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## The Crimes within the Jurisdiction of the International Criminal Court (Part II, Articles 5–10)

### 1. PURPOSE AND PLAN OF THE PRESENT ENQUIRY

Among the main points of contention during the drafting process, both at the Preparatory Committee stage in New York and in the Rome Conference, were *which* crimes under international law should be included in the jurisdiction of the permanent International Criminal Court, *how* should they be defined, to *whom* should the rules apply (i.e. crimes committed by *whom* against *whom*?), and *when* and *where* do they apply (i.e. under *what* kinds of circumstances?).

The purpose of the present enquiry is to indicate the extent to which the crimes listed and defined in the Rome Statute reflect the established norms of international law, and if they differ, how and why.

In order to evaluate the degree of fidelity of the Rome Statute's jurisdiction *ratione materiae* to the *lex lata*, it is necessary to review Articles 5 to 10 of the Rome Statute against the backdrop of established international criminal law norms. Moreover, to understand why there may be certain discrepancies or divergences between the Rome Statute régime and general international law, it is valuable to consider a number of specific issues along the way, in particular, the crimes selected for inclusion in the Statute, the controversy over the crime of aggression, and the often heated debate that went on in the drafting process over the scope and application of provisions prohibiting crimes against humanity and war crimes.

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## 2. CRIMES WITHIN THE JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT: ARTICLE 5

### 2.1. Why were genocide, crimes against humanity, war crimes and aggression included, but not other crimes under international law?

Article 5(1) of the Rome Statute provides that genocide, crimes against humanity, war crimes and the crime of aggression, shall come within the jurisdiction of the Court. However, it must be kept in mind that the régime to be created by the Rome Statute is narrower than that provided for by the rules of general international law pertaining to individual criminal responsibility in a number of ways.<sup>2</sup>

As regards the crimes envisaged to give rise to prosecution and punishment, the Rome Statute foresees a narrower range than either that reflected in general international law, or indeed, that proposed at various stages in the work of the International Law Commission (ILC)<sup>3</sup> which, since the General Assembly's adoption of the Nuremberg Principles<sup>4</sup> in 1947, has striven to codify and progressively develop international criminal law. For example, the Rome Statute does not impose individual criminal responsibility for: the threat of aggression (although possibly this may be incorporated within the Statute's definition of aggression in some form); intervention; colonial domination; the recruitment, use, financing or training of mercenaries; international terrorism; or the illicit international traffic in narcotic drugs. All these candidates for inclusion were left out of the Rome Statute, although at one stage, the ILC had proposed their inclusion in a permanent international criminal court's jurisdiction.<sup>5</sup> Certain among these crimes even claim a relatively high level of support from the international community at large and remain well anchored in established norms extant in treaty law, and to a lesser degree, international custom.

A small minority of Delegations seemed determined to narrow the range of crimes in the Statute as far as possible because they did not really support the establishment of the Court in the first place, but sensing it nevertheless might be set up, wished to

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2. In terms of institutional implementation, the permanent Criminal Court would be only one, albeit the most important, among a number of possible means by which to enforce individual criminal responsibility for crimes under international law. For example, the creation of *ad hoc* international criminal tribunals, such as those of Nuremberg and Tokyo, or those created to deal with perpetrators of crimes committed in the former Yugoslavia or Rwanda, remains an important option open to the international community. Domestic courts retain the authority also to prosecute crimes under international law, although actual practice shows this has been done only very rarely. See Bothe, McAlister-Smith, Kurzidem (eds.), *National Implementation of International Humanitarian Law 1990*; Ch. Bassiouni, E. Wise, *Aut Dedere Aut Judicare; The Duty to Extradite or Prosecute in International Law 1995*; and R.D. Atkins (ed.), *The Alleged Transnational Criminal: the Second Biennial International Criminal Law Seminar 1995*.
  3. See generally L.S. Sunga, *The Emerging System of International Criminal Law: Developments in Codification and Implementation* (The Hague 1997).
  4. General Assembly resolution 95(1), adopted on 11 December 1946 on Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal.
  5. See Draft Code of Crimes against the Peace and Security of Mankind: Titles and texts of articles adopted by the Drafting Committee, UN Doc. A/CN.4/L.459/Add.1, 5 July 1991, at the ILC 43rd session, 29 April 19 July 1991. The revised version is A/CN.4/L.464/Add.4, 15 July 1991.

see it restricted as narrowly as possible so as to reduce the likelihood of its ever being called into operation.

However, at the end of the day, the vast majority of Delegations participating in the Rome Conference proved eager to see the draft treaty adopted, and accordingly, expressed more constructive proposals. Many Delegations wished to see the crimes defined with sufficient specificity, coherence and clarity, to meet the high standards of international criminal law and ensure the fundamental principles of *nullum crimen sine lege* and *nulla poena sine lege* would be fully honoured.<sup>6</sup> Furthermore, Delegations supporting the drive to establish the Court naturally wished the Court's jurisdiction to cover only the kinds of acts most widely recognized as crimes under international law, so as to attract the signature and ratification of as many States as possible, better to maximize the Court's universality. This concern had already been raised by many Governments when they were requested by the ILC for their comments on the 1991 version of the draft Code of Crimes against the Peace and Security of Mankind. Indeed, in response to these comments, the ILC in 1996 brought out a radically truncated version of the draft Code that stuck mainly to the core crimes, namely, genocide, crimes against humanity, war crimes and the crime of aggression, dropping all other less recognized crimes.<sup>7</sup>

The hesitancy of Governments to confer upon the permanent International Criminal Court jurisdiction over crimes defined in ambiguous terms explains why the 'threat of aggression', 'intervention', 'colonial domination' and 'terrorism' were not included in Article 5. The excessively vague definition of crimes increases the opportunity for abuse by Prosecutor and perpetrator alike.

While recognizing that the illicit traffic in narcotic drugs in some cases may be serious enough even to threaten the political independence of a State, some Governments continue to ponder whether such activity ought to be handled more as a matter for inter-state co-operation i.e. more bilaterally, or at most as a matter for international co-operation at the regional level, rather than as a matter for general international co-operation.<sup>8</sup> Militating against a more comprehensive global approach were wide divergences among the cultures, traditions and laws of various countries concerning the appropriate response to the problem of illicit trafficking in narcotic drugs, the level of punishment to be meted out for violations, and different views concerning rehabilitation of the offender.

