—Parte General* (2011), pp. 861–2, 875 (Spain); Theune, '§ 46', in Laufhütte, Rissing-van Saan, and Tiedemann, *Leipziger Kommentar*, ii (2006), mn. 5 (Germany); in the same vein, see Ambos and Nemitz, 'Commentary', in Klip and Sluiter, *Annotated Leading Cases*, ii (2001), p. 839.

[385] See in more detail, D'Ascoli, *Sentencing* (2011), pp. 154–5.

[386] cf. Carcano, *ICLQ*, 51 (2002), 589–90, 609; Harmon and Gaynor, *JICJ*, 5 (2007), 698–9; Book, *Appeal and Sentence* (2011), pp. 33, 125; Holá, Bijleveld, and Smeulers, *ICLR*, 11 (2011), 750; on the inherent gravity, see Nemitz, *YbIHL*, 4 (2001), 112–13.

is a twofold concept to be defined with a view to the offence and its commission by the offender. The victimization, adduced by D'Ascoli, belongs to the offence since it refers to its effects on the victims.[385]

As to the nature of the crime, one must distinguish between the inherent or abstract gravity (gravity *in rem*) and the concrete, subjective gravity (gravity *in personam*) with regard to the actual commission (harm, culpability).[386] Of course, the *abstract* hierarchy between the international core crimes ('abstract gravity'),[387] can only be the starting point and must be complemented by *concrete* considerations focusing on the underlying offences and the circumstances of the particular case ('concrete gravity'). The concrete gravity either verifies or falsifies the abstract gravity, but it is clear that the former is decisive as to the overall assessment of gravity to be translated into actual sentences.[388] Thus, for example, murder as a crime against humanity (Article 7(1)(a) ICC Statute) may, *in abstracto*, be considered more serious than murder ('wilful killing') as a war crime (Article 8(2)(a)) because the different context element entails a greater wrong. In contrast, notwithstanding the difference with regard to the context elements, the war crime of torture (Article 8(2)(b)) appears, again *in abstracto*, to be more serious than the crime against humanity of imprisonment (Article 7(2)(e) ICC Statute). Of course, such comparisons *in abstracto* may lead to different results *in concreto* because the concrete commission of the crimes may change the abstract assessment of the degree of their wrongfulness. Thus, while, as just noted, torture according to Article 8(2)(b) appears, *in abstracto*, to be more serious than imprisonment according to Article 7(2)(e), imprisonment of a great number of persons under inhumane conditions for a long period of time could amount to torture, or it could be considered equally as wrongful and blameworthy as torture.

Clearly, as to the difference between the individual underlying acts, especially of crimes against humanity and war crimes, abstract criteria are only of a limited value. The case law does not offer any decisive criteria. In the only empirical study on the matter,[389] Holá, Smeulers, and Bijleveld find it 'impossible . . . to disentangle sentence length in every case on the basis of the underlying offences'.[390] Notwithstanding, they find that acts based on discriminatory grounds receive relatively lengthier sentences than 'random' crimes and acts of violence against life and limb, and lengthier

[387] Section A. (3)(a). In favour of such a hierarchy with regard to uniformity in sentencing, see Clark, *GeoLJ*, 96 (2008), 1697; see also Carcano, *ICLQ*, 51 (2002), 594 (referring to the 'impact at the sentencing stage'); Henham, *JICJ*, 5 (2007), 774; Carcano, *ICLQ*, 52 (2003), 98 (critical of the case law's failure to establish such a hierarchy).

[388] In a similar vein, see Book, *Appeal and Sentence* (2011), p. 125; see also Carcano, *ICLQ*, 51 (2002), 607 (stressing the primacy of concrete gravity in ICTY case law).

[389] Holá, Smeulers, and Bijleveld, *JICJ*, 9 (2011), 416, 423 ff. (distinguishing between killing, rape, torture, violence, property, and other).

[390] Holá, Smeulers, and Bijleveld, *JICJ*, 9 (2011), 424.

[391] Holá, Smeulers, and Bijleveld, *JICJ*, 9 (2011), 424–5 with table 2. However, according to Meernik and King, *LJIL*, 16 (2003), pp. 746–7 ethnicity plays no role in sentencing ('there are few differences in the sentences meted out to the guilty based on ethnicity').

[392] Holá, Smeulers, and Bijleveld, *JICJ*, 9 (2011), 426–7 with table 3.

[393] See Olusanya, *Sentencing* (2005), pp. 60 ff., 97 rejecting the same interest approach in favour of the different interest approach with regard to crimes against humanity and war crimes (pp. 11, 17, 52).

sentences than crimes against liberty or property.[391] This is supported by an approach focusing on the protected interests violated: here the offences can be 'rank ordered into a seriousness scale' with offences against life first, followed by the ones against limb, liberty, and property.[392] While this confirms previous claims that important criteria exist in the form of different sentencing approaches looking at the interests protected ('same or different interest approach')[393] or at a specific purpose or motive pursued by the perpetrator ('persecution-type v murder-type approach',[394] 'discriminatory motive v non-discriminatory motive approach'[395]), none of these approaches alone produces satisfactory and fully reliable results.[396] They must be complemented by additional criteria, and here the recourse to national (sentencing) law can be very helpful. While, as we have already seen,[397] the recourse to the national sentencing practice by way of statutory *fiat* can easily be undermined by trial judges, national law on international crimes, and the respective criteria by national legislators and judges with regard to sentencing, can certainly be a valuable source of information with regard to the ranking of international crimes and the underlying acts.

The second element of the gravity concept refers to the *accused's participation* in the crime. In this regard the accused's level of hierarchy and his position of authority, his concrete involvement and role in the respective crime(s), as well as the modalities of commission all have to be considered.[398] We cannot go into detail here, but a brief remark is necessary. The extension of the gravity concept to these offender-related considerations generates difficult problems of delimitation with regard to the individual or personal circumstances of the defendant as the second factor to be considered besides gravity (see in particular Article 78(1) ICC Statute) since several of these (aggravating) circumstances are included in the offender-related considerations of the gravity concept. In terms of terminology, one may even argue that 'gravity of the crime' strictly understood is limited to offence ('crime'), excluding offender-related considerations, at least if they cannot be linked to the commission of the offence. We will now turn to the ensuing delimitation issue.

[394] See Olusanya, *Sentencing* (2005), pp. 14–15, 93 ff. rejecting this approach because of its alleged violation of the *nullum crimen* principle (pp. 96–7, 99, 147).

[395] See Olusanya, *Sentencing* (2005), pp. 104 ff., 135, 148–9 developing on the basis of this (his own) approach a revised system of penalties for crimes against humanity and war crimes which clearly demonstrate that the former deserve more severe sentences than the latter.

[396] The same is true for *Olusanya's* own approach, the 'discriminatory motive v non-discriminatory motive approach'. While this approach suggests a very useful criterion by emphasizing the racist or discriminatory motive of the perpetrator, it does not help when both a crime against humanity and a war crime are committed without such a motive. In this context, it may also be recalled that only the crime against humanity of persecution requires a specific discriminatory (persecutory) intent or motive, not crimes against humanity in general, cf. Chapter II, B. (2)(e) and C. (8).

[397] cf. note 239 and main text.

[398] cf. Book, *Appeal and Sentence* (2011), pp. 129 ff.; D'Ascoli, *Sentencing* (2011), pp. 150 ff. both with various references to the jurisprudence; see also Holá, Bijleveld, and Smeulers, *EJCrim*, 9 (2012), 544–5 demonstrating that the actual rank or position of an accused within a state structure is an 'important factor in the assessment of the gravity of the crime'; see also previously Holá, Smeulers, and Bijleveld, *JICJ*, 9 (2011), 430–2, 438.

[399] cf. *Erdemović*, IT-96-22-T, paras. 86–94, 95–102, 102–11, distinguishing between 'circumstances contemporaneous with the carrying out of the criminal act', 'circumstances following the commission of the acts', and 'factors relating to personality'.

[400] *Blaškić*, IT-95-14-T, para. 765.

As we have seen in connection with the prohibition of double counting, it is not always easy to distinguish the ambit of gravity from aggravating and mitigating circumstances. In a temporal sense, issues of delimitation only occur with regard to circumstances 'contemporaneous with the carrying out of the criminal act'[399] or 'specific material circumstances',[400] that is, the ones which are directly related with the offence and its commission. Pre- or post-offence personal circumstances ('specific personal circumstances'),[401] which are normally mitigating (e.g., cooperation with the prosecution, showing remorse), neither affect the gravity of the crime,[402] since they are not connected to its *actus reus*,[403] nor the perpetrator's culpability.[404] Thus, for example, the *Tadić* AC could not see a violation of the Trial Chamber's scope of discretion when denying the mitigating effect of the fact that the Appellant would serve his prison term away from his family in a foreign country (Germany), and that he would 'suffer from the notoriety of being the first war criminal convicted by the International Tribunal'.[405] In the Appeal Chamber's view, both circumstances refer to post-offence conduct and thus cannot influence the gravity of the crimes.

With regard to circumstances temporally connected to the commission of the offence, a distinction between mitigating and aggravating circumstances has to be made. As to the former, the US Military Tribunal of the *Hostage* case famously stated:

> . . . mitigation of punishment does not in any sense of the word reduce the degree of the crime. It is more a matter of grace than of defence. In other words, the punishment assessed is not a proper criterion to be considered in evaluating the findings of the court with reference to the degree of magnitude of the crime.[406]

The same position—mitigation of punishment, not crime—has been adopted by the ad hoc tribunals.[407] In fact, as demonstrated by Book, mitigating circumstances only exceptionally affect the gravity of the crime, namely only if they refer to the degree of responsibility exercised by the accused (i.e. in cases of diminished responsibility, duress,

[401] *Blaškić*, IT-95-14-T, para. 765. [402] cf. Ruggiu, ICTR 97-32-I, para. 80.

