CHAPTER THIRTY-TWO

CRIMES AGAINST HUMANITY IN CONTEMPORARY INTERNATIONAL LAW

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I. THE EVOLUTION OF CRIMES AGAINST HUMANITY

Crimes against humanity are directed against any civilian population and are forbidden either in time of peace or of armed conflict.[1] Their legal definition has its origins in the Charter of the International Military Tribunal of Nuremberg. According to Article 6(c) of the Charter, as amended by the Protocol of 6 October 1945, crimes against humanity were

> namely murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.[2]

The subsequent evolution of international law implied a radical change in the definition of crimes against humanity, with the gradual disappearance of the requirement of the act being committed during the war or in connection with any crime against peace or war crime. Several international treatie recognized the autonomy of crimes against humanity. The 1948 Convention on the prevention and punishment of the crime of genocide deserves a special mention. Although the crime of genocide was until then considered as the second category of crimes against humanity, this Convention no longer requires it being committed during an armed conflict.

Nor the subsequent evolution of the definition on the first category of crimes against humanity contained any substantive link with other crimes relating to a state of war. The first step in this direction was taken by the Control Council established by the four victorious Powers in

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[1] *Report of the Secretary-General on the Statute of the International Criminal Tribunal for the former Yugoslavia* (S/25704), para. 47.

[2] Roger S. Clark and Iuri A. Reshetov, 'Crimes against Humanity' in G. Ginsburgs and V. N. Kudriavtsev (eds.), *The Nuremberg Trial and International Law* (Martinus Nijhoff, Dordrecht, 1990), pp. 180–192.

order to administer Germany after World War II. The Control Council passed Law No. 10 for the Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity. It defined "crimes against humanity" as an open list of "atrocities and offences ... whether or not in violation of the domestic laws of the country where perpetrated".[3] This trend was consolidated by the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity and by national case-law, mainly the *Eichmann, Barbie* and *Touvier* cases.[4]

This trend was consecrated at the international level by the case-law of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Although the ICTY Statute[5] keeps on declaring that this Tribunal has jurisdiction "to prosecute persons responsible for [crimes against humanity] when committed in armed conflict, whether international or internal in character ...", the ICTY Appeals Chamber has concluded that "customary international law no longer requires any nexus between crimes against humanity and armed conflict, while Article 5 was intended to reintroduce this nexus only for the purposes of this Tribunal".[6]

The last step forward was represented by Article 3 of the ICTR Statute.[7] On this occasion, the Security Council not only dissociated crimes against humanity from crimes against peace or war crimes, it also replaced the requirement of these crimes being "committed in armed conflict, whether international or internal in character" with the exigency of these crimes being "committed as part of a widespread or systematic attack against any civilian population".[8] This provision has influenced

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[3] In the *Einsatzgruppen* Case, 8–9 February 1948, Judgment, the Military Tribunal held that: "The International Military Tribunal, operating under the [Nuremberg] Charter, declared that the Charter's provisions limited the Tribunal to consider only those crimes against humanity which were committed in execution of or in connection with crimes against peace and war crimes. The Allied Control Council, in its Law No. 10, removed this limitation so that the present Tribunal has jurisdiction to try all crimes against humanity as long known and understood under the general principles of criminal law", pp. 113–114.

[4] All relevant national and international instruments and judgments on crimes against humanity are available at www.icc-cpi.int/legaltools, 29 May 2009.

[5] SC Res. 827 (1993), 25 May 1993, established the ICTY.

[6] ICTY, Decision of 2 October 2005 on the Defence Motion for Interlocutory Appeal on Jurisdiction on the *Tadic* Case, paras. 78, 140–141.

[7] SC Res. 955 (1994), 8 November 1994, established the ICTR.

[8] It must be noted that this provision goes on saying "on national, political, ethnic, racial or religious grounds". However, as the ICTR held in its *Kajelijeli* case, 1 December 2003, Trial Judgment, para. 877: "This provision is jurisdictional in nature, limiting the

the drafting of both the 1998 Statute of the International Criminal Court (ICC), and the different Statutes establishing internationalized tribunals.[9]

II. THE GENERAL ELEMENTS OF CRIMES AGAINST HUMANITY

The general elements, common to all crimes against humanity, are described in the heading of Article 7(1) of the ICC Statute, as "acts ... committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack".[10]

A. *The Context Elements*

The concept of 'attack' has been widely discussed both by the ICTY and the ICTR.[11] According to the ICTY, an "attack is a course of conduct involving the commission of acts of violence".[12] These acts of violence are not necessarily limited to the use of armed force, as the ICTY has made clear that the concepts of 'attack' and 'armed conflict' are different. The attack can be a part of an armed conflict, but this is not always required.[13] However, the ICTR has followed a broader

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jurisdiction of the Tribunal to a narrower category of crimes, and not intended to alter the definition of crimes against humanity in international law". *See also Akayesu* case, 1 June 2001, ICTR, Appeal Judgment, paras. 464–466.

[9] Regulation No. 2000/15, 6 June 2000, *On the establishment of Panels with exclusive jurisdiction over serious criminal offences in East Timor*, Section 5; Statute of the Special Court for Sierra Leone, Article 2; Agreement between the United Nations and the Royal Government of Cambodia establishing the Extraordinary Chambers concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea, Article 9.

[10] For each of the 16 particular crimes against humanity specified in the *Elements of Crimes*, the last two elements are: "a) The conduct was committed as part of a widespread or systematic attack directed against a civilian population; b) The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population." ICC, *Elements of Crimes*, adopted by the Assembly of State Parties, first session, New York, 3–10 September 2002 (Official Records ICC-ASP/1/3), pp. 116–124.

[11] Although Article 5 of the ICTY Statute does not provide for this requirement, the ICTY has considered it as a necessary requirement for the establishment of a crime against humanity. *See Kunarac et al.*, 22 February 2001, Trial Judgment, para. 410. On the other hand, the existence of an 'attack' is expressly required by Article 3 of the ICTR Statute.

[12] *Naletilic and Martinovic*, 31 March 2003, ICTY, Trial Judgment, para. 233.

[13] *Vasiljevic*, 29 November 2002, ICTY, Trial Judgment, paras. 29–30. In *Kunarac et al.*, 12 June 2002, Appeal Judgment, para. 86, the ICTY declared that: "The concepts of 'attack' and 'armed conflict' are not identical. As the Appeals Chamber has already noted when comparing the content of customary international law to the Tribunal's Statute, "the two – the 'attack on the civilian population' and the 'armed

interpretation, being sufficient to exert pressure on the civil population when the widespread or systematic requirements are fulfilled.[14]

The ICC Statute has adopted a restrictive interpretation of the term 'attack'.[15] Pursuant to its Article 7(2)(a), this restrictive interpretation requires the existence of a course of conduct but, due to the influence of the ICTR case-law, it substitutes the reference to the 'commission of acts of violence' by the term 'multiple commission of acts referred to in paragraph 1'. This interpretation adds, as a new requirement, that these 'acts' must be committed "pursuant to or in furtherance of a State or organizational policy to commit such attack".[16]

Although this last requirement was introduced by the International Law Commission (ILC) in its 1996 Draft Code,[17] the ICTY Appeals Chamber concluded that there is nothing in customary international law which requires proof of the existence of a plan or policy to commit these crimes.[18] Despite some initial contradictions,[19]

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conflict' – must be separate notions, although of course under Article 5 of the Statute the attack on 'any civilian population' may be part of an 'armed conflict'". Under customary international law, the attack could precede, outlast, or continue during the armed conflict, but it need not be part of it. Also, the attack in the context of a crime against humanity is not limited to the use of armed force; it encompasses any mistreatment of the civilian population".

[14] *Akayesu*, 2 September 1998, ICTR, Trial Judgment, para. 581 defined an attack "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 … 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".

[15] María Torres, *La responsabilidad internacional del individuo por la comisión de crímenes de lesa humanidad* (Tirant, Valencia, 2008), pp. 112–128.