These persistent questions did not prevent the Rome Conference from leaving open the possibility to include in the jurisdiction of the Court in future the crime of illicit trafficking in narcotic drugs, or indeed other crimes as the international community may so decide. Article 121 of the Rome Statute provides States Party to the Statute

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6. According to these principles, there can be neither crime nor punishment in relation to a specific act unless the law already prohibited it prior to the time of its commission.
  7. See Draft Code of Crimes against the Peace and Security of Mankind: Titles and Texts of Drafts Articles, *adopted by* the Drafting Committee on second reading at its 47th and 48th sessions; A/CN.4/L.522 of 31 May 1996; and Draft Report of the ILC on the Work of its 48th Session, A/CN.4/L.527/Add.10 of 16 July 1996.
  8. The so-called 'treaty crimes' of terrorism, illicit trafficking in narcotic drugs, and crimes against UN and associated personnel, remained under consideration for inclusion in the Statute until the final week of the Rome Conference. See e.g., Discussion Paper issued by the Bureau of the Rome Conference; A/CONF.183/C.1/L.53 of 6 July 1998.

the opportunity to propose amendments following the expiry of a period of seven years from the Statute's entry into force. Moreover, Article 124 obliges the UN Secretary-General to convene a review conference, open to an Assembly of States' Parties, to consider amendments to the Statute including *inter alia* 'the list of crimes contained in Article 5'.

Certainly, a controversial candidate for inclusion in the Statute shall continue to be the crime of aggression, which although foreseen in the Court's jurisdiction *ratione materiae* as per Article 5(1), has yet to be defined for the purposes of international criminal law.<sup>9</sup>

## 2.2. The Crime of Aggression: A Controversial Inclusion

Article 5 (2) provides specifically that jurisdiction over cases of aggression shall not be exercised by the Court until a provision is adopted on aggression according to the procedures set out in Articles 121 and 123. Article 5(2) further stipulates that the provision 'shall be consistent with the relevant provisions of the Charter of the United Nations'.

The decision of Delegations to the Rome Conference to include in the Court's jurisdiction the crime of aggression, subject to its being properly defined for the purpose of international criminal law enforcement, tells most of the story. Clearly, the majority of states shared the view that, in our contemporary world, to set up a permanent international criminal court with jurisdiction over crimes of far lesser magnitude, such as individual cases of war crimes or crimes against humanity, without seeking to punish belligerency writ large, would create a strange anomaly. As most abuses occur in the context of armed conflict, omitting the crime of aggression from the Statute would be tantamount in many cases to treating mere symptoms while ignoring the pathogenic cause.

However, Delegations could not agree on the precise definition for the crime of aggression, and indeed, this remains a challenging legal question. Historically, the use of force on the international plane has been more the norm rather than the exception. The last five hundred years are replete with seemingly endless examples of wars launched for the most banal of reasons – squabbles over succession, minor territorial disagreements and petty alliances. States regarded the initiation of war as their sovereign right, and it was not until the era of the League of Nations that the international community endeavoured to develop legal procedures to outlaw it.<sup>10</sup>

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9. See A.M. Rifaat, *International Aggression: A Study of the Legal Concept – Its Development and Definition in International Law* (Stockholm 1979) and Sunga *supra* note 3 at pp. 31–59.

10. See most notably the Paris Pact (International Treaty for the Renunciation of War as an Instrument of National Policy), also known as the Kellogg-Briand Pact, *signed* initially on 27 August 1928 by the representatives of 15 states, *entered into force* 24 July 1929, 94 L.N.T.S. 57, 46 Stat. 2343, T.S. No. 796, and *signed* by sixty-three states by the outbreak of the Second World War. See also Articles 11, 12, 13 and 15, of the League of Nations Covenant which obliged the parties to refer the dispute to the League of arbitration, judicial settlement or to the League Council. See further the procedural restrictions on the international resort to the use of force set out in Article 10 designed to delay the deployment of armed force for three months.

An important stride towards holding an individual leader criminally responsible for aggression was taken after the end of World War I with the insertion of Article 227 in the Treaty of Versailles.<sup>11</sup> However, it was not until the Nuremberg and Tokyo Trials that individual Axis leaders and organizers were actually prosecuted and punished for the count of ‘crime against peace’ – perhaps a somewhat broader concept than ‘crime of aggression’ – which was, at the time of the drafting of the Nuremberg and Tokyo Charters, new law.<sup>12</sup> Largely due to the insistence of the US representatives to the War Crimes Commission, Article 6(a) of the Nuremberg Charter as finally adopted, provides that crimes against peace ‘namely, planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements, or assurances . . .’ comes within the Nuremberg Tribunal’s jurisdiction.<sup>13</sup> However, Article 6(a) did nothing to provide a clear definition as to what precisely constitutes a war of aggression or how we are to recognize it if we see it.

In fact, the ILC’s efforts to create an international criminal Code and Court, begun in 1946, were suspended in 1954 over the lack of a legal definition of aggression. In 1974, following years of negotiation, the General Assembly adopted resolution 3314 spelling out a definition of aggression.<sup>14</sup> Unfortunately, this definition was not specifically designed to apply for the purposes of criminal prosecutions. This partly accounts for the fact that neither Statute of the two *ad hoc* International Criminal Tribunals for the Former Yugoslavia and Rwanda extends jurisdiction over the crime of aggression. Nevertheless, resolution 3314 will prove no doubt a valuable source for the Assembly of States’ Parties to the Rome Statute to arrive at a workable definition of aggression amenable to fair and effective implementation.

Another source of controversy over inclusion of the crime of aggression in the Rome Statute was, and remains, the question of the Security Council role *vis-à-vis* the International Criminal Court. Chapter VII of the United Nations Charter designates the Security Council as the responsible organ to respond to cases of the threat or breach of international peace and security including, of course, a war of aggression – the most serious breach of this kind.

Any Security Council role in international criminal process raises the issue of the judicial independence of the Court from the Security Council, a political body in which

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11. Article 227 foresees the prosecution of the former Kaiser, Emperor Wilhelm II, before a special tribunal ‘for a supreme offence against international morality and the sanctity of treaties’. However, the former Kaiser found safe haven in neutral Holland, which refused either to prosecute or extradite him to another state for prosecution. Although Article 227 could never be implemented, it at least symbolized in principle that even a Head of State could be prosecuted by an international tribunal for aggression.
  12. Indeed, at the UN War Crimes Commission established by the Allied Powers in October 1943 to pave the way for the prosecution of Axis leaders once victory could be established, there was considerable disagreement as to whether individuals ought to be liable for prosecution only for war crimes (an already established legal category) and crimes against humanity (a new legal category) – crimes at least grounded in the ancient customary *ius in bello* – or whether to add also provisions that would make individuals responsible for planning, preparing, initiating or waging a war of aggression.
  13. See History of the UN War Crimes Commission 1948.
  14. General Assembly resolution 3314 (XXIX), GAOR 29th Session, Supp. No. 31, *adopted without a vote*, 14 December 1974.

any of the permanent Members may exercise the right of veto. Not surprisingly, at many junctures in the Rome Conference negotiations, the permanent Members expressed hesitancy to surrender any of their special Security Council powers to the permanent International Criminal Court, with the exception of the United Kingdom which, to its credit, seemed the least concerned about this prospect.<sup>15</sup>

Whether the Assembly of States Parties eventually will decide to follow the Nuremberg (or perhaps Tokyo) Charter approach, an alternative based on General Assembly resolution 3314, or yet another formula, shall be, no doubt, a matter of great interest for years to come.