[403] Book, *Appeal and Sentence* (2011), p. 37.

[404] cf. Ashworth, *Sentencing* (2010), p. 170 (England); Jareborg, *Straffrättsideologiska Fragment* (1992), p. 156 (Sweden); Calderón Cerezo and Choclán Montalvo, *Derecho Penal*, i: *Parte general* (2005), p. 482 (Spain); Maurach and Zipf, *Strafrecht Allgemeiner Teil*, i (1992), § 63 I A (Germany). See also Nemitz, *Strafzumessung* (2002), pp. 255–9.

[405] *Tadić*, IT-94-1-A & IT-94-1-Abis, para. 18.

[406] *US v von List et al.* (*Hostage* case) (case 7), in US-GPO, *TWC*, xi (1997), p. 1317 (19 February 1948).

[407] *Kambanda*, ICTR-97-23-S, para. 37; *Blaškić*, IT-95-14-T, para. 765; *Ntakirutimana*, No. ICTR-96-10 & ICTR-96-17-T, para. 889; *Milutinović et al.*, IT-05-87-T, para. 1150; *Orić*, IT-03-68-T, para. 747.

[408] Book, *Appeal and Sentence* (2011), pp. 66 ff. (98).

[409] In the same vein, see Beresford, *ICLR*, 1 (2001), 54; Nemitz, *Strafzumessung* (2002), pp. 257–8, 270, 277; D'Ascoli, *Sentencing* (2011), pp. 314, 321–2.

[410] Thus, perhaps most famously, Biljana Plavšić, former leader of the Bosnian Serbs, received a sentence of only eleven years' imprisonment although she pleaded guilty to an extremely serious crime, namely persecution as a crime against humanity (*Prosecutor v Plavšić*, No. IT-00-39&40/1-S, Trial Chamber Sentencing Judgment, para. 5 and *passim* (27 February 2003); critical, Chifflet and Boas, *CLF*, 23 (2012), 148–51). On guilty plea and plea agreements Beresford, *ICLR*, 1 (2001), 64–5; Nemitz, *YbIHL*, 4 (2001), 119–21; Nemitz, *Strafzumessung* (2002), pp. 262–6, 270–1; Sayers, *LJIL*, 16 (2003), 767–9; Harmon and Gaynor, *JICJ*, 5 (2007), 702–3, 705 ff.; generally critical, Henham, *ICLQ*, 52 (2003), 102 ff.

[411] An ICTR TC found that *Omar Serushago*, one of the five leaders of the '*interahamwe*', had committed genocide and—as crimes against humanity—murder, extermination, and torture, having

superior order).[408] Thus, while mitigating circumstances are important for the individualization of the sentence, they should not be allowed to outweigh the severe penalty required because of the gravity of the offence;[409] otherwise, the proportionality principle in its negative form ('*Untermaßverbot*') would be disregarded. Unfortunately, the case law has sometimes deviated from this rule, in particular if the sentence was based on a plea agreement,[410] or the accused cooperated in another way with the Prosecution.[411]

In contrast, the aggravating circumstances recognized in the case law all relate to the culpability of the accused and thus generate difficult problems of delimitation with regard to the gravity of the offence.[412] Indeed, the *Erdemović* TC once famously held, in connection with crimes against humanity, that 'the existence of any aggravating circumstances does not warrant consideration' and instead considered 'circumstances surrounding the commission of the crime likely *to characterize its gravity* which might preclude any leniency stemming from mitigating circumstances'.[413] Such an understanding, apart from recalling the Nuremberg *Hostage* case's side-lining of mitigating circumstances, makes aggravating circumstances part of the gravity concept and thus impossible to disentangle the two.[414] Insofar, only a strict understanding of the 'gravity of the offence', limiting it to facts or circumstances which are constitutive of the *actus reus* of the respective offence, that is, which amount themselves to constitutive elements of the offence,[415] makes a delimitation, at least *in abstracto*, possible. Take the example mentioned earlier.[416] As awareness of the attack is a statutory requirement of every crime against humanity, it is part of the *actus reus* and, thus, belongs to the gravity of the offence and cannot be considered again in sentencing. Of course, *in concreto* this delimitation often remains difficult[417] and

personally murdered four Tutsis, while thirty-three people were killed by militiamen placed under his authority (*Serushago*, ICTR 98-39-S, para. 27), but imposed only a sentence of fifteen years' imprisonment although the gravity of this crime normally entails life imprisonment, or a much higher temporal sentence (see Section A. (3) (a) with the respective considerations on genocide). The Chamber acknowledged that the crimes committed were 'irrefutably, of extreme gravity' (para. 27) and that *Serushago* 'played a leading role' in the commission of these crimes and, having been the *de facto* leader of the Interahamwe in Giseny, that he 'enjoyed definite authority in his region (paras. 28–9, 42). Yet, it considered that 'exceptional circumstances in mitigation . . . may afford him some clemency' taking into account the defendant's cooperation with the Prosecutor, his voluntary surrender, his guilty plea, his social background, his assistance given to certain potential Tutsi victims, his family obligations, and his show of remorse (paras. 31 ff.). Selective examples of cooperation are discussed by Sayers, *LJIL*, 16 (2003), 769–72.

[412] Book, *Appeal and Sentence* (2011), pp. 35, 99 ff. (122), 307.

[413] *Erdemović*, IT-96-22-T, para. 45 (emphasis added).

[414] In the same vein, see Meernik and King, *LJIL*, 16 (2003), 739 (arguing that in case of 'widespread and violent atrocities of the most vicious sort, it might seem to a certain extent superfluous to specify additional aggravating circumstances . . . '); in a similar vein, see Beresford, *ICLR*, 1 (2001), 55 (calling the 'egregious nature' of the crime 'the most significant aggravating circumstance').

[415] cf. Book, *Appeal and Sentence* (2011), pp. 127–9 (but confusing at 129), 307; concurring, Nemitz, *JICJ*, 11 (2013), 283; in a similar vein, previously, Nemitz, *Strafzumessung* (2002), pp. 258–9, 269.

[416] Note 343 and main text.

[417] See for example *Krajišnik*, IT-00-39-A, para. 787 (' . . . difficult or artificial to separate the two [gravity and aggravating circumstances] in some cases . . . ').

[418] In a similar vein, see Book, *Appeal and Sentence* (2011), p. 129.

[419] See also *Krajišnik*, IT-00-39-A, para. 787 ('[w]hat is important is to avoid double counting'); Holá, Smeulers, and Bijleveld, *JICJ*, 9 (2011), 420.

[420] Note 338 and main text.

depends on the circumstances of the individual case, leaving a considerable discretion to a Trial Chamber.[418] In any case, from a fairness perspective and notwithstanding doctrinal niceties, the decisive issue is to avoid double counting[419] which is to be understood in a broad sense.[420]

(c) Remaining circumstances (mitigating or aggravating)

The 'remaining' circumstances are those which have not yet been considered as part of the (offender-related) gravity of the crime. They are the personal circumstances of the convicted person within the meaning of Article 24(2) ICTYS, Article 23(2) ICTRS, and Article 78(1) ICC Statute, and may have an aggravating or mitigating effect. They have to be clearly defined[421] and their factual basis must always be properly proved.[422] In particular, aggravating circumstances must be proven beyond reasonable doubt since they operate to the detriment of the accused,[423] while for mitigating circumstances a balance of probabilities is sufficient.[424] A Chamber may at the stage of sentencing take into account crimes which have not been charged as aggravating factors as long as they can be linked to the culpability of the accused.[425]

[421] Council of Europe, Recommendation No. R (92) 17, Appendix, C. no. 2 and Explanatory Memorandum, s. III. C. no. 2.

[422] Council of Europe, Recommendation No. R (92) 17, Appendix, C. no. 3.

[423] *Delalić et al.*, IT-96-21-A, para. 777; *Blaškić*, IT-95-14-A, para. 686; *Prosecutor v Bagaragaza*, No. ICTR-2005-86-S, Trial Chamber Sentencing Judgment, para. 29 (17 November 2009); *Mrkšić et al.*, IT-95-13/1-A, para. 352; *Nahimana, Barayagwiza and Ngeze*, ICTR-99-52-A, para. 1038; *Popović et al.*, IT-05-88-T, para. 2137; *Prosecutor v Stanišić and Župljanin*, No. IT-08-91-T, Trial Chamber Judgment, Volume 2 of 3, para. 895 (27 March 2013); *Serugendo*, ICTR-2005-84-I, para. 41; *Milutinović et al.*, IT-05-87-T, para. 1150; *Lubanga Dyilo*, ICC-01/04-01/06-2901, para. 33; see also Meernik and King, *LJIL*, 16 (2003), 740; Sayers, *LJIL*, 16 (2003), 761; Bagaric and Morss, *ICLR*, 6 (2006), 207; Sloane, *JICJ*, 5 (2007), 726; Melloh, *Strafzumessung* (2010), pp. 363, 523; Holá, Smeulers, and Bijleveld, *JICJ*, 9 (2011), 419; generally Council of Europe, Recommendation No. R (92) 17, Appendix, C. no. 3.

[424] *Delalić et al.*, IT-96-21-A, para. 763; *Bagaragaza*, ICTR-2005-86-S, para. 29; *Hadžihasanović and Kubura*, IT-01-47-A, para. 302; *Mrkšić et al.*, IT-95-13/1-A, para. 352; *Prosecutor v Zelenović*, No. IT-96-23/2-A, Appeals Chamber Judgment, para. 11 (31 October 2007); *Deronjić*, IT-02-61-A, para. 141; *Sesay, Kallon and Gbao*, SCSL-04-15-A, para. 1239; *Nahimana, Barayagwiza and Ngeze*, ICTR-99-52-A, para. 1038; *Popović et al.*, IT-05-88-T, para. 2137; *Serugendo*, ICTR-2005-84-I, para. 40; *Milutinović et al.*, IT-05-87-T, para. 1150; *Stanišić and Župljanin*, IT-08-91-T, para. 895; *Lubanga Dyilo*, ICC-01/04-01/06-2901, para. 34; see also Meernik and King, *LJIL*, 16 (2003), 743; Sayers, *LJIL*, 16 (2003), 764; Bagaric and Morss, *ICLR*, 6 (2006), 207; Sloane, *JICJ*, 5 (2007), 726; Melloh, *Strafzumessung* (2010), pp. 363, 523; Holá, Smeulers, and Bijleveld, *JICJ*, 9 (2011), 419.