[16] "A policy which has a civilian population as the object of the attack would be implemented by State or organizational action. Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack. The existence of such a policy cannot be inferred solely from the absence of governmental or organizational action." *Elements of Crimes*, *supra* note 10, p. 116, para. 3. On the possibility of committing a crime by lack of action, *see* Darryl Robinson, 'The Elements of Crimes against Humanity' in R. S. Lee, (ed.), *The International Criminal Court. Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, Ardsley, 2001), pp. 74–76.

[17] *Report of the International Law Commission to the General Assembly on the work of its forty-eight session* (1996) II *Yearbook of the ILC*, part 2, p. 47, para. 5.

[18] In its *Kunarac et al.*, Appeal Judgment, para. 98, the ICTY held that: "neither the attack nor the acts of the accused needs to be supported by any form of 'policy' or 'plan'. There was nothing in the Statute or in customary international law at the time of the alleged acts which required proof of the existence of a plan or policy to commit these crimes. As indicated above, proof that the attack was directed against a civilian population and that it was widespread or systematic, are legal elements of the crime. But to prove these elements, it is not necessary to show that they were the result of the existence of a

the ICTR subsequently adopted the ICTY case-law, arguing "that the existence of a policy or plan may be evidentially relevant, in that it may be useful in establishing that the attack was directed against a civilian population and that it was widespread or systematic, but the existence of such a plan is not a separate legal element of the crime".[20]

Nonetheless, the ICC Statute requires the proof of this element, considering that the promotion or encouragement by a State or organization of an attack against a civilian population is an essential element, aimed at distinguishing crimes against humanity from crisis situations where the same material acts can take place, but without the seriousness required to fulfil this qualification.

The attack must be either widespread or systematic in nature. Neither the Nuremberg Charter nor the ICTY Statute included this requirement.[21] However, the ILC Draft Code[22] and the ICTR Statute laid it down. As the ICTR has underlined, customary international law requires that the attack be of a widespread or systematic nature and need not be both.[23] However, at the Rome Conference many national

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policy or plan … Thus, the existence of a policy or plan may be evidentially relevant, but it is not a legal element of the crime." *See also*: *Naletilic and Martinovic*, Trial Judgment, para. 234; *Kordic and Cerkez*, 26 February 2001, ICTY, Trial Judgment, para. 182; *Krnojelac*, 15 March 2002, ICTY, Trial Judgment, para. 58; *Vasiljevic*, 29 November 2002, ICTY, Trial Judgment, para. 36.

[19] Some of the first ICTR pronouncements asserted the need of a State policy as a requirement for the existence of a crime against humanity. *See for instance*, *Kayishema and Ruzindana*, 21 May 1999, Trial Judgment, para. 124.

[20] *Semanza*, 15 May 2003, ICTR, Trial Judgment, para. 329. This idea was ratified by *Semanza*, 20 May 2005, Appeal Judgment, para. 269.

[21] In *Blaskic*, 3 March 2000, Trial Judgment, para. 202, the ICTY held that: "the 'widespread or systematic' character of the offence does not feature in the provisions of Article 5 of the Statute which mention only acts 'directed against any civilian population'. 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 nature and by law, an element of being widespread or organised, whether as regards the acts or the victims."

[22] *Report of the ILC*, *supra* note 17, p. 47, paras. 3–4.

[23] In *Rutaganda*, 6 December 1999, Trial Judgment, paras. 67–68, the ICTR held that: "with regard to the nature of this attack, the Chamber notes that Article 3 of the English version of the Statute reads 'as part of a widespread or systematic attack' whilst the French version of the Statute reads « *dans le cadre d'une attaque généralisée et systématique* ». The French version requires that the attack be both of a widespread and systematic nature, whilst the English version requires that the attack be of a widespread or systematic nature and need not be both. The Chamber notes that customary international law requires that the attack be either widespread or systematic nature and need not be both. The English version of the Statute conforms more closely with customary international law and the Chamber therefore accepts the elements as set forth in Article 3 of the English version of the Statute and follows the interpretation in other ICTR judgments namely: that the 'attack' under Article 3 of the Statute, must be either of a

delegations supported the requirement of both characteristics, arguing that this is the main reason for distinguishing crimes against humanity from other similar common offences that are not sufficiently serious to be subjected to the ICC jurisdiction. Finally, the arrangement reached maintained this requirement in the alternative, given that the required existence of an "attack" as "a course of conduct involving the multiple commission of acts … pursuant to or in furtherance of a State or organizational policy to commit such attack" ensured the reticent States a broader restriction on the concept of crimes against humanity.

The ICTR has considered that the concept of 'widespread' may be defined as massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims. The concept of 'systematic' may be defined as thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources.[24] Factors to consider in determining whether an attack satisfies either or both requirements of a widespread or systematic attack are enumerated in the ICTY jurisprudence, and include (i) the consequences of the attack upon the targeted population, (ii) the number of victims, (iii) the nature of the acts, and (iv) the possible participation of officials or authorities or any identifiable patterns of crimes.[25]

Taking into account both that the attack requires a "multiple commission of acts" and that it must be "a widespread or systematic attack" there have been doubts whether a single act can qualify as a crime against humanity. It must be noted that it is the attack, and not the single act, which must be widespread or systematic. The ICTY has held that as long as there is a link with the widespread or systematic attack against a civilian population, a single act could qualify as a crime against humanity. As such, an individual committing a crime against a single victim or a limited number of victims might be recognized as guilty of a crime against humanity if his acts were part of the specific context of crimes against humanity.[26] A different question is the convenience of prosecuting this individual before the ICC, as its jurisdiction has been limited "to the most serious crimes of concern to the international community as a whole" (Article 5), bearing in mind that in other cases

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widespread or systematic nature and need not be both."

[24] *Akayesu*, Trial Judgment, *supra* note 14, para. 580.

[25] *Stakic*, 31 July 2003, Trial Judgment, para. 625. *See also Blaskic*, 3 March 2000, Trial Judgment, paras. 203–204; *Jelisic*, 14 December 1999, Trial Judgment, para. 53; *Kunarac et al.*, Appeal Judgment, para. 95.

[26] Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence in the *Mrksic, Radic, and Sljivancanin* case, 3 April 1996, para. 30.

the domestic tribunals have jurisdiction by virtue of the complementarity principle.[27]

The attack must be "directed against any civilian population". Neither the ICC Statute nor its *Elements of Crimes* define the concept of 'civilian population' for the purposes of crimes against humanity. This requirement has been interpreted by the ICTY and the ICTR, taking into account different international humanitarian law treaties. According to these Tribunals, the requirement that the civilian population be the main aim of the attack, reaffirms the collective character of crimes against humanity, with the exclusion of single or isolated acts.[28] However, the use of the term 'population' does not mean that the entire population of the geographical entity in which the attack is taking place must have been subjected to that attack. It is sufficient to show that enough individuals were targeted in the course of the attack, or that they were targeted in such a way as to satisfy these Tribunals that the attack was in fact directed against a civilian *population*, rather than against a limited and randomly selected number of individuals.[29]

International humanitarian law defines 'civilian population' in a negative way, embracing all persons who are not combatants.[30] But as the ICTY and the ICTR have declared, crimes against humanity may be committed either in peace time or during an armed conflict, whether national or international.[31] Therefore, the term 'civilian' must be

[27] The ICTY has already followed this practice. *See* Decision for referral to the authorities of the Republic of Croatia pursuant to Rule 11bis in the *Ademi and Norac* case, 14 September 2005; Decision of the Appeals Chamber on Rule 11bis Referral in the *Jankovic* case, 11 November 2005.

[28] *Tadic*, 7 May 1997, ICTY, Trial Judgment, para. 644.

[29] For the ICTY, *see Kunarac et al.*, Appeal Judgment, para. 90; *Simic et al.*, Trial Judgment of 17 October 2003, para. 42. For the ICTR, *Bagilishema*, 7 June 2001, Trial Judgment, para. 80. In *Brdjanin*, 1 September 2004, Trial Judgment, para. 134, the ICTY added: "in order to determine whether the attack may be said to have been directed against a civilian population, the means and methods used in the course of the attack may be examined, the number and status of the victims, the nature of the crimes committed in its course, the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war".