### 3. GENOCIDE: ARTICLE 6

In the Rome Conference negotiations, the crime of genocide occasioned the least controversy and its inclusion the least resistance. The legal categories of ‘war crimes’ and ‘crimes against humanity’, as discussed below, draw from several sources and bodies of international law, and encompass quite a range of distinct crimes that differ widely in gravity and scale. International legal norms prohibiting genocide, in contrast, benefit from the fact that they derive from a single multilateral treaty – the Genocide Convention, 1948<sup>16</sup> – drafted by the international community with considerable care and precision for the purposes of criminal prosecution by domestic courts or an international tribunal or court.

Article 6 of the Rome Statute, replicating word for word the definition part of Article II of the Genocide Convention, 1948, (found also in Articles 4 and 2 of the Statutes for the International Criminal Tribunals for the Former Yugoslavia and Rwanda, respectively) provides that:

- ‘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.

A few delegations proposed that the Conference could perhaps improve upon the Genocide Convention definition. However, from the opening day of the Rome Conference, most delegations seemed aware of the complex task that lay ahead and

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15. The majority of Delegations expressed serious reservations over the possibility of Security Council interference in the workings of the International Criminal Court. Consensus seemed to form around a middle position: the Security Council role assigned by Chapter VII of the Charter had to remain intact, but it should be kept to a minimum and strictly defined *vis-à-vis* the Court.

16. Convention on the Prevention and Punishment of the Crime of Genocide, *adopted unanimously* 9 December 1948, *entered into force* 12 January 1951; 78 UNTS 277.



appeared to have been conscious of the need to avoid opening up controversy on issues that already claimed a high level of consensus. As a negative consequence, the weaknesses and ambiguities in the Genocide Convention definition have been carried over into the Rome Statute, except for one notable improvement.

In terms of weaknesses and ambiguities, the Article 6 definition does not clear up the perennial question ‘how many persons have to be killed before it qualifies as genocide?’ Some would see this omission as a major defect in terms of the level of precision required of criminal law. However, the question of numbers seems to start from the incorrect premise that there must be at least a single person killed before an act of genocide has been committed. It should be kept in mind that the legal definition of genocide cannot be equated with the use of the word ‘genocide’ in common parlance. The fact that the definition refers to *any one* of the less extreme acts that also count as acts of genocide, namely, causing serious bodily or mental harm, deliberately inflicting on the group conditions of life calculated to bring about its destruction, the imposition of measures intended to prevent births and the forcible transfer of children of the group to another group, makes clear enough, in legal terms, that not a single person has to die for an act of genocide to have been perpetrated. This interpretation squares also with the purpose of the Genocide Convention which is to prevent genocide from being carried out, not only to punish perpetrators once the world has stood by and watch them do it. On the other hand, one can imagine that the Judges of the International Criminal Court would exercise a healthy dose of caution when considering whether to make a finding that an act of genocide has been committed in a particular instance, given that genocide is recognized to be such a serious crime.

Debate over the definition of genocide has also ensued over what constitutes ‘a national, ethnical, racial or religious group’. During the drafting of the Genocide Convention, the concern was to prevent recurrence of the extermination policies planned and executed by the Nazi German Government that targeted a specific community distinguished by relatively immutable and stable attributes. That is why the Genocide Convention does not protect political groups, and would not apply, for example, to the case of Government crackdowns on political dissident movements, unless the question of such characteristics as race, religion and ethnicity were involved.<sup>17</sup>

Some might question whether there is a real difference between politically motivated killings perpetrated by Government agents, and killings targeting a specific national, ethnic, racial or religious group, since in both cases the individual is just as dead and the group perhaps similarly threatened. However, the international community recognizes 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

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17. See J. Kunz, ‘The United Nations Convention on Genocide’, 43 *American Journal of International Law* (1949), 738–746; L. Leblanc, ‘The Intent to Destroy Groups in the Genocide Convention: Proposed U.S. Understanding’, 78 *American Journal of International Law* (1949), 369–385; N. Robinson, *The Genocide Convention: a Commentary* (New York 1960); and G.J. Andreopoulos (ed.), *Genocide: ‘Conceptual and Historical Dimensions’* (Philadelphia 1994).

difference. Because of this special vulnerability, it is therefore warranted to provide such groups with specific protection – a concern the legal definition of genocide appropriately reflects.

Fortunately, the Rome Conference did not incorporate the contents of Article III of the Genocide Convention into the Rome Statute. Article III of the Convention broadens the range of punishable acts to include, in addition to genocide, ‘conspiracy to commit genocide’, ‘direct and public incitement to commit genocide’, ‘attempts to commit genocide’ and ‘complicity in genocide’. The terms of Article III, combined with the rather broad definition of ‘genocide’ in Article II, would have considerably lowered the threshold of the Court beyond reasonable limits. For example, a plain reading of Articles II and III might lead one to the logical conclusion that the mere conspiring to cause mental harm to some members of a religious group, counts as genocide. Would this mean that planning a meeting to criticize the mind-bending activities of a religious cult would constitute an act of genocide? With the omission of Convention Article III from the Rome Statute, these kinds of frivolous issues are avoided and the Court is left with the discretion to apply Article 6 in a manner consistent with the principles and purposes of international criminal law.

On the other hand, there may be clear cases of conspiracy to commit genocide, for example, which should be dealt with by the Court. The Article 3 contents of the Genocide Convention may still be applied in one or both of two ways, notwithstanding the absence of any mention of a conspiracy in Article 5. First, these elements may be inserted into Article 9 of the Statute on Elements of Crimes, should the Assembly of States Parties so decide. Alternatively, the Court could apply Article 21(1)(b) broadly to bring in these elements through the process of adjudication.

#### 4. CRIMES AGAINST HUMANITY: ARTICLE 7

Although considered one of the ‘core crimes’, the definition and scope of the legal category of ‘crimes against humanity’ became the subject of considerable debate at the Rome Conference. Unlike genocide, defined in relatively clear legal terms in a single multilateral treaty – the Genocide Convention, 1948 – ‘crimes against humanity’ had suffered some serious defects during its birth in the Nuremberg Charter, of which one was its unnatural attachment to its Siamese twin, the legal category of ‘war crimes’.<sup>18</sup> Ironically, however, the delayed maturation of the legal norms prohibiting crimes against humanity allowed the international community better to clarify, expand and shape them, taking fuller account of relevant norms of contemporary general international law.

At the Rome Conference, Delegations expressed differing views as to whether norms prohibiting crimes against humanity apply only to situations of international armed

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18. For an overview of the early development of the legal category of ‘crimes against humanity’ and its relation to ‘war crimes’ as incorporated in the Nuremberg Charter, see, L.S. Sunga, *Individual Responsibility in International Law for Serious Human Rights Violations* (Dordrecht 1992), Chapter II (4) and (5). See further Ch. Bassiouni, *Crimes against Humanity in International Criminal Law* (Dordrecht 1992).



conflict, or instead, also to situations of non-international armed conflict and even to situations which qualify legally as 'peace-time'.