[425] cf. *Lubanga Dyilo*, ICC-01/04-01/06-2901, paras. 60 ff. where the Trial Chamber considers sexual violence, despite not being charged by the Prosecution, and stresses that it can be considered pursuant to Rule 145(1)(c) and (2)(b)(iv) ICC RPE (para. 67) if this aggravating factor can be established beyond reasonable doubt and attributed to the defendant 'in a manner that reflects his culpability pursuant to Rule 145(1)(a)' (para. 69). This was, however, *in casu* denied by the Majority of the Chamber since it was 'unable to conclude that sexual violence … was sufficiently widespread' and that Lubanga 'ordered or encouraged' it, that is, the necessary 'link … has not been established beyond reasonable doubt' (para. 74; dissenting in this regard, Judge Odio Benito, *Lubanga Dyilo*, ICC-01/04-01/06-2901, Dissenting Opinion, paras. 2, 4 ff.).

[426] D'Ascoli, *Sentencing* (2011), p. 185; Galbraith, *LJIL*, 25 (2012), 802 ff. (regarding 'good deeds' as mitigating factors, finding an unequal and doctrinally inconsistent treatment).

[427] D'Ascoli, *Sentencing* (2011), p. 189. See previously Meernik and King, *LJIL*, 16 (2003), 740 ff. demonstrating that, on the one hand, especially the magnitude of the crime and the zeal or eagerness displayed during commission may significantly aggravate the sentence (741–2, 748) while, on the other, a guilty plea may significantly mitigate the sentence (744–5, 748); see also Meernik and King, *ICLR*, 1 (2001),

Unfortunately, the jurisprudence is sometimes unclear and largely inconsistent with regard to the *weight* of certain circumstances and their effect as aggravating or mitigating factors.[426] While certain circumstances clearly result in higher or lower sentences—aggravating factors such as magnitude of crime, cruelty, and superior position of the accused versus mitigating factors such as a guilty plea, remorse, and cooperation,[427] in other cases their significance is not explained or they are used inconsistently for either aggravation or mitigation purposes (e.g., age, 'good character', or even a guilty plea).[428] More fundamentally, there is no uniform definition as to what constitutes an aggravating or mitigating circumstance; therefore, the decision is mostly case-specific.[429]

A special problem is whether a circumstance must, in *temporal terms*, be directly related to the offence and offender or whether it can also occur after commission.[430] The latter seems difficult to relate to aggravating circumstances for reasons of sheer logic and common sense: post-offence conduct, for example lack of respect in the courtroom, cannot aggravate the offence committed previously.[431] It may, at best, shed light on the accused's character and raise doubts as to his acceptance of responsibility

360 ff. For the same result Holá, Smeulers, and Bijleveld, *JICJ*, 9 (2011), 432, 438 (regarding cruelty and zeal as aggravating factors for low-level offenders) and 434 (regarding the mitigating effect of a guilty plea) but see also Holá, Bijleveld, and Smeulers, *ICLR*, 11 (2011), 771 (finding, regarding the ICTR, that 'no low-ranking defendant, no matter how enthusiastic or zealous, has yet been sentenced to life imprisonment'). On the importance of zeal and 'heinous means' as aggravating factors, see also Sloane, *JICJ*, 5 (2007), 727–8. Ewald, *ICLR*, 10 (2010), 389–90 wants to analyse guilty plea cases separately since they distort the general sentencing pattern. D'Ascoli, *Sentencing* (2011), pp. 194–6 finds that the mitigating value of a guilty plea varies considerably. Hoven, *ZStW*, 125 (2013), 164–6 wants to limit the guilty plea to cases where it is indispensable for evidentiary purposes.

[428] D'Ascoli, *Sentencing* (2011), pp. 189–91, 194–6. The *Lubanga* TC qualifies the intelligence and good education of Lubanga as a 'relevant factor', but not an aggravating one as suggested by the Prosecution (*Lubanga Dyilo*, ICC-01/04-01/06-2901, paras. 55–6).

[429] Holá, Smeulers, and Bijleveld, *JICJ*, 9 (2011), 419.

[430] D'Ascoli, *Sentencing* (2011), p. 192 referring to the opposing views of the *Kunarac* TC (*Prosecutor v Kunarac et al.*, No. IT-96-23-T & IT-96-23/1-T, Trial Chamber Judgment, para. 850 (22 February 2001), only circumstances 'directly related'), and *Delalić et al.*, IT-96-21-A, para. 788 including subsequent factors.

[431] But see *Delalić et al.*, IT-96-21-T, paras. 1244, 1251 (taking into account Mucić's 'defiant attitude' and 'lack of respect for the judicial process…' as aggravating circumstance); *Prosecutor v Kayishema and Ruzindana*, No. ICTR-95–1-T, Trial Chamber Sentence, para. 17 (21 May 1999) (smiling and laughing as survivors testified during trial suggested as aggravating by Prosecution).

[432] *Kunarac et al.*, IT-96-23-T & IT-96-23/1-T, paras. 850, 854; see also Nemitz, *YbIHL*, 4 (2001), 118–19; Nemitz, *Strafzumessung* (2010), pp. 253–4.

[433] cf. *Delalić et al.*, IT-96-21-A, para. 763; *Semanza*, ICTR-97-20-T, paras. 567–70; see also Melloh, *Strafzumessung* (2010), p. 363.

[434] cf. D'Ascoli, *Sentencing* (2011), p. 192 with various references in n. 351 (e.g. *Stakić*, No. IT-97-24-T, paras. 911, 920; *Rugambarara*, ICTR-00-59-T, para. 30; *Popović et al.*, IT-05-88-T, para. 2137); *Deronjić*, IT-02-61-A, para. 112; *Renzaho*, ICTR-97-31-A, para. 615 with n. 1312; *Simba*, ICTR-01-76-A, para. 82 with n. 178; *Serugendo*, ICTR-2005-84-I, para. 41; *Milutinović et al.*, IT-05-87-T, para. 1150; *Stanišić and Župljanin*, IT-08-91-T, para. 895. Contra Hoven, *ZStW*, 125 (2013), 162–4 (arguing that one should exclusively focus on the gravity of the offence and exclude personal, forward-looking factors; a show of remorse may be merely 'opportunistic').

[435] Subpara. (a) refers to the 'conduct after the act, including any efforts to compensate the victims and any cooperation with the Court'.

[436] cf. D'Ascoli, *Sentencing* (2011), p. 193 quoting the misleading *Krnojelac* TC, attaching mitigating value to the cooperative behaviour of the defence counsel, *Prosecutor v Krnojelac*, No. IT-97-25-T, Trial Chamber Judgment, para. 520 (15 March 2002); concurring, *Prosecutor v Vasiljević*, No. IT-98-32-T, Trial Chamber Judgment, para. 297 (29 November 2002).

and the prospects of rehabilitation.[432] In fact, for reasons of fairness, aggravating circumstances can only be taken into account if they relate to the charged offence.[433] Thus, post-offence conduct should only be taken into account for mitigation,[434] as indeed done by Rule 145(2)(a) ICC RPE;[435] yet, of course, a personal mitigation, for example because of cooperative behaviour, must result from the conduct of the accused, not that of third parties (e.g., his defence lawyer).[436]

Clearly, the sheer number of sentencing circumstances calls for a systematization. National law usually distinguishes, on the one hand, between offence- or offender-related circumstances and, on the other, between the circumstances belonging to the *actus reus* and those ones outside of it.[437] Both distinctions can also be found in ICL as discussed earlier. The former distinction corresponds to the twofold structure of the gravity concept and, in principle, the distinction between mitigating and aggravating circumstances in Rule 145(2) ICC RPE.[438] The latter distinction is reflected in the delimitation of gravity and (aggravating) circumstances.

In a comprehensive empirical-quantitative analysis of the case law,[439] D'Ascoli identifies thirteen aggravating circumstances[440] and sixteen mitigating circumstances,[441] two of which are used for both aggravating and mitigating purposes.[442] While there is generally a consistent and uniform application of aggravating circumstances, this is not the case with mitigating circumstances which are sometimes not taken into account although they are present.[443] Apart from that, D'Ascoli confirms the obvious if she concludes that these circumstances 'surely are influential' factors

[437] cf. Melloh, *Strafzumessung* (2010), p. 175; Council of Europe, Recommendation No. R (92) 17, Explanatory Memorandum, s. III. C. nos. 2 and 3; for the offence-offender (*in rem* and *in personam*) dichotomy see also Hallevy, *The Right to be Punished* (2013), pp. 57 ff., 104.

[438] Subpara. (a) contains offender-related mitigating circumstances, subpara. (b) offence-related aggravating circumstances (see also Melloh, *Strafzumessung* (2010), pp. 313 ff., 327–8, 377), although 'relevant prior criminal convictions' (Rule 145(2)(b)(i)) are also offender-related in that these circumstances refer to prior offence conduct.

[439] D'Ascoli, *Sentencing* (2011), pp. 203–61. D'Ascoli only examines the case-related and proceeding-related factors since only these are to be measured with regard to an aggravating or mitigating effect on the final sentence (p. 208). Concretely, she examines the length of sentences (comparing ICTY and ICTR), the sentencing impact of the type of crime, the mode of liability, the type of perpetrator, and a guilty plea, as well as aggravating and mitigating circumstances (pp. 215 ff.). On length of sentence and type of crime, see notes 162, 51, and main text.