[30] United Nations War Crime Commission, *History of the United Nations War Crimes Commission and the Development of Laws of War* (H.M.S.O., London, 1948), p. 193. *See* Article 4 of the Convention (IV) relative to the Protection of Civilian Persons in Time of War (Geneva, 12 August 1949) and Article 50 of Protocol I Additional to the Geneva Conventions relating to the Protection of Victims of International Armed Conflicts (8 June 1977).

[31] Pursuant to Egon Schwelb, 'Crimes against Humanity' (1946) 22 *British Yearbook of International Law* p. 191, during the first trials concerning crimes against humanity after World War II, the commission of these crimes against members of the

understood within the context of war as well as relative peace. These Tribunals consider that a wide definition of 'civilian' is applicable and, in the context of a situation where there is no armed conflict, includes all persons except those who have the duty to maintain public order and have the legitimate means to exercise force.[32] In all cases, the fact that there are certain individuals among the civilian population who are not civilians does not deprive the population of its civilian character,[33] provided that these are not regular units with fairly large numbers of soldiers.[34] Hence, for the ICTR:

> Members of the civilian population are people who are not taking 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. Where there are certain individuals within the civilian population who do not come within the definition of civilians, this does not deprive the population of its civilian character.[35]

B. *The Subjective Element*

The *Elements of Crimes* have identified as the second common element to all crimes against humanity that "the perpetrator knew that the conduct was part of or intended to be part of a widespread or systematic attack against a civilian population". This *mens rea* comprises three elements: "(i) the intent to commit the underlying offence or offences with which he is charged; (ii) the knowledge that there is an attack against the civilian population; and (iii) the knowledge that his acts comprise part of that attack".[36]

According to Article 30(3) of the ICC Statute, the term 'with knowledge of the attack' means "awareness that a circumstance exists", that is, the perpetrator must be aware of the existence of a widespread or

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armed forces was accepted only when the author and the victim of the crime had the same nationality.

[32] *Kayishema and Ruzindana*, 21 May 1999, ICTR, Trial Judgment, para. 127.

[33] For the ICTR, *see Rutaganda*, Trial Judgment, para. 72; *Kayishema and Ruzindana*, Trial Judgment, para. 127–129; *Musema*, 27 January 2000, Trial Judgment, para. 207. For the ICTY, *see Jelisic*, Trial Judgment, para. 54; *Kupreskic et al.*, 14 January 2000, Trial Judgment, paras. 547–549; *Kordic and Cerkez*, Trial Judgment, para. 180; *Naletilic and Martinovic*, Trial Judgment, para. 235.

[34] *Blaskic*, 29 July 2004, Appeal Judgment, para. 115; *Brdjanin*, Trial Judgment, para. 134.

[35] *Akayesu*, Trial Judgment, para. 582. For the ICTY, *see Blaskic*, Trial Judgment, para. 214.

[36] *Blagojevic and Jokic*, 17 January 2005, Trial Judgment, para. 548.

systematic attack against a civilian population as the general context of his acts. The ICTY Appeals Chamber has concreted this requirement:

> Concerning the required *mens rea* for crimes against humanity, the Trial Chamber correctly held that the accused must have had the intent to commit the underlying offence or offences with which he is charged, and that he must have known "that there is an attack on the civilian population and that his acts comprise part of that attack, or at least [that he took] the risk that his acts were part of the attack". This requirement, as pointed out by the Trial Chamber, does not entail knowledge of the details of the attack.
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> For criminal liability pursuant to Article 5 of the Statute, "the motives of the accused for taking part in the attack are irrelevant and a crime against humanity may be committed for purely personal reasons". Furthermore, the accused need not share the purpose or goal behind the attack. It is also irrelevant whether the accused intended his acts to be directed against the targeted population or merely against his victim. It is the attack, not the acts of the accused, which must be directed against the target population and the accused need only know that his acts are part thereof. At most, evidence that he committed the acts for purely personal reasons could be indicative of a rebuttable assumption that he was not aware that his acts were part of that attack.[37]

According to the *Elements of Crimes*, "existence of intent and knowledge can be inferred from relevant facts and circumstances".[38] Hence, the *mens rea* may be inferred from a concurrence of concrete facts, such as the historical and political circumstances in which the acts occurred, the functions of the accused when the crimes were committed, his responsibilities within the political or military hierarchy, the scope and gravity of the acts perpetrated, the nature of the crimes committed and the degree to which they were common knowledge or other similar facts and circumstances.[39]

The ICTR has added that:

> Part of what transforms an individual's act(s) into a crime against humanity is the inclusion of the act within a greater dimension of

[37] *Kunarac et al.*, Appeal Judgment, paras. 102–103. *See also*: *Tadic*, 15 July 1999, Appeal Judgment, paras. 270–272; *Kordic and Cerkez*, Trial Judgment, paras. 185–187. Even the *Elements of Crimes* has settled down that this element "should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization". *See supra* note 10, p. 116, para. 2.

[38] *Ibid.*, p. 112, para. 3.

[39] *Blaskic*, Trial Judgment, para. 259; *Kordic and Cerkez*, Trial Judgment, para. 183.

criminal conduct; therefore an accused should be aware of this greater dimension in order to be culpable thereof. Accordingly, actual or constructive knowledge of the broader context of the attack, meaning that the accused must know that his act(s) is part of a widespread or systematic attack on the civilian population and pursuant to some kind of policy or plan, is necessary to satisfy the requisite *mens rea* element of the accused.[40]

III. THE SPECIFIC ELEMENTS OF THE DIFFERENT CRIMES AGANST HUMANITY

1. *Murder*

Article 7(1)(a) of the ICC Statute contains a very brief description of the first crime against humanity, 'murder'. Moreover, the *Elements of Crimes* does not provide for much guidance in this case, as the only specific element of this crime is limited to state that "the perpetrator killed[41] one or more persons".[42] There was a significant linguistic problem with the authentic versions of the ICTY and ICTR Statutes, as the English version refers to 'murder', whilst the French version refers to '*assassinat*'.[43] These terms imply differences not only affecting the *mens rea* required, but also on the existence of a premeditation element.

At first, some Chambers of both Tribunals held that customary international law dictates that it is the act of 'murder"' that constitutes a crime against humanity and not '*assassinat*'. Accordingly, they defined murder as "the unlawful, intentional killing of a human being". The specific *mens rea* was that "at the time of the killing the accused or a subordinate had 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 is reckless whether death ensues or not".[44]

Other Chambers supported the French version. General international rules ("as a matter of interpretation, the intention of the drafters should be followed so far as possible and a statute should be

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[40] *Kayishema and Ruzindana*, Trial Judgment, para. 134.

[41] "The term 'killed' is interchangeable with the term 'caused death'."

[42] *Elements of Crimes*, *supra* note 10, p. 116.

[43] Even in the authentic Spanish texts, the term '*asesinato*' is used in the ICTY Statute, while the ICTR uses the term '*homicidio intencional*'. María Torres and Valentín Bou, *La contribución del Tribunal Internacional Penal para Ruanda a la configuración jurídica de los crímenes internacionales* (Tirant,Valencia, 2004), pp. 387–391.

[44] For the ICTR *see Akayesu*, Trial Judgment, paras. 588–589; *Rutaganda*, Trial Judgment, paras. 80–81; *Musema*, Trial Judgment, para. 214. For the ICTY *see Jelisic*, Trial Judgment, para. 51; *Blaskic*, Trial Judgment, para. 216; *Kordic and Cerkez*, Trial Judgment, para. 253.

given its plain meaning … Indeed, by using '*assassinat*' in French, the drafters may have intended that only the higher standards of *mens rea* for 'murder' will suffice") and criminal law ("if in doubt, a matter of interpretation should be decided in favour of the accused; in this case, the inclusion of premeditation is favourable to the accused") led to the finding that, when 'murder' is considered along with '*assassinat*', 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.[45]

This controversy was set down in *Semanza*, where the ICTR held:

> It is premeditated murder (*assassinat*) that constitutes a crime against humanity in Article 3(a) of the Statute. Premeditation requires that, at a minimum, the accused held a deliberate plan to kill prior to the act causing death, rather than forming the intention simultaneously with the act … The Chamber observes that the requirement that the accused must have known that his acts formed part of a wider attack on the civilian population generally suggests that the murder was pre-planned. The Chamber emphasises that the accused need not have premeditated the murder of a particular individual;[46] for crimes against humanity it is sufficient that the accused had a premeditated intention to murder civilians as part of the widespread or systematic attack on discriminatory grounds.[47]

The ICC Statute has lost the opportunity to settle with these linguistic differences, as its English version refers to 'murder', the French to '*meurtre*', and the Spanish to '*asesinato*'.