Delegations also took different positions on what threshold, if any, should apply to crimes against humanity before the Court could seize jurisdiction. A low threshold could mean that the Court would be flooded by an endless stream of isolated violations that posed little or no threat to international peace and security. On the other hand, a very high threshold could prevent the Court from seizing jurisdiction over cases of massive violations, even where all other jurisdictional requirements had been met. Finally, Delegations sounded some discordant notes over specifically which kinds of acts ought to figure within the legal category of 'crimes against humanity' and how they should be defined.

Article 7(1) of the Rome Statute lists the acts which come within the legal definition of 'crimes against humanity', and Article 7(2) sets out definitions of key terms to guide the Court's adjudication on any crime against humanity. The general scope of application and the issue of the threshold to be reached before the Court can seize jurisdiction with respect to crimes against humanity, are addressed in the chapeau to Article 7(1).

#### **4.1. The Chapeau to Article 7(1)**

Article 7(1) provides that:

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

and then lists: murder; extermination; enslavement; deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced 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 as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; 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.

The phrase 'For the purposes of this Statute' disconnects, or at least dissociates, the Statute's definition of 'crimes against humanity' from other definitions of the term that have been used in the past, may currently be in use, or may be developed in future, in contexts not directly related to the operation of the International Criminal Court. This approach allows the Court to apply the term 'crimes against humanity' in ways that reflect the more contemporary expression of the will of the international community as manifested at the Rome Conference, rather than to become encumbered with either its very unclear and confused Nuremberg Charter formulation, or

its unreasonably narrow construction in the Security Council's Statute of the International Criminal Tribunal for the Former Yugoslavia.<sup>19</sup>

At the Rome Conference, many Delegations expressed their desire to reserve the Court's authority for the more serious kinds of cases. On the one hand, 'crimes against humanity' had to be sufficiently narrow to admit into the Court's jurisdiction only those cases that pose a threat to international peace and security, rather than to sweep in all sorts of cases left unprosecuted from national jurisdictions. On the other hand, 'crimes against humanity' had to be defined broadly enough to cover crimes committed by agents of the state against its own nationals and crimes committed outside situations of armed conflicts – which were not covered by norms on war crimes. Indeed, this was a major reason why, in 1945, the Allied Powers recognized that a separate new category of 'crimes against humanity' had to be inserted into the Nuremberg Charter to cover acts committed by the Nazi German Government against its own nationals.

As drafted, the chapeau to Article 7(1) is broad in that it omits any reference to 'armed conflict'. Some Delegations had argued consistently that the Court should not be vested with any jurisdiction over cases involving non-international armed conflict situations. However, the majority recognized that were the Court restricted to operating only with respect to international armed conflict, not only could it be prevented from acting in the great number of civil wars, which in recent decades have become far more frequent than international war, and just as bloody, but also to any situation *status mixtus* i.e. any armed conflict that manifested both international and non-international aspects. Moreover, the Court would have been assigned the unenviable task of having to decide upon its own jurisdiction according to the basic international/non-international armed conflict distinction that determines the application of international humanitarian law, but is not defined by it. Thus, the chapeau to Article 7(1) wisely avoids any specific reference to 'armed conflict' which leaves 'crimes against humanity' broad enough to apply to situations of armed conflict, situations that may qualify legally as 'peace-time' and indeed any other situation beyond or in between, subject to the other limiting conditions set out in the chapeau.

The Article 7(1) chapeau limits the application of 'crimes against humanity' in three main ways.

First, a crime against humanity is not deemed to come within the jurisdiction of the Court unless it were committed 'as part of a widespread or systematic attack'. In other words, a case of murder, to take an example, will not qualify as a crime against humanity unless it was perpetrated in the context of an attack that is 'widespread' i.e. that involves a certain number of persons or involves its commission over a wide territorial area. Alternatively, a crime against humanity may be committed if it formed part of a 'systematic' attack i.e. one that involved planning and organization.

Second, the act will not qualify as a crime against humanity unless, in addition to its being committed as part of a widespread or systematic attack, the attack was directed against a civilian population. Article 7(2)(a) provides that:

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19. See further Sunga *supra* note 3 at pp. 159–163.

‘Attack against any civilian population’ means a course of conduct involving the multiple commission of acts referred to or against any civilian population, pursuant to or in furtherance of a state or organizational policy to commit such attack.

The phrase in furtherance of a state or organizational policy to commit such attack ‘indicates that non-government actors are exposed to individual criminal responsibility wherever the acts they may have committed were associated either with state policy or an organizational policy’ (whether a state policy or not). This formula has the considerable merit of keeping out cases not connected to situations characterized by a serious level of organized violence and which involve only spontaneous or sporadic disturbances. At the same time, as discussed above, the absence of any specific reference to ‘armed conflict’ relieves the Court from embroiling itself in the highly technical – and potentially politically contentious – burden of having to fit complex cases that may come before it, into theoretically neat and distinct legal categories of armed conflict.

Third, the acts must also have been committed ‘with knowledge of the attack’. This raises two subsidiary issues: what level of ‘knowledge of the attack’ does the alleged perpetrator have to have had before his or her act may be deemed to have been perpetrated ‘pursuant to or in furtherance of a State or organizational policy to commit such attack’? and as an evidentiary matter, does the Prosecutor have to prove actual knowledge on the part of the alleged offender that an attack had occurred, was occurring or was planned to occur, or something less?

One can imagine cases where the alleged offender was intimately involved with the planning or execution of an attack, and as such, should be brought before the International Criminal Court for such crime, let us say, for the murder of a civilian. Such cases might be relatively unproblematic.<sup>20</sup>

On the other hand, suppose an accused person of Group A, kills a civilian member of Group B, perhaps aware of a background state of hostilities in which Group A militia were attacking members of Group B. However, suppose the accused committed the murder more for motives personal (such as jealousy or revenge) rather than political. Should the accused be prosecuted by the Court? The purpose of the International Criminal Court is to enforce individual criminal responsibility for the commission of particularly serious crimes, not to substitute for domestic courts in ordinary murder cases. Thus, if the murder was committed for reasons wholly unconnected to hostilities in course, then the case should perhaps be left to the domestic courts.

However, determining motive and ‘knowledge of the attack’ could raise difficult issues concerning the Prosecutor’s burden of proof. If ordinary murder cases are not to be prosecuted by the International Criminal Court, then the accused might have a very strong incentive, depending upon the facts, to claim that, even if he or she could be proved to have committed the murder in question, it was perpetrated for purely

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20. Plans by military or paramilitary organizations to carry out a widespread or systematic attack require extensive coordination, frequently involving the use of maps, order of battle (or attack) plans, written logistical, ammunition and supply details, and telecommunicated messages. All these are susceptible to interception, being recorded and adduced as evidence.

personal motives, not pursuant to or in furtherance of any state or organizational policy and as such, does not come within the Court's jurisdiction. Indeed, the accused could disclaim any knowledge of any attack and argue that it was therefore impossible to have acted pursuant to or in furtherance of it.