[440] These are 'gravity, victimization, trauma, vulnerability, premeditation, cruelty, willingness, direct participation, superior position, abuse of authority, criminal record, good character, conduct', cf. D'Ascoli, *Sentencing* (2011), p. 245 (Figure 4.1.5). See previously Meernik and King, *LJIL*, 16 (2003), pp. 740–1 with table 4 also identifying thirteen aggravating circumstances (magnitude of crimes, zeal in committing crimes, heinousness of crimes, duration of crimes, discriminatory intent, vulnerability of victims, youth of victims, trauma of surviving victims, abuse of trust or personal authority, failure to punish those committing crimes, intimidation of witnesses/courtroom, demeanour, personal gain).

[441] These are 'orders/duress, first offender, family, young age, advanced age, health conditions, remorse, unwillingness, indirect participation, help offered, co-operation, surrender, guilty plea, testimony, good character, conduct', cf. D'Ascoli, *Sentencing* (2011), p. 251 (Figure 4.16). See previously Meernik and King, *LJIL*, 16 (2003), 745 with table 5, identifying seventeen mitigating circumstances (guilty plea, guilty plea excluding *Jelisić*, cooperation, remorse, surrendered, no prior criminal record, assisted victims, not active participant, family youth, old age, not a present threat, redeemable, subordinate rank, prison would be far away, context of actions, co-operation with defence counsel, post-conflict conduct).

[442] These are 'good character' and 'conduct of the accused', cf. D'Ascoli, *Sentencing* (2011), p. 210.

[443] D'Ascoli, *Sentencing* (2011), pp. 255–6 with figure 4.1, 260.

[444] D'Ascoli, *Sentencing* (2011), p. 257.

but the '"weight" of each factor varies . . . and some circumstances are more "influential" than others'.[444] Thus, as to the length of sentences, this confirms what already followed from the normative analysis of the jurisprudence, that is, that the most influential factors are, on the one hand, the abstract type of crime, its concrete gravity/magnitude and impact on victims ('victimisation') (genocide entailing a particular harsh sentence) and, on the other, the superior ('leadership') level and 'abuse of authority/trust' of the accused.[445]

Book distinguishes three groups of *aggravating circumstances*: regarding degree of harm (scale of crime, status and vulnerability of victims, age of victim, grave effect on victim, seriousness of crime), particular cruelty and state of mind (display of cruelty, motive/discriminatory intent, zeal) and others (role in the crime, position of authority, professional background, courtroom behaviour).[446] Melloh identifies six groups as follows: prior convictions, discriminatory commission, abuse of a position of authority or of an official position, special circumstances of commission, special consequences of the offences (for the victims), and similar circumstances.[447]

As to the *level of responsibility*, James Meernik and Kimi Lynn King have shown earlier that there is a 'fairly strong and positive relationship between power and punishment', that is, the higher an accused stands in the hierarchy, the higher the sentence he finally receives.[448] In a similar vein, Ewald has demonstrated that the 'leadership level' is the 'central factor in international sentencing' and directly impacts on the severity of the sentence.[449] He even finds that the different leadership levels and the respective sentencing ranges 'serve as an initial "anchor value" to determine a sentence for new cases'.[450] Holá, Bijleveld, and Smeulers have shown that 'abuse of superior position/authority/influence' are the most frequent aggravating factors cited by the judges[451] and that the rank of the offender is—after the inherent gravity of the crime—the second-strongest predictor of sentencing length.[452] In contrast, as shown

[445] D'Ascoli, *Sentencing* (2011), pp. 259–60.

[446] Book, *Appeal and Sentence* (2011), pp. 99 ff. (122).

[447] Melloh, *Strafzumessung* (2010), pp. 359 ff., 378, 525 ff. (regarding the ICC).

[448] Meernik and King, *LJIL*, 16 (2003), 736–9, 747–8; confirmed by Meernik, *SocSciQ*, 92 (2011), 596, 601–2; see also Meernik and King, *ICLR*, 1 (2001), 359, 365.

[449] Ewald, *ICLR*, 10 (2010), 385, 395 ff. (distinguishing in total eleven leadership levels to be grouped in the higher, medium, and lower level and one level for perpetrators 'outside' the hierarchy, 396).

[450] Ewald, *ICLR*, 10 (2010), 399–402 (400).

[451] Holá, Bijleveld, and Smeulers, *EJCrim*, 9 (2012), 543; see also Holá, Smeulers, and Bijleveld, *JICJ*, 9 (2011), 435–6 with tables 9 and 10 (in total listing eleven aggravating factors for the ICTY and ten for the ICTR) and Holá, Bijleveld, and Smeulers, *ICLR*, 11 (2011), 755 (regarding the ICTR).

[452] Holá, Bijleveld, and Smeulers, *EJCrim*, 9 (2012), 546–7 (distinguishing between high-, middle-, and low-ranking offenders; also at 545); see also Holá, Smeulers, and Bijleveld, *JICJ*, 9 (2011), 418–19, 430–2 (with table 6), 438 and Holá, Bijleveld, and Smeulers, *ICLR*, 11 (2011), 759, 771–2 (regarding the ICTR finding that 'leadership figures seem to be regarded as the most culpable' and thus received the highest sentences). In the same vein, see previously Sloane, *JICJ*, 5 (2007), 726–7; Critical of this practice, see Chifflet and Boas, *CLF*, 23 (2012), 148, 151. Surprisingly, Glickman, *ColJTransnat'lL*, 43 (2004–2005), 264 considers a distinction between low-level soldiers and leaders with regard to genocide and crimes against humanity unnecessary 'because the fundamental crime is so horrendous as to warrant extremely serious punishment in any case'.

[453] D'Ascoli, *Sentencing* (2011), pp. 259–60. But see also Holá, Bijleveld, and Smeulers, *EJCrim*, 9 (2012), 544 arguing that liability modes 'can either "augment" or "lessen" the gravity of a crime'; see also Holá, Smeulers, and Bijleveld, *JICJ*, 9 (2011), 417, 429–30 with table 5. Ewald, *ICLR*, 10 (2010), 394–5 with figure 6 finds that in cases of command responsibility the average sentence is lower.

by D'Ascoli, the type of participation (direct/indirect), mode of liability (Articles 7/6(1) or (3) ICTYS/ICTRS), age of the accused, and the composition of the judicial bench, do not prove to be significant.[453]

With regard to *mitigating circumstances*, a useful classification has been proposed by Sloane distinguishing three categories: pragmatic (voluntary surrender, guilty plea, substantial cooperation), moral or rehabilitative (remorse, sympathy for the victims, rehabilitative potential, good character, or prior acts) and clemency (old age and frail health).[454] This categorization can be complemented, following Book, by additional categories referring to a rehabilitative or restorative purpose, factors relating to the responsibility of the accused and taking into account possible fair trial violations.[455] With this, six categories of mitigating circumstances can be distinguished: the moral or rehabilitative group (remorse, good character, no prior criminal record, conduct in detention), the pragmatic group (guilty plea, voluntary surrender, cooperation), the restorative group (acts of mercy, post-conflict conduct), factors relating to clemency (poor health, family circumstances, age) or the accused's responsibility (diminished responsibility, duress, superior order) and those accounting for a violation of the accused's rights.[456] Melloh identifies four groups of circumstances all contained in Book's first five groups: conduct during commission, especially diminished responsibility, conduct after commission, especially cooperation and reparation/restitution, good character and individual circumstances, for example, age.[457] The non-inclusion of fair trial violations is, from a doctrinal perspective, correct since the mitigating effect in these cases is not due to the defendant's praiseworthy conduct but to the unfair procedural activity of the prosecution and/or the court. These five groups also capture the most frequently cited mitigating factors at the tribunals, that is, 'family circumstances of a defendant', or 'his/her assistance of victims'.[458]

(4) Towards a structured sentencing regime for the ICC

From the principled and practical considerations discussed in the previous section, it follows that a more structured approach to sentencing is required. A more formalized approach would accord international sentencing the importance and attention it deserves. After all, as already said at the beginning of this section, the sentencing decision is of utmost importance to the parties of international criminal proceedings, to both the defendant and the prosecutor, as well as the victims. It is for this reason that a

[454] Sloane, *JICJ*, 5 (2007), 729. [455] Book, *Appeal and Sentence* (2011), pp. 38, 68.
[456] Book, *Appeal and Sentence* (2011), pp. 66 ff. (99).
[457] Melloh, *Strafzumessung* (2010), pp. 356 ff., 524–5; but see also p. 378 where he—confusingly—includes good character and individual circumstances of the convicted person in post-offence conduct.
[458] cf. Holá, Bijleveld, and Smeulers, *EJCrim*, 9 (2012), 545; see also Holá, Smeulers, and Bijleveld, *JICJ*, 9 (2011), 433–4 with tables 7 and 8 (listing ten mitigating factors for the ICTY and eleven for the ICTR) and Holá, Bijleveld, and Smeulers, *ICLR*, 11 (2011), 755 (assistance to victims most relevant in ICTR genocide cases). On assistance to victims as a mitigating factor ('good deeds'), see also Galbraith, *LJIL*, 25 (2012), 802 ff., 812–13 (finding that 'good deeds' are either recognized directly or indirectly as evidence of 'good character').
[459] Contra Meernik and King, *LJIL*, 16 (2003), 749; D'Ascoli, *Sentencing* (2011), p. 283.
[460] D'Ascoli, *Sentencing* (2011), pp. 284–5, 287, 294, 318–20, 321; see note 166 and main text.

rational and fair sentencing regime and practice would enhance the credibility and legitimacy of international criminal justice, especially the ICC.

