

THE CURRENT LAW OF CRIMES AGAINST HUMANITY

*An analysis of UNTAET Regulation 15/2000*

The following paper is based on a legal brief requested by the Office of the Prosecutor General, Serious Crimes Investigation Unit, of the United Nations Transitional Administration for East Timor (UNTAET), in April 2001. The Office of the Prosecutor General required that the brief analyse the applicable law of crimes against humanity under UNTAET Regulation 15/2000<sup>1</sup> with regard to the crimes committed in East Timor between 1 January and 25 October 1999. This period is covered by the temporal jurisdiction of the Serious Crimes Panel of the District Court of Dili (s. 2.3 of Reg. 15/2000). The exact scope of the brief was to cover the following crimes against humanity, which are deemed to be the most important ones with regard to the situation in East Timor: murder; deportation and forcible transfer of persons; imprisonment or other severe deprivation of liberty; torture; persecution; inhumane acts. The sexual crimes defined in section 5.1(g) of Regulation 15/2000 are not included as they were dealt with in a separate brief.

Substantive parts of Regulation 15/2000, including section 5 dealing with crimes against humanity (see annex 2), are adopted almost literally from the Rome Statute of the International Criminal Court (ICC).<sup>2</sup> Therefore, the Serious Crimes Panel is the first court to apply substantive provisions of the Rome Statute, and its case law may be regarded as precedent for future prosecutions before the ICC. These prosecutions, however, will probably take place in completely different settings than that

---

\* Kai Ambos, Privatdozent Dr. iur. (Ludwig-Maximilians-Universität München); Senior Research Fellow, Max Planck Institute for Foreign and International Criminal Law, Freiburg, Germany; Steffen Wirth, Research Fellow, Max Planck Institute for Foreign and International Criminal Law, Freiburg, Germany. The authors wish to express their appreciation for the support of the Serious Crimes Unit, in particular from Marco Kalbusch, and for the financial support provided by the International Coalition for Justice. We are also grateful to Dr. Claus Kress, University of Cologne and Prof. Johan D. van der Vyver, Emory University, Atlanta for helpful comments. Guy Cumes of Charles Stuart University, New South Wales, contributed to the part on the law of murder. Tobias Wenning (MPI) assisted us in the final editing.

<sup>1</sup> Available at <<http://www.un.org/peace/etimor/untaetR/r-2000.htm>>.

<sup>2</sup> U.N. Doc. A/CONF.183/9 (1998).

of East Timor. Insignificant issues before the Serious Crimes Panel may become crucial before the ICC. In applying Regulation 15/2000 it therefore seems important to avoid creating case law that may unnecessarily complicate future trials before the ICC.

As to the content of this paper, it intends to present a clearly defined set of elements, which must be proven in order to obtain a conviction for crimes against humanity. For this purpose, the elements of crimes against humanity have been listed in annex 1. The legal analysis will begin with an examination of the so-called context element which distinguishes crimes against humanity from ordinary crimes. The second section of this paper will then set out the current law for each inhumane act. Apart from Regulation 15/2000, the analysis will take into account national and international case law until March 2002, in particular the jurisprudence of the *ad hoc* International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR). In addition, the drafts and reports of the International Law Commission (ILC) and other international bodies as well as relevant contributions in the literature will be considered.

## I. THE CONTEXT ELEMENT

### 1. *Background for Interpretation of the Context Element*

The definition of crimes against humanity requires that the individual criminal act, for example, a murder, be committed within a broader setting of specified circumstances. This so called context element, in the case of UNTAET Regulation 2000/15, is described in the chapeau of section 5.1:

For the purposes of the present regulation, “crimes against humanity” means any of the following acts when committed as part of a “*widespread or systematic attack and directed against any civilian population, with knowledge of the attack*” (emphasis added).