The phrasing of the chapeau does not seem to require the Court to 'get inside the head' of the alleged perpetrator. 'Knowledge of the attack' must be interpreted as directing the Court to apply an objective test as to whether the alleged perpetrator 'knew or ought to have known', according to 'reasonable person' standard, whether in fact there was an attack. It would appear too high a threshold to impose upon the Prosecutor the burden of proof that the accused actually knew the act was committed pursuant to or in furtherance of a state or organizational policy to commit an attack against a civilian population. Otherwise, Article 7(1) might have been phrased along the lines of: 'when committed knowingly as part of a widespread or systematic attack'.

## **4.2. Specific Acts Prohibited as 'Crimes Against Humanity'**

### *4.2.1. Paragraphs (a-f), (h-i) and (k)*

Paragraphs (a-f), (h-i) and (k) of Article 7(1) may be conveniently treated together as these provisions follow closely those of Article 6(c) of the Nuremberg Charter, 1945, which for the first time, provided an international law definition of 'crimes against humanity'. The Charter's Article 6(c) lists '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'. Articles 5 and 3 of the Statutes of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, respectively, define 'crimes against humanity' by repeating the Nuremberg and Tokyo Charter definitions, namely, murder, extermination, enslavement, deportation, but then depart slightly from the Nuremberg formula of 'persecutions on political, racial *or* religious grounds' to 'persecutions on political, racial *and* religious grounds'. The formula of the two *ad hoc* International Criminal Tribunal Statutes introduces the requirement that *all three* criteria (political, racial and religious) have to be met – a much narrower formula than that in general international law, and therefore a rather retrogressive development.

The Rome Statute follows the Nuremberg and Tokyo Charters and Former Yugoslavia and Rwanda Statutes in the crimes listed, but in paragraph (d), adds to the word 'deportation' the words 'or forcible transfer of population'. This constitutes an important refinement of the law, since 'deportation' may be interpreted by the Court to apply only to individual cases, subject to the 'widespread or systematic attack' conditions of the chapeau. However, the words 'forcible transfer of population' make amply clear that the forced relocation of a group of persons, even within the territory of a single state, qualifies as a crime against humanity within the jurisdiction of the International Criminal Court.

Similarly, in paragraph (h), the Rome Statute expands the scope of the crime of persecution beyond that expressed in the Nuremberg and Tokyo Charters and the narrower Yugoslavia and Rwanda Tribunal Statutes to:

Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.

Paragraph (h) is probably the weakest element of the Rome Statute's definition of 'crimes against humanity' from the point of view of respect for the principles *nullum crimen sine lege, nulla poena sine lege*, for three reasons. First, paragraph (h) is cast in overly broad terms, employing the phrase 'any identifiable group or collectivity', terms much broader than those used in Article 6 of the Rome Statute, for example. Second, paragraph (h) is non-exhaustive, referring to 'other grounds that are universally recognized as impermissible under international law'. In this connection, even the term 'impermissible' is rather vague since it seems to connote more a factual, descriptive meaning as to what is or is not permitted to happen. It would have been better to have employed the term 'prohibited' – the standard normative term indicating the forbidding, banning or outlawing of a particular kinds of act. Third, the placement of 'persecution' in Article 7(1), as a substantive element of 'crimes against humanity', seems a little illogical because it refers to persecution 'in connection with any act referred to in this paragraph', i.e. it appears self-referential, and in the context, even tautological. Fortunately, the words, 'or any crime within the jurisdiction of the Court' salvages the crime of persecution by also directing the Court to relate this norm to any crime listed in Articles 6, 7 or 8, of the Rome Statute.

The problem of the placement and role of 'persecution' in the list of crimes may derive from an ambiguity basic to the legal definition of 'persecution'. If 'persecution' is to be understood more as the *way* in which violations are perpetrated (a procedural facet) and less as an independent and discrete crime under international law (a substantive norm), then the targeting of an identifiable group should simply have been incorporated as part of the chapeau to the definitions of 'crimes against humanity', and perhaps 'war crimes', not as a separate substantive element. Incidentally, this very same inconsistency appears also in Article 21 of the ILCs 1991 draft Code against the Peace and Security of Mankind.

Paragraph (f), listing 'torture' as a crime against humanity, follows the examples of the Yugoslavia and Rwanda International Criminal Tribunal Statutes, by referring simply to 'torture'. In contrast, neither the Nuremberg or Tokyo Charter mentions 'torture', but rather refer to 'ill-treatment' in the provisions on war crimes, and 'other inhumane acts' in provisions on crimes against humanity.

In Article 7(2)(e), the Rome Statute defines 'torture' to mean:

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

This definition of 'torture' is to be preferred over that of Article 1 of the UN Torture

Convention, 1984,<sup>21</sup> because the Torture Convention applies only to cases ‘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’, whereas the Rome Statute refers only to situations relating to ‘a person in the custody or under the control of the accused’ – a far broader provision in terms of jurisdiction *ratione personae* that relieves the Court of having to establish in particular cases before it the problematic question as to whether the accused was acting pursuant to or with the colour of official capacity.

Unfortunately however, the Rome Statute definition of torture carries over the Torture Convention’s exception according to which torture does not encompass any ‘pain or suffering arising only from, inherent in or incidental to, lawful sanctions’, leaving States a wide scope to define away torture in their jurisdictions through domestic laws authorizing sanctions of a cruel or inhumane character. One way out of this quandary would be for the Court to determine the ‘lawfulness’ of the sanctions, not solely according to criteria set by the domestic law of the State in question, but also against the background of customary international human rights standards.

Interestingly, paragraph (k) referring to ‘other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health’ is not connected to ‘torture’ in paragraph (f). Particularly as paragraph (k) comes as the final paragraph of the article, rather than as part of, or even immediately following paragraph (f) on torture, this indicates the intention of the drafters to introduce into paragraph (k) a non-exhaustive aspect to the whole of Article 7(1).

‘Enforced disappearance of persons’ in paragraph (i) represents a welcome recognition of the severity of this phenomenon. Indeed, in 1992, the General Assembly considered that enforced disappearance undermines the deepest values of any society committed to respect for the rule of law, human rights and fundamental freedoms, and that the systematic practice of such acts is of the nature of a ‘crime against humanity’ in the preamble to the Declaration on the Protection of all Persons from Enforced Disappearance.<sup>22</sup> The specific phenomenon of enforced disappearance did not appear within the category of ‘crimes against humanity’ in the Nuremberg or Tokyo Charters, the two *ad hoc* International Criminal Tribunal Statutes, or even in the codification work of the ILC.

#### 4.2.2. Paragraph (g) on Crimes of Sexual Violence

For the most part, international criminal law norms have been unconscionably silent on crimes of sexual violence. Paragraph (g) of the Rome Statute goes a long way in rectifying this major shortcoming. Articles 5(g) and 3(g) of the Statutes for the International Criminal Tribunals for the Former Yugoslavia and Rwanda, respectively, include rape as a crime against humanity but threatened to narrow unduly the appli-

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21. Adopted by consensus by the General Assembly 10 December 1984, opened for signature 4 February 1985, entered into force 26 June 1987.