2. *Extermination*

The ICC Statute has codified the traditional crime against humanity of extermination, introducing, as an innovation, that "'extermination' includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population" (Article 7(2)(b)).

Extermination is a crime which by its very nature is directed against a group of individuals. Extermination differs from murder in that

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[45] For the ICTR *see Kayishema and Ruzindana*, Trial Judgment, paras. 138–140; *Bagilishema*, Trial Judgment, para. 84. For the ICTY *see Kupreskic et al.*, Trial Judgment, paras. 560–561.

[46] On this particular point, *see* for the ICTY *see Kupreskic et al.*, Trial Judgment, para, 562*; Brdjanin*, Trial Judgment, para. 386.

[47] *Semanza*, Trial Judgment, para. 339. For the ICTY *see Krnojelac*, Trial Judgment, para. 326.

it requires an element of mass destruction. In its first Judgment, the ICTR identified two specific essential elements of extermination: (i) the accused or his subordinates participated in the killing of certain named or described persons; and (ii) the act or omission was unlawful and intentional.[48]

These elements have caused two problems. The first problem is whether extermination encompasses intentional and unintentional killing, as was held by Professor Bassiouni.[49] The ICTR followed this opinion on several occasions,[50] but in *Semanza* it was of the view "that, in the absence of express authority in the Statute or in customary international law, international criminal liability should be ascribed only on the basis of intentional conduct".[51] The ICTY shared this opinion.[52] Later on, the ICTY elaborated further the elements of the crime of 'extermination' as follows:

> 1. The material element of extermination consists of any one act or combination of acts which contributes to the killings of a large number of individuals (*actus reus*).
>
> 2. The offender must intent to kill, to inflict grievous bodily harm, or to inflict serious injury, in the reasonable knowledge that such act or omission is likely to cause death or otherwise intends to participate in the elimination of a number of individuals, in the knowledge that his action is part of a vast murderous enterprise in which a large number of individuals are systematically marked for killing or killed (*mens rea*).[53]

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[48] *Akayesu*, Trial Judgment, para. 591–592. *See also Kayishema and Ruzindana*, Trial Judgment, para. 142; *Rutaganda*, Trial Judgment, para. 82; *Musema*, Trial Judgment, para. 217; *Bagilishema* Trial Judgment, para.86; *Elizaphan and Gérard Ntakirutimana* Trial Judgment of 21 February 2003, para.813; *Niyitegeka* Trial Judgment of 16 May 2003, para.450; *Semanza*, Trial Judgment, para. 340.

[49] "The reason for the latter is that mass killing of a group of people involves planning and implementation by a number of persons who, though knowing and wanting the intended result, may not necessarily know their victims. Furthermore, such persons may not perform the *actus reus* that produced the deaths, nor have specific intent toward a particular victim." M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law*, 2nd ed. (Kluwer Law International, The Hague, 1999), p. 302.

[50] *Kayishema and Ruzindana*, Trial Judgment, para. 146; *Bagilishema*, Trial Judgment, para. 90.

[51] *Semanza*, Trial Judgment, para. 341. *See also Akayesu*, Trial Judgment, paras. 591–592; *Rutaganda*, Trial Judgment, paras. 83–84; *Musema*, Trial Judgment, para. 218; *Elizaphan and Gérard Ntakirutimana*, Trial Judgment, paras. 812–813; *Niyitegeka*, Trial Judgment, para. 450.

[52] *Krstic*, 2 August 2001, Trial Judgment, paras. 490–503.

[53] *Vasiljevic*, Trial Judgment, para. 229.

The second problem concerns the number of victims needed for the crime to be deemed 'extermination'. This is a rather complex problem and these Tribunals have never fixed a particular number of victims needed.[54] The opinion that has finally prevailed is:

> An actor may be guilty of extermination if he kills, or creates the conditions of life that kills, a single person providing the actor is aware that his act(s) or omission(s) forms part of a mass killing event. For a single killing to form part of extermination, the killing must actually form part of a mass killing event. An 'event' exists when the mass killings have close proximity in time and place".[55]

These opinions have been reflected in the *Elements of Crimes*.

3. *Enslavement*

Pursuant to the ILC, "enslavement means establishing or maintaining over persons a status of slavery, servitude or forced labour contrary to well-established and widely recognized standards of international law".[56] However, these norms did not include any stipulation on the individual criminal responsibility for enslavement practices until the end of World War II.[57]

The ICC Statute includes 'enslavement' among the crimes against humanity. Enslavement means "the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children" (Article 7(2)(c)). Neither this definition, nor the *Elements of Crimes* have been innovators on this topic, as they closely follow Article 1 of the 1926 Slavery Convention.

Only the ICTY has provided for some guidance on the definition of enslavement in contemporary international law:

> Enslavement as a crime against humanity in customary international law consisted of the exercise of any or all the powers attaching to the right of ownership over a person ... The *actus reus* of the violation is the exercise of any or all the powers attaching to the right of ownership over a person. The *mens rea* of the violation consists in the intentional exercise of such powers ... Under this definition,

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[54] For the ICTY, *see Krstic*, Trial Judgment, para. 501. For the ICTR, *see Nahimana, Barayagwiza and Ngeze*, 3 December 2003, Trial Judgment, para. 1061.

[55] *Kayishema and Ruzindana*, Trial Judgment, para. 147.

[56] *Report of the ILC*, *supra* note 17, p. 48, para. 10.

[57] *See* the Nuremberg Judgment concerning *Von Schirach*. Applying Control Council Law No. 10, *see also* the Judgment of 16 April 1947 in *The United States of America* v. *Erhard Milch* and the Judgment of 3 November 1947 in *The United States of America* v. *Oswald Pohl et al.*

> indications of enslavement include elements of control and ownership; the restriction or control of an individual's autonomy, freedom of choice or freedom of movement; and, often, the accruing of some gain to the perpetrator. The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or captivity, psychological oppression or socio-economic conditions. Further indications of enslavement include exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and human trafficking … The 'acquisition' or 'disposal' of someone for monetary or other compensation, is not a requirement for enslavement. Doing so, however, is a prime example of the exercise of the right of ownership over someone. The duration of the suspected exercise of powers attaching to the right of ownership is another factor that may be considered when determining whether someone was enslaved; however, its importance in any given case will depend on the existence of other indications of enslavement. Detaining or keeping someone in captivity, without more, would, depending on the circumstances of a case, usually not constitute enslavement … The factors … to be taken into consideration in determining whether enslavement was committed … are 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. The Prosecutor also submitted that the mere ability to buy, sell, trade or inherit a person or his or her labours or services could be a relevant factor. The Trial Chamber considers that the mere ability to do so is insufficient, such actions actually occurring could be a relevant factor.[58]

4. *Deportation or Forcible Transfer of Population*

The ICC Statute lays down the traditional crime against humanity of deportation. However, as an innovation, it also introduces the crime of forcible transfer of population. The ICTY had considered this last conduct as included among those constituting 'other inhumane acts'.[59] In its opinion, both deportation and forcible transfer relate to the involuntary and unlawful evacuation of individuals from the territory in which they reside. Yet, the two are not synonymous in customary

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[58] *Kunarac et al.*, Trial Judgment, paras. 539–542; *Kunarac et al.*, Appeal Judgment, paras. 117–121.

[59] *Stakic*, Trial Judgment, para. 723; *Brdjanin*, Trial Judgment, para. 544.

international law. Deportation presumes transfer beyond State borders, whereas forcible transfer relates to displacements within a State.[60] Hence, deportation means "the forced displacement of persons by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law. Deportation requires the displacement of persons across a national border",[61] whereas forcible transfer is "the forced removal or displacement of people from one area to another which may take place within the same national borders".[62]

Concerning the *actus reus* of both crimes, the ICTY has identified the following common elements, that are needed to ascertain that an act of deportation or forcible transfer has occurred: "(i) the unlawful character of the displacement;[63] (ii) the area where the person displaced lawfully resided and the destination to which the person was displaced; and (iii) the intent of the perpetrator to deport or forcibly[64] transfer the victim".[65]

Pursuant to Article 7(2)(d) of the ICC Statute:

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

The *Elements of Crimes* has kept the definition of the *actus reus* reached by the ICTY, modifying only the intent element. The ICTY

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[60] *Krstic*, Trial Judgment, para. 521.