Section 5 of Regulation 15/2000 is an almost verbatim repetition of article 7 of the Rome Statute, differing only in three relevant respects from the latter. First, in section 5.1, the word “and” has been inserted between the words “attack” and “directed”; the relevant passage of the chapeau of the ICC Statute reads: “attack directed against any civilian population”. The consequences of this insertion, which apparently occurred unintentionally,<sup>3</sup> will be discussed in connection with the individual act as a sub-element of the context element.

<sup>3</sup> Morten Bergsmo, *Means of proof for the objective contextual element of the existence of “a widespread and systematic attack” for crimes against humanity under s. 5 of Regulation 15/2000*, unpublished memorandum, 10 September 2000 (on file with authors), p. 2.

The second difference is the deliberate<sup>4</sup> omission of article 7(2)(a) of the Rome Statute in section 5.2. The subparagraph of the Rome Statute contains a definition of the word “attack” as used in the chapeau of article 7(1). Article 7(2)(a) reads:

2. For the purpose of paragraph 1:

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

This definition is the result of a widely criticised compromise during the negotiations of the Rome Statute.<sup>5</sup> We will set out below, however, that the omission of the subparagraph has no particular implications for the interpretation of the term “attack” or the so-called policy element which is part of the context element.

The third difference concerns the crime of persecution. Section 5.1(h) of Regulation 15/2000 and article 7(1)(h) of the Rome Statute both require a connection between the persecutory act and other conduct. Article 7(1)(h) requires that the act be committed “in connection with any act referred to in this paragraph or any crime within the jurisdiction of the *Court*” (emphasis added). Section 5.1(h) of Regulation 15/2000 requires a “connection with [. . .] any crime within the jurisdiction of the *panels*” (emphasis added). The difference between both provisions lies in the scope of the jurisdiction of the respective judicial body. Whereas the Rome Statute comprises only international crimes,<sup>6</sup> the jurisdiction of the serious crime panels also includes some “ordinary” Indonesian national crimes (*e.g.*, s. 8, “Murder”). However, it will turn out that this difference is of no practical relevance because most, if not all, national crimes under Regulation 15/2000 simultaneously fulfil the requirements of certain enumerated inhumane acts of crimes against humanity.

a. *The History of the Context Element and the War Nexus*

The context element, as formulated in section 5.1 of Regulation 15/2000, is the result of a complex evolution during which parts of the element were adopted from earlier concepts while other parts were omitted and still others newly invented. There was a permanent struggle on the part of the respective drafters or judges to meet what they felt were the demands of

---

<sup>4</sup> Morten Bergsmo, *supra* note 3, pp. 1–2.

<sup>5</sup> Phyllis Hwang, *Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court*, 22 *FORDHAM INT’L L.J.* 457, 497–501 (1998).

<sup>6</sup> Contempt of court is deliberately labeled an “offence” (not a “crime”) in article 70 of the Rome Statute.

international criminal law and, at the same time, to balance these demands with state sovereignty. Therefore, awareness of origin and history of the distinct (sub-) elements of the context element is necessary in order to properly assess their respective legal significance.

The problem of the so-called war *nexus* will also be dealt with here, although, at present, it is only of historical interest. The survey concludes with a résumé highlighting the observations which will serve as a guidance for the analysis of the context element in section 5.1.<sup>7</sup>

(i) *The Nuremberg Charter and Control Council Law No. 10*. When crimes against humanity were defined for criminal law purposes for the first time in the Nuremberg Charter, the context element was different from the one contained in section 5.1 of Regulation 15/2000 and article 7 of the Rome Statute. Article 6(c) of the Nuremberg Charter requires that the individual act – e.g., a murder – be committed “in execution or connection with any crime within the jurisdiction of the Tribunal [*i.e.*, crimes against peace or war crimes]”.<sup>8</sup> Moreover, it requires that the victims be civilians. Both the so called war *nexus* and the qualification of possible victims as civilians can be explained by the origin of crimes against humanity within the law of armed conflict.<sup>9</sup> The Martens Clause, which is commonly cited as the first appearance of the concept of crimes against humanity,<sup>10</sup> is found in a treaty on the law of war, the 1907 Hague Convention (IV).<sup>11</sup> Another reason for