22. General Assembly resolution 47/133, adopted 18 December 1992.



cation of norms prohibiting rape by subsuming ‘rape’ under the overly restrictive chapeaux in those Statutes. It is to be recalled that the Former Yugoslavia Statute linked ‘crimes against humanity’ to ‘armed conflict’, a connection that does not appear even in Control Council Law No. 10 of 20 December 1945, the 1954 ILC draft Code, or the definitions of genocide and apartheid in the Genocide Convention, 1948, or the Apartheid Convention, 1973,<sup>23</sup> respectively, which expanded the definition of ‘crimes against humanity’.

Significantly, paragraph (g) is not limited to rape, but sweeps in a number of other crimes, such as sexual slavery and enforced prostitution and forced pregnancy, widely perpetrated, for example, by occupying Japanese forces during the Second World War, more recently, in the armed conflicts that took place in the former Yugoslavia and Rwanda, and in many other theatres of war that could be mentioned. By the words, ‘or any other form of sexual violence of comparable gravity’, paragraph (g) maintains flexibility, without leaving the door completely open, because of the words ‘of similar gravity’ – which direct the Court to seize jurisdiction over comparable acts on the basis of reasoning by analogy.

#### 4.2.3. *Paragraph (j) on Apartheid*

The crime of apartheid does not appear in the Nuremberg or Tokyo Charter definitions of ‘crimes against humanity’ and in neither of the International Criminal Tribunal Statutes, since these instruments were designed to address other kinds of situations. However, apartheid has received a substantial level of international recognition as a crime against humanity, as reflected in the UN Apartheid Convention, 1973, which qualifies it as such.

The definition of the crime of apartheid in Article 7(2)(j) of the Rome Statute constitutes a major improvement over that of Article 1 of the Apartheid Convention, and even that of the ILCs 1991 draft Code, Article 20(2) of which had introduced greater precision. The Rome Statute’s definition refers to ‘an institutional régime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that régime’ as the context in which any of the other acts listed in Article 7(1) as ‘crimes against humanity’ may come within the Court’s jurisdiction, omitting the long, vague list of acts that appears in the Apartheid Convention.

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23. By resolution 3068 (XXVIII) adopted by the General Assembly 30 November 1973, *opened for signature*, as the International Convention on the Suppression and Punishment of the Crime of Apartheid.

## 5. WAR CRIMES: ARTICLE 8

### 5.1. The Chapeau to Article 8(1)

Article 8(1) delimits the entire application of Article 8, much in the same way as do the chapeaux in Articles 6 and 7, by establishing certain threshold criteria before the Court can seize jurisdiction. Article 8(1) provides 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’.

The phrase ‘in particular when committed as a part of a plan or policy’ implies that the Court shall assume jurisdiction only over cases involving a certain level of organization and command responsibility in fact (not necessarily related to a State). Conversely, acts that may qualify as war crimes under international humanitarian law or laws of war, may not come within the statutory definition of ‘war crimes’ if committed only on an isolated basis, without the sanction of any higher authority within a chain of command. While a few Delegations and some human rights NGOs at the Rome Conference had hoped for a lower threshold, the majority of Delegations expressed concern that were the Court conferred jurisdiction over all cases of war crimes, whether or not committed as part of a plan or policy, it would soon be swamped with cases arising in sundry countries, conflicts and contexts, pulled this way and that. Better to reserve to the attention and resources of the Court situations involving a genuine breach or threat of international peace and security where perhaps the Court could play a more constructive deterrent role, rather than to chase after perpetrators of less significance to conflict prevention and national reconciliation. Indeed, the requirement of a connection of the act to a plan or policy is known in international humanitarian law, in particular, Article 1(1) of Protocol II which provides that the Protocol shall apply to conflicts:

which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized group which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

The reference in Article 8(1) to ‘large-scale commission of such crimes’ is disjunctive so that even if the acts in question were not committed as part of a ‘plan or policy’, they may still come within the Court’s jurisdiction where committed on a sufficiently wide scale.

Article 8(2) spells out the acts that fall within the Statute’s definition of ‘war crimes’ in four categories. With regard to international armed conflict, Article 8(2) covers first, Geneva grave breaches Convention and second, other serious violations. Concerning non-international of the armed conflict, Article 8(2) covers serious violations of Article 3 common to the four Geneva Conventions and second, other serious violations.

## 5.2. International Armed Conflict

### 5.2.1. *Grave Breaches of the Geneva Conventions, 1949*

Article 8(2)(a) lists grave breaches of the Geneva Conventions as ‘war crimes’ to be any of the following acts when committed against ‘persons or property protected under the provisions of the relevant Geneva Convention’: wilful killing, torture or inhuman treatment, including biological experiments; wilfully causing great suffering, or serious injury to body or health; extensive destructive and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; compelling a prisoner of war or other protected person to serve in the forces of a hostile power; wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial; unlawful deportation or transfer or unlawful confinement; and taking of hostages. These words come from the provisions set out in Article 50 of Convention I, 51 of Convention II, 130 of Convention III, and 147 of Convention IV.

The application of the grave breaches of the Geneva Conventions to situations of international armed conflict only, is in line with the Appeals Chambers Judgement of the International Criminal Tribunal for the Former Yugoslavia in the *Tadić Case* which overruled the Trial Chambers on this point. The Majority in the Appeals Chambers held that the armed conflict in question had to have an international element before the grave breaches provisions could apply.<sup>24</sup>

### 5.2.2. *Other Serious Violations of the Laws and Customs Applicable in International Armed Conflict*

Article 8(2)(b) brings within the jurisdiction of the Court certain kinds of acts committed in the context of international armed conflict not already covered by Article 8(2)(a) devoted to the grave breaches provisions of the Geneva Conventions, 1949.

From the point of view of drafting, it would seem to have been preferable were the Rome Conference had come up with a consolidated set of provisions on war crimes which could have brought greater coherence to the field, rather than to follow the *lex lata* so closely. Article 8, as structured, incorporates crimes from the Geneva

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24. Despite the lack of any reference to ‘international armed conflict’ in Article 2 of the Statute of the International Criminal Tribunal for the Former Yugoslavia, as well as growing recognition – including that indicated by the Government of the United States submitted to the Tribunal in an *amicus curiae* brief - that the grave breaches provisions of the Geneva Conventions should be recognized to apply both to situations of international and non-international armed conflict, the Majority in the Appeals Chamber held they did not. The Majority opined that: ‘The international armed conflict requirement was a necessary limitation on the grave breaches system in light of the intrusion on state sovereignty that such mandatory universal jurisdiction represents. States Parties to the 1949 Geneva Conventions did not want to give other states jurisdiction over serious violations of international humanitarian law committed in their internal armed conflicts – at least not the mandatory universal jurisdiction involved in the grave breaches system’. See *The Prosecutor of the Tribunal v. Dusko Tadić*, Decision of the Appeals Chamber on the Defense Motion of the Interlocutory Appeal concerning Jurisdiction at 73 (Case No. IT-94-1-D) of 2 October 1995 at para. 80. *But see also* the Dissenting Opinion of Judge Abi-Saab on this point.