[61] *Krnojelac*, Trial Judgment, para. 474.

[62] *Simic et al.*, Trial Judgment, para. 122.

[63] The displacement of persons is only illegal where it is forced, *i.e.* not voluntary, and "when it occurs without grounds permitted under international law". In other words, displacement motivated by an individual's own genuine wish to leave an area is lawful. *Naletilic and Martinovic*, Trial Judgment, para. 519; *Krstic*, Trial Judgment, paras. 523–528; *Krnojelac*, Trial Judgment, para. 475.

[64] The ICTY has interpreted broadly the requirement that the displacement be forced or forcible. The term 'forced' is not limited to physical force; it may also include the "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". The essential element is that the displacement be involuntary in nature, that "the relevant persons had no real choice". In other words, a civilian is involuntarily displaced if he is "not faced with a genuine choice as to whether to leave or to remain in the area". An apparent consent induced by force or threat of force should not be considered to be real consent. *Krnojelac*, Trial Judgment, para. 475; *Krstic*, Trial Judgment, paras. 147, 529–530; *Naletilic and Martinovic*, Trial Judgment, para. 519; *Krnojelac*, 17 September 2003, Appeal Judgment, paras. 229, 233; *Simic et al.*, Trial Judgment, para. 125.

[65] *Simic et al.*, Trial Judgment, para. 124.

requires not only the awareness of the conduct, but also the intention of the displacement being permanent.[66] However, the *Elements of Crimes* only requires that the perpetrator was aware of the factual circumstances that established the lawfulness of such person or persons' presence in the area from which they were so deported or transferred.[67]

5. *Imprisonment or Other Severe Deprivation of Physical Liberty*

Imprisonment as a crime against humanity was first ruled by Control Council Law No. 10. However, "other severe deprivation of physical liberty" is an innovation introduced by the ICC Statute. Hence, the ICTY and the ICTR have clarified only the concept of 'imprisonment'. For the ICTY:

> the term imprisonment in Article 5(e) of the Statute should be understood as arbitrary imprisonment, that is to say, the deprivation of liberty of the individual without due process of law, as part of a widespread or systematic attack directed against a civilian population ... The Trial Chamber will have to determine the legality of imprisonment as well as the procedural safeguards pertaining to the subsequent imprisonment of the person or group of persons in question, before determining whether or not they occurred as part of a widespread or systematic attack directed against a civilian population.[68]

However, both Tribunals are of the view that any form of arbitrary physical deprivation of liberty of an individual may constitute imprisonment as long as the other requirements of the crime are fulfilled.[69] Deprivation of an individual's liberty will be arbitrary and, therefore, unlawful if no legal basis can be called upon to justify the initial deprivation of liberty. If national law is relied upon as justification, the relevant provisions must not violate international law.[70]

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[66] *Ibid.*, para. 134; *Brdjanin*, Trial Judgment, para. 545.

[67] *Elements of Crimes*, *supra* note 10, p. 118.

[68] *Kordic and Cerkez*, Trial Judgment, para. 302.

[69] For the ICTY, *see Krnojelac*, Trial Judgment, paras. 111–114. For the ICTR, *Ntagerura et al.*, 25 February 2004, Trial Judgment, para. 702.

[70] International instruments use various terms to refer to deprivation of liberty, including, *inter alia*, 'arrest', 'detention' and 'imprisonment'. The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, as adopted by the General Assembly resolution 43/173 of 9 December 1988, defines these terms in its preamble while declaring that the principles enshrined shall apply "for the protection of all persons under any form of detention or imprisonment". The Working Group on Arbitrary Detention, established in1991, also points out that deprivation of liberty is referred to by different names, including, "apprehension, incarceration, prison, reclusion, custody and remand", United Nations High Commissioner for Human Rights, *Fact Sheet No 26,*

In addition, the legal basis for the initial deprivation of liberty must apply throughout the period of imprisonment. If at any time the initial legal basis ceases to apply, the initially lawful deprivation of liberty may become unlawful at that time and be regarded as arbitrary imprisonment.

Article 7(1)(e) of the ICC Statute expressly specifies that not only imprisonment, but other severe deprivation of physical liberty, is also a crime against humanity. It also points out that deprivation of liberty must be carried out in violation of fundamental rules of international law. The *Elements of Crimes* adds, as a third element *(mens rea)*, that "the perpetrator was aware of the factual circumstances that established the gravity of the conduct".[71]

6. *Torture*

Control Council Law No. 10 was the first international instrument to consider torture as a crime against humanity. Subsequently, this prohibition has "evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules".[72]

In contemporary international law the definition of torture as a crime against humanity has undergone an important evolution. At first, the international Tribunals applied the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[73] Subsequently, the ICTY held that the Torture Convention is addressed to States and seeks to regulate their conduct, and it is only for that purpose that it deals with the acts of individuals acting in an official capacity. However, "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".[74]

Hence, for these Tribunals torture means "the intentional infliction, by act or omission, of severe pain or suffering, whether physical or mental, for an illegal purpose".[75] It is the seriousness of the

Working Group on Arbitrary Detention, p. 4. The Commission on Human Rights adopted in its resolution 1997/50 the definition "deprivation of liberty imposed arbitrarily" (E/CN.4/RES/1997/50), 15 April 1997, para. 15.

[71] *Elements of Crime*, *supra* note 10, p. 118.

[72] *Furundzija*, 10 December 1998, ICTY, Trial Judgment, para. 153.

[73] *See*, for instance, *Akayesu*, ICTR, Trial Judgment, paras. 593–595.

[74] *Kunarac et al.*, Appeal Judgment, paras. 146–148.

[75] For the ICTY *see Furundzija*, Trial Judgment, para. 162; *Celebici*, 16 November 1998, Trial Judgment, para. 468; *Brdjanin*, Trial Judgment, para. 481. For the ICTR *see Semanza*, Trial Judgment, para. 343.

pain or suffering that sets torture apart from other forms of mistreatment. International jurisprudence has not specifically set the threshold level of suffering or pain required for the crime of torture, and it consequently depends on the individual circumstances of each case.[76] The act or omission must have occurred for any of the illegal purposes foreseen in the Torture Convention (in order to obtain information or a confession, or to punish, intimidate or coerce the victim or a third person, or to discriminate, on any ground, against the victim or a third person) or for other similar purposes.[77]

The ICC Statute has broadened the concept of 'torture' as a crime against humanity even more. Pursuant to its Article 7(2)(e), torture means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions. This definition does not require the existence of any illegal purpose.[78] The requirement that the victim must be "in the custody or under the control of the accused" is an innovation introduced by this Statute. It does not mean that the victim must be in prison. It also includes detention or other deprivation of physical liberty, even those forms that are not severe, as well as other circumstances where the influence on the victim may impede the use of his free will.

7. *Rape*

The ICC Statute introduces rape, without a definition, among the crimes against humanity.[79] The international Tribunals have had to define rape,

[76] "In assessing the seriousness of any mistreatment, the objective severity of the harm inflicted must be considered, including the nature, purpose and consistency of the acts committed. Subjective criteria, such as the physical or mental condition of the victim, the effect of the treatment and, in some cases, factors such as the victim's age, sex, state of health and position of inferiority will also be relevant in assessing the gravity of the harm. Permanent injury is not a requirement for torture; evidence of the suffering need not even be visible after the commission of the crime". *Celebici*, Trial Judgment, paras. 468–469; *Kvocka et al.*, 2 November 2001, Trial Judgment, paras. 143–144; *Krnojelac*, Trial Judgment, paras. 182–183; *Brdjanin*, Trial Judgment, paras. 483–487.