The correct approach should opt for a middle ground in relation to the unfettered discretion of Trial Chambers resulting in widespread disparity and 'rigid sentencing tariffs',[459] that is, it should strive for '*guiding principles*'[460] or flexible 'soft' sentencing guidelines.[461] While an overly strict sentencing framework is impractical since each and every sentencing system must leave a reasonable range of discretion to the judges, fairly precise sentencing ranges are a necessary and useful starting point for every structured sentencing regime.[462] Of course, sentencing ranges are always based on abstract criteria that have to be filled with life by actual cases. While these cases must be decided within the sentencing framework provided for by the abstract sentencing ranges and the additional guiding principles, this framework must leave enough room to determine an appropriate sentence for each and every case. After all, it is ultimately the proper task of the judge to impose the *concrete* sentence, taking into account the particularities and individual circumstances of the respective case.[463]

Concrete *sentencing ranges* can be derived, first of all, from the international case law once this has been systematized accordingly. This is the approach taken by Book, who develops, on the basis of the ICTY and ICTR case law, four categories of sentencing ranges focusing essentially on the gravity of the offence.[464] While this approach gives rise to controversy as to the minimum and maximum ranges and the qualifying criteria, it is a good basis for discussion and certainly superior to a fixed 'baseline' or minimum sentence as proposed by the *Lubanga* Prosecution.[465] Such a fixed baseline will always appear arbitrary (why 80 per cent of the maximum temporal sentence, as

[461] Beresford, *ICLR*, 1 (2001), 82 ff.; Meernik and King, *LJIL*, 16 (2003), 748–9 (but also calling for caution and more research); Harmon and Gaynor, *JICJ*, 5 (2007), 710–12; Leinwand, *ColHRLR*, 40 (2008–2009), 844–50 ('soft', 'advisory' international guidelines modelled on the US sentencing guidelines and deferring to national law); Book, *Appeal and Sentence* (2011), p. 306; Chifflet and Boas, *CLF*, 23 (2012), 144–5. See generally on the main techniques for reducing sentencing disparity Ashworth, 'Reducing Sentence Disparity', in von Hirsch, Ashworth, and Roberts, *Principled Sentencing* (2009), pp. 243 ff. (discussing judicial self-regulation, narrative style sentencing guidelines, statutory sentencing principles, and mandatory sentencing laws); on the form and content of guidance, see also Roberts, 'Sentencing Discretion', in von Hirsch, Ashworth, and Roberts, *Principled Sentencing* (2009), pp. 231–4.

[462] cf. D'Ascoli, *Sentencing* (2011), p. 320 ('sentencing ranges could prove useful and essential for uniformity, internal consistency and, ultimately effectiveness of sentences . . . '); in favour, see also Hoven, *ZStW*, 125 (2013), 152–4.

[463] See also Melloh, *Strafzumessung* (2010), p. 548.

[464] cf. Book, *Appeal and Sentence* (2011), pp. 150–8 distinguishing between (i) fines of up to five years for minor offences, (ii) five to fifteen years where either the crime or the perpetrator's contribution is particularly serious, (iii) fifteen to twenty-five years where both the crime and the contribution were 'present to a major degree' and (iv) twenty-five years to life imprisonment where either the crime or the contribution are extreme. See also Galbraith, *LJIL*, 25 (2012), 812, suggesting, regarding the particular problem of a defendant's laudable conduct towards the victims ('good deeds'), a 'rough comparison' between the gravity of the crime and the good deeds that would entail a partial mitigation of the sentence. This, of course, is not very precise, and also appears arbitrary.

[465] *Lubanga Dyilo*, ICC-01/04-01/06-2901, paras. 92–3 referring to the Prosecution proposal of a minimum sentence of 80 per cent of the maximum temporal sentence (thirty years) of the ICC Statute (i.e., twenty-four years), rightly rejected by the Trial Chamber for having no basis in the law and going against the proportionality principle.

[466] Critical, see also Hoven, *ZStW*, 125 (2013), 153–4.

proposed by the ICC OTP, and not 70 per cent or 90 per cent?) and makes it impossible to do justice to the differences of individual cases.[466]

Another important source of information is the 'national *international* criminal law', in particular if it exists in the form of a comprehensive codification implementing the ICC Statute. In this sense, I have proposed elsewhere that comparative research should be carried out on the national 'international criminal laws' to deduce from them more precise sentencing guidelines as a kind of general principle of law.[467] This approach must not be confused with a comparative analysis of *national* law, which may be useful with regard to overarching sentencing principles,[468] but which is, as regards the concrete sentencing ranges, of dubious value since international crimes are structurally different from ordinary national ones. This explains why a statutory duty to take recourse to *national* sentencing practice cannot be binding on an *international* criminal tribunal,[469] and why such a tribunal must rightly reject an 'automatic application' of this practice.[470]

Against this background, it is not surprising that D'Ascoli's findings, comparing the sentencing laws of six jurisdictions,[471] are neither very illuminating nor representative.[472] Ultimately, she proposes, with regard to international crimes, 'a range of penalties (with ample minima and maxima) related to the different categories and subcategories of international crimes'[473] without, however, indicating more precise ranges with concrete numbers. Similarly, Melloh's comparative analysis of six major jurisdictions would remain pointless if he did not connect it to the ICL on sentencing, that is, the case law of the ad hoc tribunals and the ICC legal regime.[474] The same problem is encountered by the Max Planck study on the punishment of serious crimes: it provides important information, but its focus is on serious *national* crimes.[475] In this sense comparative analysis is, as correctly stated by Book, not 'the prime avenue' to achieve a consistent sentencing regime in ICL.[476] In any case, national sentencing

[467] Ambos, 'Nulla Poena', in Haveman and Olusanya, *Sentencing* (2006), p. 35; concurring, Haveman, 'Sentencing and Sanctioning', in Haveman and Olusanya, *Sentencing* (2006), p. 15; see also Harmon and Gaynor, *JICJ*, 5 (2007), 710–11.

[468] Of course, this applies only if such common principles can be found in the compared jurisdictions, for a sceptical view see Nemitz, *Strafzumessung* (2002), pp. 240–3, 268 and *passim* with regard to England/Wales, France, Germany, and Sweden.

[469] Note 239 and main text.

[470] *Kunarac et al.*, IT-96-23-T & IT-96-23/1-T, para. 829 (no 'automatic application'); see also *Kunarac et al.*, IT-96-23 & IT-96-23/1-A, para. 347; *Blaškić*, IT-95-14-A, para. 682; *Kordić and Čerkez*, IT-95-14/2-A, para. 1085; *Krstić*, IT-98-33-A, para. 260; *Nikolić*, IT-94-02-A, para. 69; *Prosecutor v Boškoski and Tarčulovski*, No. IT-04-82-T, Trial Chamber Judgment, para. 587 with note 2069 (10 July 2008); *Đorđević*, IT-05-87/1-T, para. 2204 with note 7397; *Prosecutor v Limaj, Bala and Musliu*, No. IT-03-66-T, Trial Chamber Judgment, para. 734 with note 2440 (30 November 2005); *Prosecutor v Strugar*, No. IT-01-42-T, Trial Chamber Judgment, para. 473 with note 1337 (10 January 2005).

[471] D'Ascoli, *Sentencing* (2011), pp. 75 ff.

[472] D'Ascoli, *Sentencing* (2011), pp. 106–8 essentially concluding that the six jurisdictions provide for sentencing ranges or maximum limits and that international crimes are punished with the 'highest penalties available' (106) being considered 'crimes of utmost seriousness' (107).

[473] D'Ascoli, *Sentencing* (2011), p. 284.

[474] Melloh, *Strafzumessung* (2010), see note 289.

[475] Sieber, *Punishment* I (2004), pp. 90–124, concluding for example that in the twenty-three countries analysed, murder attracts the most severe penalties.

[476] Book, *Appeal and Sentence* (2011), p. 21.

[477] Note 315 and main text.

[478] In this sense speaking of a 'comparative analysis', Sloane, *JICJ*, 5 (2007), 718–19. There are some references in the case law to this kind of vertical comparison, see for example *Jelisić*, No. IT-95-10-A, para.

ranges and practice for serious (international) crimes offer a useful orientation for sentencing in ICL if the respective international statute, as the ICC Statute, only provides for overly broad sentencing ranges, practically ignoring the national practice. Also, comparing similar cases—in the sense of the vertical proportionality standard mentioned earlier[477]—can be useful, notwithstanding the differences in detail, in establishing general sentencing guidelines with more precise sentencing ranges.[478]

Of course, these sentencing ranges must be complemented by the *general sentencing principles* discussed earlier, that is, the principles of culpability and proportionality and the prohibition of double counting.[479] As to the concrete sentencing factors, the concept of the gravity of the crime is the basis and touchstone of a structured sentencing regime to be adjusted for the individual circumstances of the instant case and the instant defendant.[480] Of course, the more important the role of gravity is in determining a concrete sentence, the less weight the aggravating and mitigating circumstances will have.[481] In other words, an increase in the importance of gravity entails a decrease in the importance of the remaining circumstances. In any case, the gravity concept is to be understood in a narrow sense, remitting all factors which do not belong to the 'statutory gravity', that is, which are not part of the *actus reus* of the respective offence, to the aggravating or mitigating circumstances. Otherwise, a reasonable delimitation between factors belonging to the gravity from those belonging to the circumstances is not possible. Also, while international core crimes are by definition very serious, this abstract gravity may have to be corrected, perhaps even mitigated, in light of the concrete circumstances of the case ('concrete gravity'). Insofar, it may even be possible that the commission of the respective crimes appears to be less serious in an armed conflict than in a situation of peace.[482]

Perhaps the most concrete proposal for such a structured sentencing system has been made by D'Ascoli.[483] Her system of guiding principles ranges from general proposals (e.g., stating the purposes of punishment with regard to sentencing, establishing a hierarchy of crimes) to more concrete rules regarding sentencing (systematization and weighting of aggravating and mitigating circumstances, indicative ranges

96 (sentence 'capricious or excessive if it is out of reasonable proportion with a line of sentences passed in similar circumstances for the same offences'); *Kvočka et al.*, IT-98-30/1-A, para. 681 ('[s]entences of like individuals in like cases should be comparable', and quoting *Jelisić*).