Conventions grave breaches provisions and then adds provisions fashioned from other sources. This makes the Statute's war crimes provisions on international armed conflict rather long – with 34 subparagraphs – and also increases the risk of unnecessary overlap as a single act might in some cases trigger the application of more than one provision. For example, a military air strike by one state directed against an undefended village in the territory of another state that employed the use of Agent Orange defoliants and bombs might conceivably violate subparagraphs (i), (ii), (iv), (v) and (xvii) of Article 8(2)(b) as well as subparagraphs (iii) and (iv) of Article 8(2)(a). Although multiple-count indictments are not at all uncommon, the experience of the two *ad hoc* Tribunals indicates that the Prosecution may resort to 'throwing the book' at the accused i.e. indicting the accused under counts that look even remotely connected to the act in question, with the hope that one or more charge will stick. Such tactic may diminish the capacity of the accused to launch an effective defence and invite confused interpretation from the Bench as well. Secondly, less economic formulations are frequently less comprehensible to commanders and soldiers alike – a factor that may hinder general compliance on the part of even the most co-operative of States Parties to the Statute.

On the other hand, the Statute's war crimes provisions were naturally more sensitive for Governments, particularly Departments of Defense, than were provisions on genocide and crimes against humanity, since war crimes concern in particular the kinds of acts committed by members of the armed forces. By sticking closely to the traditional conventional sources, Delegations to the Rome Conference and Capitols could reassure themselves that the draft Statute provisions on war crimes did not stray beyond the relevant *lex lata*. Moreover, by adding 'other serious violations of the laws and customs applicable in international armed conflict', the Statute's war crimes provisions could be brought more up-to-date by drawing upon provisions set out in Protocols I and II which supplement the Geneva Conventions.

Turning to the specific provisions of Article 8(2)(b), it is valuable to recall that the Hague Conventions and Regulations of 1899 and 1907 were adopted to 'revise the laws and general customs of war . . . for the purpose of modifying their severity as far as possible'. Moreover, Protocol I not only supplements the four Geneva Conventions, 1949, but to a significant degree, effects a convergence between Geneva Law and The Hague Law, i.e. between international humanitarian law and the laws and customs of war. Thus, in drawing primarily from provisions set out in Protocol I, Article 8(2)(b) covers much of the classic laws and customs of war, and therefore, its chapeau aptly refers to 'other serious violations of the laws and customs applicable in international armed conflict'.

Subparagraphs (i), (ii), (v) and (vi), derive from the provisions of Article 85(3) of Protocol I; subparagraph (iii), the Convention on the Safety of United Nations and Associated Personnel, 1995;<sup>25</sup> subparagraph (iv), Articles 35(3) and 55 of Protocol I; subparagraph (vii), Article 38(2) of Protocol I; subparagraphs (viii–ix), Article 85(4)

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25. Convention on the Safety of United Nations and Associated Personnel, *adopted unanimously*, 17 February 1995; A/RES/49/59.

of Protocol I;<sup>26</sup> subparagraph (x), Articles 11(1) and 11(2) of Protocol I; subparagraph (xi), Article 23(b) of the Hague Convention No. IV Regulations; subparagraph (xii), Article 40 of Protocol I and Article 23 (d) of the Hague Convention No. IV Regulations; subparagraph (xiii), Article 53 of Geneva Convention IV and Articles 23(g) and 46 of the Hague Convention No. IV Regulations; subparagraph (xiv), Article 23(h) of the Hague Convention No. IV Regulations; subparagraph (xv), Article 51 of Geneva Convention IV; subparagraph (xvi), Article 33 of Geneva Convention IV and Articles 28 and 47 of the Hague Convention No. IV Regulations; subparagraph (xvii), Article 23(a) of the Hague Convention No. IV Regulations; subparagraph (xviii), the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare;<sup>27</sup> subparagraph (xix), the Declaration concerning Expanding Bullets;<sup>28</sup> subparagraph (xx), Article 35(2) of Protocol I and Article 23(e) of the Hague Convention No. IV Regulations; subparagraph (xxi), Article 75(2)(b) of Protocol I; subparagraph (xxii), Article 76(1) of Protocol I; subparagraph (xxiii), Article 51(7) of Protocol I; subparagraph (xxiv), Article 12(1) of Protocol I; subparagraph (xxv), Article 54(1) of Protocol I; and subparagraph (xxvi), Article 77(2) of Protocol I.

Article 8(2)(b) leave out some elements of Protocol I. For example, Article 85(4)(b) of Protocol I concerning an unjustifiable delay in the repatriation of prisoners of war or civilians does not count as a war crime in the Rome Statute. The provision in Article 85(4)(c) of Protocol I concerning ‘practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity based on racial discrimination’ is not reflected anywhere in Article 8, but figures in Article 7(2)(h) as a crime against humanity. The Protocol I guarantee in Article 85(4)(e) of the right to fair and regular trial, does not figure in the Statute’s paragraph 8(2)(b), but is already covered in paragraph 8(a)(vi). The norms provided for in Articles I, II and III of the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques<sup>29</sup> are not reflected in the Rome Statute, except perhaps indirectly in Article 8(2)(b)(iv).

As for prohibited weapons, it is remarkable that the Rome Conference included in the Statute’s definition of ‘war crimes’ the use of poison, poisoned weapons, asphyxiating or poisonous gases as well as expanding or flattening bullets, but could not agree to the inclusion of nuclear weapons,<sup>30</sup> non-detectable fragmentation weapons,<sup>31</sup>

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26. Subparagraph (ix) also draws upon the Convention for the Protection of Cultural Property in the Event of Armed Conflict, *adopted* in The Hague, 14 May 1954.

27. *Adopted* in Geneva, 17 June 1925.

28. *Adopted* in The Hague, 29 July 1899.

29. *Adopted* by the UN General Assembly as resolution 31/72 of 10 December 1976.

30. *See* Legality of the Threat or Use of Nuclear Weapons, General List No. 95 (ICJ Advisory Opinion) of 8 July 1996, in which the Majority ruled that the threat or use the nuclear weapons is prohibited in international law, except possibly in an extreme case of self-defense in which the survival of the State is at stake.

31. *See* Protocol on Non-Detectable Fragments (Protocol I to the Geneva Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects), *adopted* in Geneva, 10 October 1980.

landmines,<sup>32</sup> incendiary weapons,<sup>33</sup> or blinding laser weapons.<sup>34</sup> Subparagraph (xx) is, however, phrased in a general way, referring to the employment of:

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, provides that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123

leaving open the opportunity to an Assembly of State Parties to the Statute to consider additions to the list of prohibited means and methods of warfare as they may evolve over time.