[77] *See Kunarac et al.*, Trial Judgment, para. 497; *Krnojelac*, Trial Judgment, paras. 179, 186. According to both Trial Chambers, "humiliation" is not a purpose of torture acknowledged under customary international law, which has been stated so by the *Furundzija* and *Kvocka et al.*, Trial Judgments (paras. 162 and 141 respectively). This approach has subsequently been confirmed by the *Furundzija*, 21 July 2000, Appeal Judgment, para. 111. *See also Naletilic and Martinovic*, Trial Judgment, para. 338; *Semanza*, Trial Judgment, para. 343.

[78] *Elements of Crimes*, *supra* note 10, p. 119.

[79] James McHenry III, 'The Prosecution of Rape under International Law: Justice

as there is no commonly accepted definition of this term in international law. The ICTR took the initiative in the *Akayesu* case, where it considered that rape is a form of aggression and that the central elements of this crime cannot be captured in a mechanical description of objects and body parts. Like the Torture Convention, it is better to focus on the conceptual framework of state-sanctioned violence.[80] Therefore, rape was defined as "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive".[81]

This was a very broad definition that causes problems of legal security. Hence, the ICTY defined rape in a narrower, mechanical description of objects and body parts:

> the Trial Chamber finds that the following may be accepted as the objective elements of rape: (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.[82]

The ICTY Appeals Chamber endorsed this definition, while concreting its second element:

> where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances. The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.[83]

The different factors which will classify the relevant sexual acts as the crime of rape are the following:

> (i) the sexual activity is accompanied by force or threat of force to the victim or a third party; (ii) the sexual activity is accompanied by force or a variety of other specified circumstances which made the victim particularly vulnerable or negated her ability to make an

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that is Long Overdue' (2002) 35:4 *Vanderbilt Journal of Transnational Law* pp. 1269–1311.

[80] *Akayesu*, Trial Judgment, para. 597. The ICTR followed this approach in *Musema*, Trial Judgment, paras. 220–229, and the ICTY in *Celebici*, Trial Judgment, paras. 478–479.

[81] *Akayesu*, Trial Judgment, para. 598.

[82] *Furundzija*, Trial Judgment, para. 185.

[83] *Kunarac et al.*, Appeal Judgment, para. 127. The ICTR has followed this definition since *Semanza*, Trial Judgment, para. 345.

> informed refusal; or (iii) the sexual activity occurs without the consent of the victim.[84]

This second definition has influenced the *Elements of Crimes*, where the specific elements of the crime of rape are the following:

> 1. The perpetrator invaded[85] 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[86].[87]

8. *Sexual Slavery*

The ICC Statute has introduced for the first time different crimes against humanity involving sexual violence different from rape. One of them is sexual slavery. The Rome Conference considered that sexual slavery is a particular form of slavery but, due to its influence in such a personal field as sexual freedom, it deserved a special mention as an autonomous crime.

Although sexual slavery is an ancient practice, taking place mainly during an armed conflict, none of the international Tribunals have ever dealt with this specific crime against humanity. This type of conduct has actually been present in several Prosecutors' indictments[88] and even in some international judgments.[89] But it has always been qualified as other crimes against humanity (slavery, rape or other inhumane acts).

In order to be considered as a crime of sexual slavery, the conduct shall satisfy all the elements of slavery as a crime against humanity. It also needs a sexual element: to limit a person's autonomy, her or his freedom of movement or the capacity to take decisions

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[84] *Kunarac et al.*, Trial Judgment, para. 442.

[85] "The concept of 'invasion' is intended to be broad enough to be gender-neutral".

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

[87] *Elements of Crimes, supra* note 10, p. 119.

[88] For the ICTY, *see for instance* the Third Amended Indictment in *Stankovic*, 8 December 2003.

[89] *For instance*, *Kunarac et al.*, Appeal Judgment, para. 132.

concerning her or his own sexual activities and other related activities, such as forced marriage or other forced sexual practices.[90] Accordingly, the *Elements of Crimes* has identified two specific elements for the commission of this crime:

> 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.[91]
>
> 2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.[92]

9. *Enforced Prostitution*

There is no international instrument defining the crime against humanity of enforced prostitution.[93] The ordinary meaning of the term 'prostitution' relates to any act of a sexual nature offered in order to obtain some advantage or a reward, while the term 'enforced' means that the offer is made without the consent of the victim or under any form of coercion or threat of force.

In most of the cases, this crime is closely linked to the crime of sexual slavery, as it implies a degree of control over the person subject to forced prostitution that is similar to the exercise of any or all of the powers attaching to the right of ownership over one or more persons. However, both legal security reasons and the acknowledgement of the grievous character of this conduct justify a particular definition of the elements of this conduct, often forgotten by international treaties, even by the Nuremberg and Tokyo Tribunals.[94]

Pursuant to the *Elements of Crimes*, a crime against humanity of enforced prostitution will result from the concurrence of the following specific elements:

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[90] M. Boot *et al.*, 'Article 7. Crimes against Humanity' in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court. Observers' Notes, Article by Article* (Nomos Verlagsgesellschaft, Baden-Baden, 1999), p. 142.

[91] "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."

[92] *Elements of Crimes*, *supra* note 10, p. 120.

[93] Nora V. Demleitner, 'Forced Prostitution: Naming an international offence' (1994) 18:1 *Fordham International Law Journal* pp. 163–197.

[94] Maria Clara Maffei, *Tratta, prostituzione forzata e diritto internazionale: Il caso delle "donne di conforto"* (Giuffrè, Milano, 2002), pp. 1–155.

> 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.[95]

Therefore, this crime may be the result of a single, isolated forced act of sexual nature, as multiple repetitions of such an act are not required.

10. *Forced Pregnancy*

The crime of forced pregnancy[96] is the only crime against humanity of a sexual character set down by the ICC Statute where the victim must be necessarily a woman. Its inclusion among the crimes of sexual violence showed the differences on the conception of women's rights between Islamic States, States not allowing for abortion or allowing it in a limited number of cases, who argued that not providing women with abortion facilities could be understood as a systematic practice of forced pregnancy. In order to avoid this opposition, this is the only sexual crime defined by the ICC Statute. The last provision of its definition safeguards all national laws relating to pregnancy:

> 'Forced pregnancy' means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy.[97]

According to this definition, "forced pregnancy" implies the commission of two other crimes against humanity. On the one hand, it requires "the unlawful confinement of a woman", a practice that may be qualified as a crime of imprisonment or other severe deprivation of physical liberty. On the other hand, the victim is "a woman forcibly

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[95] *Elements of Crimes*, *supra* note 10, p. 120.

[96] Kristen Boon, 'Rape and Forced Pregnancy under the ICC Statute: Human Dignity, Autonomy, and Consent' (2001) 32:3 *Columbia Human Rights Law Review* pp. 625–673.

[97] The *Elements of Crimes* limits themselves to repeating the wording of Article 7(2)(f).

made pregnant". It implies the commission of at least one crime of rape. However, these two elements alone are not sufficient in order to amount to a crime against humanity of forced pregnancy, as it additionally requires the special intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.

The crime of forced pregnancy will last until the birth takes place, although pregnancy does not necessarily need to be realized in order to establish the crime, if the other requirements were fulfilled.

11. *Enforced Sterilization*

Neither the Nuremberg Charter nor Control Council Law No. 10 regulated the crime against humanity of enforced sterilization. However, its precedents can be found in the application of this Law by some Military Courts, which included this conduct under the crime of other inhumane acts.[98] This crime was introduced by the ICC Statute.

The practice of enforced sterilization is also directed against the future existence of the civilian population which suffers this attack and it is very similar to the practice of imposing measures intended to prevent births within a national, ethnical, racial or religious group, that is, a conduct criminalised as genocide.

Pursuant to the *Elements of Crimes*, the crime against humanity of enforced sterilisation has two specific elements:

> 1. The perpetrator deprived one or more persons of biological reproductive capacity.[99]
>
> 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[100].[101]

12. *Sexual Violence*

The crime against humanity of sexual violence has its origins in the ICTR and ICTY jurisprudence. It must be remembered that the only crime against humanity of sexual character provided for by the ICTR Statute is rape, although it also foresees the crime against humanity of other inhumane acts. In its very first Judgment, the ICTR held that:

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[98] Judgment of 20 August 1947 in *The United States* v. *Karl Brandt et al. (The "Medical* Case*")*.