[479] Subsection (1)(a).

[480] Arguing in favour of a 'normative superiority' of offence-gravity as compared to 'defendant-relative proportionality', Ohlin, 'Proportional Sentences at the ICTY', in Swart, Zahar, and Sluiter, *Legacy* (2011), pp. 328 ff.

[481] See also Sloane, *JICJ*, 5 (2007), 725 (arguing, on the one hand, that 'because of the very high baseline established by the gravity of the crimes . . . it can be difficult to determine the actual effect, if any, of certain aggravating factors'; and, on the other, that the 'actual effect of mitigating factors . . . tends to be easier to ascertain').

[482] See for the respective debate whether lower sentences are more appropriate in armed conflict, Bonomy, *JICJ*, 5 (2007), 348, 351 (arguing that 'sentences may be shorter than those imposed in an equivalent domestic context'); in a similar vein, see Ohlin, 'Proportional Sentences at the ICTY', in Swart, Zahar, and Sluiter, *Legacy* (2011), p. 323 ('atrocities committed in the course of . . . a war . . . are arguably different than atrocities committed gratuitously against a civilian population independent of war'); left open by Chifflet and Boas, *CLF*, 23 (2012), 135, 136, 156–7.

[483] D'Ascoli, *Sentencing* (2011), pp. 287 ff.

[484] D'Ascoli, *Sentencing* (2011), pp. 318–19, 322.

of penalties for the underlying offences of international crimes, and different scales of responsibility depending on the form and degree of participation in the crime) and procedural matters (separate sentencing hearing, single sentence for each count, and *renvoi* of Appeals to Trial Chamber for a *de novo* assessment of sentence).[484] As to the circumstances, D'Ascoli distinguishes between 'ordinary' and 'special' circumstances, the latter only applying to specific crimes and entailing an automatic increase or decrease of the penalty.[485] As to the former, she classifies aggravating and mitigating circumstances with regard to the offender, the commission of the offence and the victims, and then assigns to each of these subcategories aggravating or mitigating factors.[486] Thus, for example, with regard to the offender, a particular high status or position has an aggravating effect, while the showing of remorse or a clean criminal record has a mitigating one; with regard to the commission, a particularly cruel method of carrying out of the crime is aggravating, a minor involvement is mitigating; with regard to the victims, their special vulnerability is an aggravating factor, their compensation by the perpetrator, a mitigating one.[487] The single circumstances are taken from the case law, but D'Ascoli reduces the thirteen aggravating circumstances found there to ten, and the sixteen mitigating ones to eight.[488] As to their importance, D'Ascoli wants to place more weight on the circumstances 'related to the accused and to victims', for example, cruelty of commission, traumatization of victims or expression of remorse,[489] but it is not clear how the concepts of 'accused' and 'victims' relate to her three categories mentioned earlier since the individual factors she mentions (e.g., cruelty) apply across the board (e.g., cruelty belongs to commission of the crime), and the factors with 'a more limited relevance' (e.g., criminal record, age or 'posterior conduct')[490] belong all to the accused. Most importantly, D'Ascoli also proposes some general principles and common rules regarding the circumstances, which we have already touched upon earlier.[491] First, aggravating circumstances should be 'specifically predetermined', not subject to interpretation by analogy, and directly (in temporal terms) relate to the crime and its commission.[492] Second, mitigating circumstances can be interpreted more broadly, consist of an open list and also refer to post-offence conduct.[493] Third, in order to avoid double counting,[494] circumstances already considered as part of the offence elements or with regard to its gravity must not be considered again as aggravating or mitigating circumstances.[495] Fourth, the maximum limit of aggravation or mitigation in case of the existence of one or more respective circumstances should be one-third of the sentence otherwise imposed.[496]

[485] D'Ascoli, *Sentencing* (2011), pp. 309–10.
[486] D'Ascoli, *Sentencing* (2011), pp. 309–10.
[487] D'Ascoli, *Sentencing* (2011), pp. 309–10.
[488] D'Ascoli, *Sentencing* (2011), pp. 311–13. See on the circumstances employed by the case law, notes 270 and 271.
[489] D'Ascoli, *Sentencing* (2011), p. 313.
[490] D'Ascoli, *Sentencing* (2011), p. 314.
[491] Subsection (3)(a).
[492] D'Ascoli, *Sentencing* (2011), pp. 310, 321; see note 269 and main text.
[493] D'Ascoli, *Sentencing* (2011), pp. 310, 321.
[494] See note 337 and main text.
[495] D'Ascoli, *Sentencing* (2011), pp. 310–11, 322.
[496] D'Ascoli, *Sentencing* (2011), pp. 314, 321–2.
[497] D'Ascoli, *Sentencing* (2011), pp. 314, 321–2.
[498] D'Ascoli, *Sentencing* (2011), pp. 314, 321–2; see note 342.
[499] D'Ascoli, *Sentencing* (2011), pp. 314–15.
[500] In practice, the mitigating effect is not substantial; cf. D'Ascoli, *Sentencing* (2011), pp. 243–4.
[501] D'Ascoli, *Sentencing* (2011), pp. 317, 322.

Fifth, the circumstances should be linked to the purposes of punishment.[497] Sixth, mitigating circumstances should not outweigh the gravity of the crimes committed.[498] Seventh, all relevant circumstances should be taken into consideration and then 'adjusted' considering their respective weight.[499] Eighth, a guilty plea should only be accorded substantial weight as a mitigating factor[500] if accompanied by sincere remorse and effective cooperation by the accused.[501]

A less detailed but still useful proposal has been made by Melloh in the form of a *six-step sentencing method*:[502] First, the applicable norms in the ICC Statute and the RPE must be looked at. Second, judges must decide which theory of punishment they want to follow (finding of theory). Third, the concrete case has to be assessed with regard to the gravity of the offence and the personal circumstances of the convicted person, qualifying them as mitigating or aggravating factors (finding of 'sentence value', '*Strafwert*'). Fourth, the applicable sentence and the respective range has to be decided (finding of sentence type, '*Strafart*'). Fifth, the concrete sentence must be determined on the basis of a global assessment of the sentence value, that is, gravity and other circumstances (finding of concrete sentence, '*Strafumfang*'). Sixth, the joint sentence within the meaning of Article 78(3) ICC Statute must be determined and possible reductions, especially because of previous detention (Article 78(2)), be taken into account.

Summarizing these proposals and taking into account the established sentencing principles, the following *five-step approach* to establishing the correct sentence can be suggested:

(1) Identify the applicable law, that is, Articles 77, 78 ICC Statute and Rules 145–148 RPE.

(2) Define the relevant theories of punishment and relate them to sentencing.

(3) Discuss the concrete case with regard to the gravity of the offence (main factor) and (other) circumstances of mitigation and/or aggravation. Depending on the number of charges/counts, a further discussion of separate charges (rules of concours) may be required.

(4) Determine the punishment for each charge/crime on the basis of an overall assessment of gravity and other circumstances. Establish single sentences and a joint sentence.

(5) Possible reduction of joint sentence?

[502] Melloh, *Strafzumessung* (2010), pp. 346–7, 503, 512, 517–19.

General Literature

Amati, E., Caccamo, V., Costi, M., Fronza, E., and Vallini, A., eds., *Introduzione al Diritto Penale Internazionale* (Milan: Giuffrè Editore, 2nd edn, 2010)

Ambos, K., *Der Allgemeine Teil des Völkerstrafrechts—Ansätze einer Dogmatisierung* (Berlin: Duncker & Humblot, 2002, repr. 2004)

——*La Parte General del Derecho Penal Internacional* (Bogotá: Temis, 2006)

——*Internationales Strafrecht—Strafanwendungsrecht, Völkerstrafrecht, europäisches Strafrecht* (Munich: C.H. Beck, 3rd edn, 2011)

——*Treatise on International Criminal Law, Vol. I Foundations and General Part* (Oxford: Oxford University Press, 2013)

Ambroise-Castérot, C., *Droit pénal spécial et des affaires* (Paris: Gualino-Lextenso Éd., 2nd edn, 2010)

Ashworth, A., *Principles of Criminal Law* (New York: Oxford University Press, 6th edn, 2009)

Association Internationale de Droit Pénal, ed., *International Criminal Law: Quo Vadis?* (Ramonville Saint-Agne: Éditiones érès, 2004)

Bantekas, I. and Nash, S., *International Criminal Law* (London: Routledge-Cavendis, 2007)

Barriga, S. and Kreß, C., eds., *Crime of Aggression Library—The Travaux Préparatoires of the Crime of Aggression* (Cambridge: Cambridge University Press, 2012)

——, Danspeckgruber, W., and Wenaweser, C., eds., *The Princeton Process on the Crime of Aggression—Materials of the Special Working Group on the Crime of Aggression, 2003–2009* (Boulder: The Liechtenstein Institute of Self-Determination at Princeton University, 2009)

Bassiouni, M.C., *Crimes against Humanity in International Criminal Law* (The Hague et al.: Kluwer Law International, 1999)

——*Introduction to International Criminal Law* (Ardsley: Transnational Publishers, 2003)

——*The Legislative History of the International Criminal Court,* ii: *An Article by Article Evolution of the Statute* (Ardsley, New York: Transnational Publishers, 2005)

——*International Criminal Law*, iii: *International Enforcement* (Leiden: Martinus Nijhoff, 3rd edn, 2008)