The majority of Delegations were firmly behind inserting in the Statute the prohibition of the use of nuclear weapons, but deferred to the equally firm opposition of the nuclear powers – States whose positions could not be ignored.<sup>35</sup>

### **5.3. Non-international Armed Conflict**

#### *5.3.1. Serious Violations of Article 3 Common to the Four Geneva Conventions, 1949*

Article 8(2)(c) incorporates the contents of Article 3 common to the four Geneva Conventions with some minor changes. First, it applies only to serious violations, affording the Court the discretion not to seize jurisdiction over mere technical infractions of common Article 3. Second, the chapeau of Article 8(2)(c) drops the common Article 3 phrase ‘without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria’, which in any case still operates,

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32. See Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II to the Geneva Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects), *adopted* in Geneva, 10 October 1980; and Convention on the Prohibition of the Use, Production, Transfer and Stockpiling of Anti-Personnel Landmines and on Their Destruction, *adopted* in Oslo, 18 September 1997.

33. See Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III to the Geneva Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects), *adopted* in Geneva, 10 October 1980.

34. On 13 October 1995, the Vienna Review Conference of the States Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects *adopted* pursuant to Article 8.3(b) of the Convention an additional Protocol entitled ‘Protocol on Blinding Laser Weapons (Protocol IV)’.

35. India, in spite of its Government’s testing of nuclear weapons on 11 and 13 May 1998 and its official declarations that it was henceforward to be considered a member of the nuclear club, pushed strongly for the inclusion of the use of nuclear weapons in Article 8 of the Statute. Delegates and Observers could only speculate on India’s motives for having taken such an apparently paradoxical position.



thanks to the more comprehensive non-discriminatory clause proposed by the Canadian Delegation during the final session of the March–April 1998 Preparatory Committee, adopted as Article 21(3) of the Statute,<sup>36</sup> which governs the Court’s application of law in general.

In common Article 3, the prohibition of hostage-taking follows directly after ‘violence to life and person . . . and torture’, and then is listed ‘outrages upon personal dignity, in particular, humiliating and degrading treatment’. The Statute reverses the order of paragraphs (b) and (c) as they appear in common Article 3 for better coherence. The Statute incorporates word-for-word the contents of subparagraph (d) of common Article 3(1), but drops the phrase ‘by civilized peoples’ – a residue of old colonialist attitudes. Of course, the parts of common Article 3 pertaining to its implementation within the context of the rest of the Geneva Conventions have been left out of the Statute since they bear no direct relation to the purposes of international criminal law. Finally, the Statute’s Article 8(2)(d) incorporates the limiting condition set out in Article 1(2) of Protocol II, that excepts from the Court’s jurisdiction ‘situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature’.

5.3.2. *Other Serious Violations of the Laws and Customs Applicable in Non-International Armed Conflict*

Subparagraphs 8(2)(e)(i–vii) correspond to Article 8(2)(b) subparagraphs (i), (xxiv), (iii), (ix), (xvi), (xxii) and (xxvi) respectively. However, paragraph (e) adds, in paragraph (viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand. Subparagraphs 8(2)(e)(ix–xii) correspond to Article 8(2)(b) subparagraphs (xi), (xii), (x) and (xiii) respectively. Subparagraphs (ii), (iv), (v), (vi), (vii), (viii), (xiv), (xv), (xvii), (xviii), (xix), (xx), (xxi), (xxiii), (xxiv) and (xxv) of Article 8(2)(b) were not incorporated into Article 8(2)(e). Article 8(2)(f) employs the limiting condition that appears in Article 1(2) of Protocol II.

Article 8(3) provides that:

Nothing in paragraphs 2(c) and 2(d) shall affect the responsibility of a Government to maintain or establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.

The presence of paragraphs 2(c) and 2(d) in the Rome Statute represents the willingness of the vast majority of states to recognize international criminal responsibility for certain kinds of acts even in cases of armed conflict situations occurring within their own sovereign territories. Read together with Article 8(3), it seems delegations

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36. Article 21(3) reads: ‘The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender, as defined in Article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.’

managed to strike a nice balance by reaffirming the responsibility, and indeed the right, of the Government to exercise force at home in the interests of its national security, political independence and territorial integrity.

## 6. ELEMENTS OF CRIMES: ARTICLE 9

A number of Delegations, particularly those of certain common law countries, including that of the United Kingdom, proposed that there should be in the Statute a provision clarifying the elements of the various crimes coming within the jurisdiction of the Court. Leaving the Court without sufficient guidance from the Statute to interpret the crimes listed therein was felt by some delegations even to violate the principles of *nullum crimen sine lege, nulla poena sine lege*.

As discussed above, difficult issues may arise, such as whether a person accused of having committed a crime against humanity had to have known that the act he or she committed formed part of an attack, or merely, that there was an attack in progress. Either way, the Statute is silent on what level of knowledge of surrounding events, if any, would be necessary to fulfill the required criminal intent. Similarly, the crime of genocide places substantial emphasis on the *mens rea* of the accused, even to the extent that possibly not a single person has to have been killed before an act of genocide has taken place, an argument raised above.

At the Rome Conference, many Delegations expressed doubts as to whether a provision in the Statute spelling out specific elements of crimes was really necessary. They felt generally that the definitions of crimes were sufficiently clear as drafted and that arriving at such a provision could delay the entry into force of the Statute. However, out of deference to those delegations which insisted upon its insertion, the Conference agreed to adopt Article 9 setting up a procedure by which a provision on the elements of crimes can be adopted by a two-thirds majority of the Assembly of States Parties.

## 7. THE RELATION BETWEEN THE ROME STATUTE'S DEFINITION OF CRIMES AND GENERAL INTERNATIONAL CRIMINAL LAW: ARTICLE 10

Article 10 of the Statute provides that: 'Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute'.

Article 10 is intended to ensure that general international law remains undisturbed by the Statute. In this respect, Article 10 leaves whatever *ad hoc* international criminal tribunals as may exist, such as those for the former Yugoslavia and Rwanda, or those that may be created in future, explicit freedom – absent any other applicable norms such as may arise from their own statutes on this point – not to consider themselves bound by the Rome Statute.

However, if and when the Statute were to enter into force, the International Criminal Court would almost certainly be the principal institution for the enforcement of inter-

national criminal law and justice. Naturally, notwithstanding the words of Article 10, the mere fact that the Statute incorporates in its list of crimes, some categories of acts and not others, will likely mean that those left out, if not enforced by other mechanisms, may be marginalized, and eventually fade away.

The Rome Conference was not merely a forum in which states took positions and then voted on a draft document to create the Statute for the International Criminal Court. It was a process in which representatives of Governments of almost all the world's states concentrated their individual energies and efforts to understand the pitfalls of international criminal law and the promise of a permanent International criminal court, from each of their unique points of view. More significantly, the Rome Conference was a process in which states could explore what interests and concerns they shared as regards the threat and reality of international crime, and how, through international cooperation and good faith, they could come to common understandings and common solutions. Thanks to the vision and political will of the great majority of Delegations, the Rome Conference succeeded in the creation of a solid platform upon which to build the centrepiece for a fair and effective system of international criminal law and justice – the International Criminal Court.