[99] "The deprivation is not intended to include birth-control measures which have a non-permanent effect in practice."

[100] "It is understood that 'genuine consent' does not include consent obtained through deception."

[101] *Elements of Crimes*, *supra* note 10, p. 121.

> The Tribunal defines rape as a physical invasion of sexual nature, committed on a person under circumstances which are coercive. The Tribunal considers sexual violence, which includes rape, as any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact. The incident described by Witness KK in which the Accused ordered the *Interahamwe* to undress a student and force her to do gymnastics naked in the public courtyard of the bureau communal, in front of a crowd, constitutes sexual violence.[102] The Tribunal notes in this context that coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence of the *Interahamwe* among refugee Tutsi women at the bureau communal. Sexual violence falls within the scope of 'other inhumane acts' … 'outrages upon personal dignity'… and 'serious bodily or mental harm'….[103]

With these precedents, it is not surprising that the ICC Statute includes for the first time the crime against humanity of any other form of sexual violence of comparable gravity. The *Elements of Crimes* has called it the crime against humanity of sexual violence.

This is considered as an open crime, expressly intended to include "other form of sexual violence of comparable gravity" as opposed to those previously described, aimed at future avoidance of defencelessness cases due to aberrant acts against human dignity. Thus, it is similar to the crime against humanity of other inhumane acts. The criminal basis of both crimes is the same: the protection of human dignity exceeding the limits of law-maker's imagination. The only difference is that this crime is limited to protecting only a fundamental aspect of human dignity, that of the sexual dignity.

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[102] *See also Akayesu*, Trial Judgment, para. 697.

[103] *Ibid.*, para. 688. The ICTR also qualified as sexual violence included among "other inhumane acts" the castration of a killed man and the public exhibition of his genitals hung on a spike, as well as "to undress the body of a Tutsi woman, who had just been shot dead, to fetch and sharpen a piece of wood, which was inserted into her genitalia". *Niyitegeka*, Trial Judgment, paras. 462–465. Even the ICTY qualified as a war crime of cruel treatment to force civilian prisoners to have sexual relations between themselves ("Witness H was ordered to lick his naked bottom and G to suck his penis and then to bite his testicles") and to make one of them castrate another civilian prisoner ("G was then made to lie between the naked *Fikret Harambac's* legs and, while the latter struggled, hit and bite his genitals. G then bit off one of *Fikret Harambac's* testicles"). *Tadic*, Trial Judgment, paras. 206, 726.

It is a fully open crime, depending upon criteria such as 'sexual violence' or 'comparable gravity'. Due to the open character of its definition, the *Elements of Crimes* pays special attention to the detailed description of its constituent elements, without forgetting its residual character for sexual crimes. These elements are:

> 1. 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.
>
> 2. Such conduct was of a gravity comparable to the other offences in article 7, paragraph 1 (g), of the Statute.
>
> 3. The perpetrator was aware of the factual circumstances that established the gravity of the conduct.[104]

13. *Persecution*

On the crime of persecution, the ICTY has held that "unfortunately, although often used, the term has never been clearly defined in international criminal law nor is persecution known as such in the world's major criminal justice systems".[105] Trying to provide a definition, the ICTY declared that persecution means:

> the gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as the other acts prohibited in Article 5.[106]

In any case, persecution is a form of discrimination on grounds of race, religion or political opinion that is intended to be, and results in, an infringement of an individual's fundamental rights. This crime encompasses a wide variety of acts, including, *inter alia*, those of a physical, economic, or judicial nature that violate an individual's basic or fundamental rights.[107] These acts must be evaluated not in isolation but in context, by looking at their cumulative effect.[108]

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[104] *Elements of Crimes*, *supra* note 10, p. 121.

[105] *Tadic*, Trial Judgment, para. 694; *Kupreskic et al.*, Trial Judgment, para. 589.

[106] *Ibid.*, para. 621. *See* Jérôme de Hemptinne, 'Controverses relatives à la définition du crime de persécution' (2003) 53:1 *Revue Trimestrielle des Droits de l'Homme* pp. 15–48.

[107] *Tadic*, Trial Judgment, paras. 697, 710.

[108] *Kupreskic et al.*, Trial Judgment, para. 622.

It is a fully open crime, depending upon criteria such as 'sexual violence' or 'comparable gravity'. Due to the open character of its definition, the *Elements of Crimes* pays special attention to the detailed description of its constituent elements, without forgetting its residual character for sexual crimes. These elements are:

> 1. 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.
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[107] *Tadic*, Trial Judgment, paras. 697, 710.

[108] *Kupreskic et al.*, Trial Judgment, para. 622.

The victim of persecution must be any identifiable group or collectivity, as required by Article 7(1)(h) of the ICC Statute, and not a single isolated individual discriminated. Nevertheless, a single discriminatory act against an individual made in the context of a general and systematic attack against a civilian population may qualify as persecution. Persecution must be carried out on discriminatory grounds. The ICC Statute contains an open list of discriminatory grounds, as persecution may result from "political, racial, national, ethnic, cultural, religious, gender … or other grounds that are universally recognized as impermissible under international law". The discriminatory grounds should be read independently of each other, as each of them in and of itself is a sufficient basis for persecution.[109]

As regards the conducts that may constitute persecution, the ICTY has held that the crime of genocide and war crimes enumerated in its Statute, which also fulfil the elements of persecution, including the general elements of crimes against humanity, can be encompassed in a finding of persecution as a crime against humanity.[110] Even the other crimes against humanity may also qualify as persecution, if committed on discriminatory grounds.[111] However, the jurisprudence of the ICTY thus far appears to have accepted that the crime of persecution can also encompass acts not explicitly listed in its Statute, if they reach the same level of gravity as the other crimes against humanity enumerated in it.[112] The assertion that the *actus reus* for persecution requires no link to crimes enumerated elsewhere in the Statute is "consonant with customary international law".[113] On the contrary, the ICC Statute has restricted this broad definition of persecution to acts perpetrated "in connection" with any of the acts enumerated in the same provision as constituting crimes against humanity (murder, extermination, enslavement, etc.) or with crimes found in other provisions such as war crimes, genocide, or aggression.[114]

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[109] *Tadic*, Trial Judgment, para. 713.

[110] *Ibid.*, para. 700.

[111] *Kupreskic et al.*, Trial Judgment, paras. 605–607.

[112] *Kordic and Cerkez*, Trial Judgment, para. 195; *Deronjic*, 30 March 2004, Trial Judgment, para. 118; *Babic*, 29 June 2004, Trial Judgment, para. 30.

[113] *Kupreskic et al.*, Trial Judgment, paras. 572, 581; *Kordic and Cerkez*, Trial Judgment, paras. 193–194. In *Tadic*, Trial Judgment, para. 703, the ICTY declared that: "in addition to the acts enumerated elsewhere in the Statute persecution may also encompass other acts if they 'seek to subject individuals or groups of individuals to a kind of life in which enjoyment of some of their basic rights is repeatedly or constantly denied'".

[114] "In short, the Trial Chamber finds that although the Statute of the ICC may be indicative of the *opinio juris* of many States, Article 7(1)(h) is not consonant with customary international law." *Kupreskic et al.*, Trial Judgment, para. 581.

Pursuant to Article 7(2)(g) of the ICC Statute persecution means "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity". The elements required for this crime are:

> 1. The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights.
>
> 2. The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.
>
> 3. Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law.
>
> 4. The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court.[115]

14. *Enforced Disappearance of Persons*

One of the main innovations introduced by the ICC Statute is the consideration of enforced disappearance of persons as a crime against humanity.[116] In 1974, the Organization of American States began to condemn this practice, requiring its immediate termination and qualifying it, in 1983, as a crime against humanity.[117] In 1978, the United Nations General Assembly considered this practice to be in contravention of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.[118] On 18 December 1992, the General Assembly adopted Resolution 47/133, entitled "Declaration on the Protection of All Persons from Enforced Disappearance", where it declared that "the systematic practice of such acts is of the nature of a crime against humanity". On 9 June 1994, the Inter-American Convention on Forced Disappearance of Persons stated that:

> For the purposes of this Convention, forced disappearance is considered to be the act of depriving a person or persons of his or

[115] *Elements of Crimes*, *supra* note 10, p. 122.