——*Crimes Against Humanity. Historical Evolution and Contemporary Application* (Cambridge et al.: Cambridge University Press, 2011)

——*Introduction to International Criminal Law* (Leiden: Martinus Nijhoff, 2nd edn, 2013)

Bassiouni, M.C. and Manikas, P., *The Law of the International Criminal Tribunal for the Former Yugoslavia* (Irvington-on-Hudson, New York: Transnational Publishers, 1996)

Bock, S., *Das Opfer vor dem Internationalen Strafgerichtshof* (Berlin: Duncker & Humblot, 2010)

Boister, N., *An Introduction to Transnational Criminal Law* (Oxford: Oxford University Press, 2012)

——and Cryer, R., *The Tokyo International Military Tribunal—A Reappraisal* (Oxford: Oxford University Press, 2008)

Boot, M., *Genocide, Crimes Against Humanity, War Crimes—Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (Antwerp: Intersentia, 2002)

Borsari, R., *Diritto Punitivo Sovranazionale come Sistema* (Padova: CEDAM, 2007)

Boyle, A. and Chinkin, C., *The Making of International Law* (Oxford: Oxford University Press, 2007)

Brown, B.S., ed., *Research Handbook on International Criminal Law* (Cheltenham: Edward Elgar Publishing, 2011)

Cassese, A., *International Criminal Law* (Oxford, New York: Oxford University Press, 2nd edn, 2008)

——*The Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009)
——and Gaeta, P., *Cassese's International Criminal Law—Revised by: A. Cassese and P. Gaeta, L. Baig, M. Fan, C. Gosnell, and A. Whiting* (Oxford: Oxford University Press, 3rd edn, 2013)
——, Chiavario, M., and De Francesco, G., eds., *Problemi Attuali della Giustizia Penale Internazionale* (Torino: Gappichelli, 2005)
——, Gaeta, P., and Jones, J.R.W.D., eds., *The Rome Statute of the International Criminal Court—A Commentary*, 3 Vol. (Oxford: Oxford University Press, 2002)
Crawford, J., *Brownlie's Principles of Public International Law* (Oxford: Oxford University Press, 8th edn, 2012)
Cryer, R., Friman, H., Robinson, D., and Wilmshurst, E., *An Introduction to International Criminal Law and Procedure* (Cambridge: Cambridge University Press, 2nd edn, 2010)
Dahm, G., Delbrück, J., and Wolfrum, R., *Völkerrecht, Bd. 1,2—Der Staat und andere Völkerrechtssubjekte. Räume unter internationaler Verwaltung* (Berlin: de Gruyter, 2nd edn, 2002)
——*Völkerrecht, Bd. 1,3—Die Formen des völkerrechtlichen Handelns. Die inhaltliche Ordnung der internationalen Gemeinschaft* (Berlin: de Gruyter, 2nd edn, 2002)
Daury-Fauveau, M., *Droit pénal spécial: livres 2 et 3 du code pénal, infractions contre les personnes et les biens 2010* (Paris: Presses Universitaires de France, 2010)
David, E., *Principes de Droit des Conflict Armés* (Bruxelles: Bruylant, 4th edn, 2008)
Debove, F., Falletti, F., and Janville, T., *Précis de droit pénal et de procédure pénal* (Paris: Pr. Univ. de France, 4th edn, 2012)
Einarsen, T., *The Concept of Universal Crimes in International Law* (Oslo: Torkel Opsahl Academic EPublisher, 2012)
Fiandaca, G. and Musco, E., *Diritto Penale, Parte Generale* (Bologna: Zanichelli, 6th edn, 2009)
Fischer, H. and Lüder, S.R., eds., *Völkerrechtliche Verbrechen vor dem Jugoslawien-Tribunal, nationalen Gerichten und dem Internationalen Strafgerichtshof: Beiträge zur Entwicklung einer effektiven internationalen Strafgerichtsbarkeit* (Berlin: Berlin Verlag, 1999)
——, Kreß, C., and Lüder, S., eds., *International and National Prosecution of Crimes under International Law: Current Developments* (Berlin: Berlin Verlag, 2001)
Fleck, D., ed., *The Handbook of International Humanitarian Law* (Oxford: Oxford University Press, 2nd edn, 2008)
Fletcher, G.P., *Basic Concepts of Criminal Law* (Oxford: Oxford University Press, 1998)
——*The Grammar of Criminal Law*, *Vol. 1: Foundations* (New York: Oxford University Press, 2007)
Garner, B.A., *Black's Law Dictionary* (St. Paul: Thomson, 9th edn, 2009)
Garofoli, R., *Manuale di Diritto Penale—Parte Generale* (Milan: Giuffrè Editore, 4th edn, 2008)
Gil Gil, A., *Derecho Penal Internacional: Especial Consideración del Delito de Genocidio* (Madrid: Tecnos, 1999)
——et al., *Curso de Derecho Penal—Parte General* (Madrid: Dykinson, 2011)
Gless, S., *Internationales Strafrecht* (Basel: Schulthess, 2011)
Gómez Colomer, J.L., González Cussac, J.L., and Cardona Lioréns, J., eds., *La Corte Penal Internacional—Un Estudio Interdisciplinar* (Valencia: Tirant lo Blanch, 2003)
Green, L., *The Contemporary Law of Armed Conflict* (Manchester: Manchester University Press, 3rd edn, 2008)
Gropengießer, H. and Kreicker, H., *Nationale Strafverfolgung völkerrechtlicher Verbrechen*, Vol. 1: *Deutschland* (Freiburg im Breisgau: Iuscrim, 2003) [quoted as separate authors for their respective parts]
Heintze, H. and Ipsen, K., *Heutige bewaffnete Konflikte als Herausforderungen an das humanitäre Völkerrecht—20 Jahre Institut für Friedenssicherungsrecht und Humanitäres Völkerrecht—60 Jahre Genfer Abkommen* (Berlin: Springer, 2011)
Herdegen, M., *Völkerrecht* (Munich: C.H. Beck, 11th edn, 2012)

Hobe, S. and Kimminich, O., *Einführung in das Völkerrecht* (Tübingen: Francke, 9th edn, 2008)
Hooper, D.O., *Blackstone's Criminal Practice 2011* (New York: Oxford University Press, 21st edn, 2010)
Hübner, J., *Das Verbrechen des Völkermordes im internationalen und nationalen Recht* (Frankfurt am Main, Berlin, Bern, Bruxelles, New York, Oxford, Wien: Lang, 2004)
ICRC Study on Customary International Humanitarian Law, Volume I: Rules, conducted by Henckaerts, J.-M. and Doswald-Beck, L. (Cambridge: Cambridge University Press, 2005)
International Law Commission, *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal,* in Yearbook of the International Law Commission, Vol. 2, Part 3 (2nd Session, 1950), pp. 374–8 with commentaries
——*Draft Code of Offences Against the Peace and Security of Mankind*, in Yearbook of the International Law Commission, Vol. 2 (6th Session, 1954), pp. 112–22
——*Draft Code of Crimes Against the Peace and Security of Mankind*, in Yearbook of the International Law Commission, Vol. 2, Part 2 (43th Session, 1991), pp. 94–107 with commentaries
——*Draft Statute for an International Criminal Court*, in Yearbook of the International Law Commission, Vol. 2, Part 2 (46th Session, 1994), pp. 26–74 with commentaries
——*Draft Code of Crimes Against the Peace and Security of Mankind*, in Yearbook of the International Law Commission, Vol. 2, Part 2 (48th Session, 1996), pp. 17–56 with commentaries
Internationaler Militärgerichtshof, *Der Nürnberger Prozess gegen die Hauptkriegsverbrecher vom 14. November 1945–1. Oktober 1946,* ii, xvii, xviii, xix, xx, xxii (Nuremberg: Reichenbach Verlag, 1947)
Ipsen, K., *Völkerrecht* (Munich: C.H. Beck, 5th edn, 2004)
Jähnke, B., Laufhütte, H.W., and Odersky, W., eds., *Leipziger Kommentar zum StGB*, v: §§ 146–222 (Berlin: De Gruyter, 11th edn, 2005)
Jennings, R. and Watts, A., *Oppenheim's International Law*, i (London, Harlow: Longman, 1992)
Jescheck, H.-H. and Weigend, T., *Lehrbuch des Strafrechts—Allgemeiner Teil* (Berlin: Duncker & Humblot, 5th edn, 1996)
Joecks, W. and Miebach, K., eds., *Münchener Kommentar zum Strafgesetzbuch*, Vol. 3: *§§ 185–262 StGB* (Munich: C.H. Beck, 2003)
——*Münchener Kommentar zum Strafgesetzbuch*, Vol. 6, Part 2: *Nebenstrafrecht III, Völkerstrafgesetzbuch* (Munich: C.H. Beck, 2009)
——*Münchener Kommentar zum Strafgesetzbuch*, Vol. 8: *Nebenstrafrecht III, Völkerstrafgesetzbuch* (Munich: C.H. Beck, 2nd edn, 2013)
Kälin, W. and Künzli, J., *The Law of International Human Rirghts Protection* (Oxford et al.: Oxford University Press, repr. 2011)
Kaplan, J., Skolnick, J.H., and Feeley, M.M., *Criminal Justice—Introductory Cases and Materials* (Westbury, N.Y.: The Foundation Press, 5th edn, 1991)
Kittichaisaree, K., *International Criminal Law* (Oxford: Oxford University Press, 2001)
Kolb, R., *Droit International Pénal* (Basel: Helbing Lichtenhahn, 2008)
——and Hyde, R., *An Introduction to the International Law of Armed Conflicts* (Oxford: Hart Publishing, 2008)
Kreicker, H., 'Völkerstrafrecht im Ländervergleich', in Eser, A., Sieber, U., and Kreicker, H., eds., *Nationale Strafverfolgung völkerrechtlicher Verbrechen, vii: Völkerstrafrecht im Ländervergleich* (Berlin: Duncker & Humblot et al., 2006)
Kühne, H.-H., Esser, R., and Gerding, M., eds, *Völkerstrafrecht* (Osnabrück: Jonscher, 2007)
Kuschnik, B., *Der Gesamttatbestand des Verbrechens gegen die Menschlichkeit: Herleitungen, Ausprägungen, Entwicklungen* (Berlin: Duncker & Humblot, 2009)
LaFave, W., *Criminal Law* (Saint Paul: West/Thomson, 5th edn, 2010)
——et al., *Criminal Procedure* (Saint Paul: Thomson Reuters, 5th edn, 2009)
Laufhütte, H.W., Rissing-van Saan, R., and Tiedemann, K., eds., *Leipziger Kommentar zum StGB,* ii: *§§ 32–55* (Berlin: De Gruyter, 12th edn, 2006)