[116] Olivier de Frouville, 'Les disparitions forcées' in H. Ascensio *et al.* (eds.), *Droit international pénal* (Pedone, Paris, 2000), pp. 377–386.

[117] OAS General Assembly Resolution 666 (XIII-0/83).

[118] Resolution 33/173, 20 December 1978. *See* Federico Andreu-Guzmán, 'Le Groupe de travail sur les disparitions forcées des Nations Unies' (2002) 84:848 *International Review of the Red Cross* pp. 803–818.

> their freedom, in whatever way, perpetrated by agents of the State or by persons or groups of persons acting with the authorization, support, or acquiescence of the State, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.

Building on these precedents, the ICC Statute is the first international treaty including enforced disappearance of persons among crimes against humanity, meaning "the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time".

Implementing this definition, the *Elements of Crimes* requires that:

> 1. The perpetrator:
>
> (a) Arrested, detained,[119] [120] or abducted one or more persons; or
>
> (b) Refused to acknowledge the arrest, detention or abduction, or to give information on the fate or whereabouts of such person or persons.
>
> 2. (a) Such arrest, detention or abduction was followed or accompanied by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons; or
>
> (b) Such refusal was preceded or accompanied by that deprivation of freedom.
>
> 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;[121] or

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[119] "The word 'detained' would include a perpetrator who maintained an existing detention."

[120] "It is understood that under certain circumstances an arrest or detention may have been lawful."

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

> (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.[122]

15. *Apartheid*

Since its Resolution 616 (VII) of 5 December 1952, the General Assembly considered apartheid in relation to the policy of racial segregation implemented by the Government of the Union of South Africa, as "inconsistent" with the UN Charter and the Universal Declaration of Human Rights. However, it was not until Resolution 1598 (XV) of 13 April 1961, when the General Assembly began to hold that its "continuance endangers international peace and security". In Resolution 1761 (XVII) of 6 November 1962, for the first time the General Assembly requested Member States to take measures, separately or collectively, in conformity with the Charter, to bring about the abandonment of the policies of apartheid of the Republic of South Africa. However, it was not until Resolution 2202 (XXI) of 16 December 1966, when the General Assembly condemned this practice as a crime against humanity. Later on, the General Assembly adopted the International Convention on the Suppression and Punishment of the Crime of Apartheid on 30 November 1973. Its Article I declares that apartheid is a crime against humanity and its Article II provides a long definition of the crime of apartheid.

The ICC Statute is the first Statute of an international Tribunal to include the crime against humanity of apartheid. It provides for a more accurate definition than the Convention on the Crime of Apartheid, as:

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

[122] *Elements of Crimes*, *supra* note 10, pp. 122–123.

In order to establish a crime of apartheid, it is required that:

> 1. The perpetrator committed an inhumane act against one or more persons.
>
> 2. Such act was an act referred to in article 7, paragraph 1, of the Statute, or was an act of a character similar to any of those acts.[123]
>
> 3. The perpetrator was aware of the factual circumstances that established the character of the act.
>
> 4. The conduct was committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups.
>
> 5. The perpetrator intended to maintain such regime by that conduct.[124]

16. *Other Inhumane Acts*

Since the Nuremberg Charter, the category of 'other inhumane acts' has been maintained as a useful category for acts not specifically stated but which are of comparable gravity. The importance of maintaining such a category was elucidated by the International Committee of the Red Cross when commenting on inhumane treatment contained in Article 3 of the Geneva Conventions:

> It is always dangerous to try to go into too much detail – especially in this domain. However much care were taken in establishing a list of all the various forms of infliction, 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. The form of wording adopted is flexible and, at the same time, precise.[125]

Other inhumane acts include those crimes against humanity that are not otherwise specified in the Statutes of international tribunals, but are of comparable seriousness.[126] The ICC Statute (Article 7(k)) provides greater detail than the ICTY and ICTR Statutes as to the meaning of other inhumane acts: "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health". The ILC commenting on Article 18 of its Draft Code of Crimes stated:

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[123] "It is understood that 'character' refers to the nature and gravity of the act."

[124] *Elements of Crimes*, *supra* note 10, p. 123.

[125] Jean S. Pictet (ed.), *The Geneva Conventions of 12 August 1949. Commentary* (ICRC, Geneva, 1952), p. 54.

[126] *Kayishema and Ruzindana*, Trial Judgment, para. 150.

> The Commission recognized that it was impossible to establish an exhaustive list of the inhumane acts which might constitute crimes against humanity. It should be noted that the notion of other inhumane acts is circumscribed by two requirements. First, this category of acts is intended to include only additional acts that are similar in gravity to those listed in the preceding subparagraphs. Secondly, the act must in fact cause injury to a human being in terms of physical or mental integrity, health or human dignity.[127]

These will be acts or omissions that deliberately cause serious mental or physical suffering or injury or constitute a serious attack on human dignity. The Prosecution must prove a nexus between the inhumane act and the great suffering or serious injury to mental or physical health of the victim. Hence, the acts that rise to the level of inhumane acts should be determined on a case-by-case basis.[128]

The ICTY has specified that 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 so long as it is real and serious.[129]

The required *mens rea* is met where the principal offender, at the time of the act or omission, had the intention of inflicting serious physical or mental suffering or to commit a serious attack on the human dignity of the victim, or where he knew that his act or omission was likely to cause serious physical or mental suffering or a serious attack upon human dignity and was reckless as to whether such suffering or attack would result from his act or omission.[130]

The specific elements required to constitute a crime of other inhumane acts are the following:

> 1. The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act.

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[127] *Elements of Crimes*, *supra* note 10, p. 50, para. 17.

[128] *Kayishema and Ruzindana*, Trial Judgment, para. 151.

[129] *Krnojelac*, Trial Judgment, para. 131; *Blagojevic and Jokic*, Trial Judgment, para. 627.

[130] For the ICTR *see Kayishema and Ruzindana*, Trial Judgment, para. 153. For the ICTY *see Aleksovski*, Trial Judgment, para. 56, *Krnojelac*, Trial Judgment, para. 132.

> 2. Such act was of a character similar to any other act referred to in article 7, paragraph 1, of the Statute.[131]
>
> 3. The perpetrator was aware of the factual circumstances that established the character of the act.[132]

IV. CONCLUSION

Nowadays there is universal recognition of crimes against humanity as those serious offences against life and dignity of human persons, as well as of the international criminal responsibility of their authors. However, the definition of these crimes and the concretion of their constituent elements have been subject to significant legal evolution, especially since 1993.

The main impetus for this evolution has been the ICTY and ICTR jurisprudence, as well as the codifying efforts reflected in the ICC Statute and in the *Elements of Crimes*. As a result, two important innovations have been introduced in contemporary international law. Firstly, the category of offences qualifying as crimes against humanity has been extensively broadened. In contemporary international law, the traditional categories of murder, extermination, enslavement, deportation and other inhumane acts are still included among the crimes against humanity. But other categories of offences have also been consecrated as new crimes against humanity. These new crimes include several conducts of sexual violence (rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other form of sexual violence of comparable gravity), as well as forcible transfer of population, imprisonment or other severe deprivation of physical liberty, torture, enforced disappearance of persons and apartheid. The qualification of these offences as new crimes against humanity represents the response of international criminal law to barbarian acts committed as part of a widespread or systematic attack directed against any civilian population.

Secondly, there has been an accurate description of the constituent elements of all the different crimes against humanity previously defined. This codifying effort encompasses not only the context and subjective elements of crimes against humanity, but also the specific elements of each particular offence.

These two important innovations are aimed at satisfying the legality principle in international criminal law. However, it must be

[131] "It is understood that 'character' refers to the nature and gravity of the act."

[132] *Elements of Crimes*, *supra* note 10, p. 124.

pointed out that neither the inclusion of new offences as crimes against humanity, nor the definition of their constituent elements have been free from political pressures. In several cases, the constituent elements of these crimes are not in harmony with customary international law, but reflect the political interests supported by States in their codification. States are not only interested in strengthening the international persecution of these offences; in some cases, they are also interested in limiting their prosecution.