Lee, R.S., ed., *The International Criminal Court: The Making of the Rome Statute* (The Hague: Kluwer Law International, 1999)
——*The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsley: Transnational Publishers, 2001)
Maguire, M., Morgan R., and Reiner, R., eds., *The Oxford Handbook of Criminology* (Oxford: Oxford University Press, 5th edn, 2012)
Maurach, R. and Zipf, H., *Strafrecht Allgemeiner Teil*, i: *Grundlehren des Strafrechts und Aufbau der Straftat* (Heidelberg: C.F. Müller, 8th edn, 1992)
May, L., *Crimes against Humanity* (Cambridge: Cambridge University Press, 2005)
——*Aggression and Crimes against Peace* (New York: Cambridge University Press, 2008)
——*Genocide: A Normative Account* (Cambridge: Cambridge University Press, 2010)
McDonald, G.K. and Swaak-Goldman, O.Q., eds., *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts,* Vol. 1: *Commentary* (The Hague, London, Boston: Kluwer Law International, 2000)
Meseke, S., *Der Tatbestand der Verbrechen gegen die Menschlichkeit nach dem Römischen Statut des Internationalen Strafgerichtshofes: eine völkerstrafrechtliche Analyse* (Berlin: BWV Berliner Wissenschafts-Verlag, 2004)
Mettraux, G., *International Crimes and the Ad Hoc Tribunals* (Oxford: Oxford University Press, 2005)
Mugwanya, G.W., *The Crime of Genocide in International Law* (London: Cameron May, 2007)
Muñoz Conde, F. and García Arán, M., *Derecho Penal—Parte General* (Valencia: Tirant Lo Blanch, 8th edn, 2010)
Neubacher, F., *Kriminologische Grundlagen einer internationalen Strafgerichtsbarkeit* (Tübingen: Mohr Siebeck, 2005)
Paul, A., *Kritische Analyse und Reformvorschlag zu Art. II Genozidkonvention* (Berlin: Springer, 2008)
Paust, J.J. et al., eds., *International Criminal Law, Cases and Materials* (Durham: Carolina Academic Press, 2007)
Pictet, J. et al., *Commentary on the Geneva Conventions of 12 August 1949, i: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Geneva: International Committee of the Red Cross, 1952, 2. repr., 2006)
——*Commentary on the Geneva Conventions of 12 August 1949, iv: Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva: International Committee of the Red Cross, 1958, 1. repr., 1994)
Pin, X., *Droit pénal général* (Paris: Dalloz, 5th edn, 2012)
Politi, M. and Nesi, G., eds., *The International Criminal Court and the Crime of Aggression* (Aldershot, Burlington: Ashgate Publishing Company, 2004)
Pradel, J., *Droit pénal général* (Paris: Cujas, 18th edn, 2010)
——and Danti-Juan, M., *Droit pénal spécial: Droit Commun, droit des affaires* (Paris: Cujas, 5th edn, 2010)
Pritchard, R.J., *The Tokyo War Crimes Trial* (Lewiston, New York: E. Mellen Press, 1998)
Pulitanò, D., *Diritto Penale* (Torino: G. Giappichelli, 2nd edn, 2007)
Rebut, D., *Droit pénal international* (Paris: Éditions Dalloz, 2012)
Robinson, N., *The Genocide Convention. A Commentary* (New York: Institute of Jewish Affairs, 1960)
Roggemann, H., *Die internationalen Strafgerichtshöfe: Einführung, Rechtsgrundlagen, Dokumente* (Berlin: Berlin-Verlag Arno Spitz, 2nd edn, 1998)
Roxin, C., *Strafrecht Allgemeiner Teil*, Vol. 1: *Grundlagen: der Aufbau der Verbrechenslehre* (Munich: C.H. Beck, 4th edn, 2006)
Sadat, L.N., ed., *Forging a Convention for Crimes Against Humanity* (Cambridge: Cambridge University Press, 2011)

Sadat Wexler, L., ed., *Model Draft Statute of the International Criminal Code Based on the Preparatory Committee's Text to the Diplomatic Conference, Rome June 15–July 17 1998* (Toulouse: Érés, 1998)
Safferling, C., *Internationales Strafrecht* (Berlin, Heidelberg: Springer, 2011)
——and Conze, E., eds., *The Genocide Convention Sixty Years after its Adoption* (The Hague: T.M.C. Asser Press, 2010)
Saltzburg, S.A. and Capra, D.J., *American Criminal Procedure—Cases and Commentary* (Saint Paul, Minnesota: Thomson Reuters, 9th edn, 2010)
Satzger, H., *International and European Criminal Law* (Munich/Oxford/Baden-Baden: C.H. Beck/Hart/Nomos, 2012)
——*Internationales und Europäisches Strafrecht: Strafanwendungsrecht, Europäisches Straf- und Strafverfahrensrecht, Völkerstrafrecht* (Baden-Baden: Nomos, 6th edn, 2013)
——, Widmaier, G., and Schmitt, B., eds., *StGB: Strafgesetzbuch, Kommentar* (Köln: Carl Heymanns, 2009)
Schabas, W., *Genocide in International Law* (Cambridge: Cambridge University Press, 2nd edn, 2009)
——*The International Criminal Court: A Commentary on the Rome Statue* (New York: Oxford University Press, 2010)
——*An Introduction to the International Criminal Court* (Cambridge: Cambridge University Press, 4th edn, 2011)
Schabas, W., McDermott, Y., and Hayes, N., *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Surrey: Ashgate, 2013)
——and Bernaz, N., eds., *Routledge Handbook of International Criminal Law* (London: Routledge, 2011)
Schmitt, M., ed., *Tallinn Manual on the International Law Applicable to Cyber Warfare* (Cambridge: Cambridge University Press, 2013), available at <http://www.ccdcoe.org/249.html> accessed 5 September 2013
Schönke, A., Schröder, H., and Eser, A., eds., *Strafgesetzbuch Kommentar* (Munich: C.H. Beck, 28th edn, 2010)
Selbmann, F., *Der Tatbestand des Genozids im Völkerstrafrech* (Leipzig: Leipziger Universitätsverlag 2002)
Senna, J.J. and Siegel, L.J., *Introduction to Criminal Justice* (Belmont, CA: West-Wadsworth, 8th edn, 1999)
Shaw, M., *What is Genocide?* (Cambridge: Polity, 2007, repr. 2008)
Stahn, C. and Sluiter, G., eds., *The Emerging Practice of the International Criminal Court* (Leiden, Boston: Martinus Nijhoff Publishers, 2009)
Stein, T. and von Buttlar, C., *Völkerrecht* (München: Vahlen, 13th edn, 2012)
The Trial of German Major War Criminals, *Judgment of the International Military Tribunal, With the Dissenting Opinion of the Soviet Member, 30 September and 1 October 1946, Nuremberg* (London: HMSO, 1946)
The Trial of German Major War Criminals, *Proceedings of the International Military Tribunal sitting at Nuremberg, Germany, i, xxii* (London: HMSO, 1948)
Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law no. 10—Nuernberg, October 1946–April 1949 (Washington, D.C.: United States, Government Printing Office, 1935–1953—Buffalo, N.Y: Hein, 1997)
Triffterer, O., *Dogmatische Untersuchungen zur Entwicklung des materiellen Völkerstrafrechts seit Nürnberg* (Freiburg i. B.: Albert, 1966)
——ed., *Commentary on the Rome Statute of the International Criminal Court* (Baden-Baden: Nomos, 1999)
——ed., *Commentary on the Rome Statute of the International Criminal Court* (Munich: C.H. Beck, Oxford: Hart, 2nd edn, 2008)
United Nations War Crimes Commission, *Law Reports of Trials of War Criminals, Vol. I–XV* (London: HMSO, 1947–1949)

United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (London: HMSO, 1948)
van Sliedregt, E., *Individual Criminal Responsibility in International Law* (Oxford: Oxford University Press, 2012)
Vest, H., *Genozid durch organisatorische Machtapparate* (Baden-Baden: Nomos, 2002)
——*Gerechtigkeit für Humanitätsverbrechen?—Nationale Strafverfolgung von staatlichen Systemverbrechen mit Hilfe der Radbruchschen Formel* (Tübingen: Mohr Siebeck, 2006)
Werle, G., *Völkerstrafrecht* (Tübingen: Mohr Siebeck, 2nd edn, 2007; 3rd edn, 2012)
——*Principles of International Criminal Law* (The Hague: T.M.C. Asser Press, 2nd edn, 2009)
Wolfrum, R., ed., *The Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2008 ff.), online edition, available at <http://www.mpepil.com> accessed 27 September 2013
Zahar, A. and Sluiter, G., *International Criminal Law: A Critical Introduction* (Oxford: Oxford University Press, 2008)

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Index of Subjects

ICC = International Criminal Court
ICL = international criminal law
ICTR = International Criminal Tribunal for Rwanda
ICTY = International Criminal Tribunal for the former Yugoslavia