<sup>7</sup> For a more comprehensive narration of the history of crimes against humanity, see Beth van Schaack, *The Definition of Crimes Against Humanity: Resolving the Incoherence*, 37 COLUMBIA J. TRANSNAT’; L. 37, 787 (1999); for the war nexus see also recently MACHTELD BOOT, NULLUM CRIMEN SINE LEGE AND THE SUBJECT MATTER JURISDICTION OF THE ICC 272, 302 (2002).

<sup>8</sup> Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (1945), including the Charter of the International Military Tribunal, (1951) 82 U.N.T.S. 280.

<sup>9</sup> ICTY Trial Chamber I has remarked: “The inclusion of crimes against humanity in the Nürnberg Charter was justified by their relation to war crimes”. *Prosecutor v. Tadic* (Case no. IT-94-1-T), Opinion and Judgment, 7 May 1997, para. 620; M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 60–69 (2nd ed., 1999).

<sup>10</sup> Matthew Lippmann, *Crimes Against Humanity*, 17 BOSTON COLLEGE THIRD WORLD L. REV. 171, 173 (1997). For references to several nineteenth century and early twentieth century cases of international concern or intervention in cases of massive atrocities, see *United States of America v. Altstoetter et al.* (“Justice Case”), 3 L.R.T.W.C. 974, 981–982 (1951).

<sup>11</sup> “[T]he inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilised peoples, from the *laws of humanity*, and the dictates of the public conscience”

the requirement of the war *nexus* was the fear that, without such a *nexus*, any concept of crimes against humanity would infringe on the principle of non-intervention.<sup>12</sup> The war *nexus*, therefore, was considered the international element of crimes against humanity. Nevertheless, it has been argued that the Nuremberg Charter's war *nexus* was merely a precondition for the International Military Tribunal's (IMT) jurisdiction, not a material element of crimes against humanity,<sup>13</sup> a view strongly supported by the wording of the 1968 Convention of the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. In any case, it can be said that the IMT itself rather paid mere lip service to the war *nexus* instead of strictly observing it.<sup>14</sup>

The war *nexus* disappeared for the first time as early as 1945 when the drafters of Control Council Law No. 10 (CCL 10)<sup>15</sup> deleted it from the elements of crimes against humanity in article II(c) of CCL 10.<sup>16</sup>

---

(emphasis added). Convention (IV) respecting the Laws and Customs of War on Land, text at DIETRICH SCHINDLER, JIŘI TOMAN, *THE LAWS OF ARMED CONFLICTS* 69–93 (3rd ed., 1988). The Martens clause is named after the Russian diplomat who drafted it: M. Cherif Bassiouni, *supra* note 9, p. 62, fn. 81.

<sup>12</sup> Matthew Lippmann, *supra* note 10, p. 183, quoting Justice Jackson.

<sup>13</sup> Margaret McAuliffe de Guzman, *The Road from Rome: The Developing Law of Crimes Against Humanity*, 22 HUMAN RTS Q. 335, 356 (2000).

<sup>14</sup> *Prosecutor v. Kupreskic et al.* (Case no. IT-95-16-T), Judgment, 24 January 2000, para. 576: “[T]here was only a *tenuous* link to war crimes or crimes against the peace. This is demonstrated by the judgment rendered by the IMT in the case of defendant von Schirach. Von Schirach, as *Gauleiter* of Vienna, was charged with and convicted of crimes against humanity for the deportation of Jews from Austria. The IMT concluded that Von Schirach was probably not involved in the ‘development of Hitler’s plan for territorial expansion by means of aggressive war’, nor had he been charged with war crimes. However, the link to another crime under the Charter (that of aggression) was found in the fact that ‘Austria was occupied pursuant to a common plan of aggression’. Its occupation was, therefore, a ‘crime within the jurisdiction of the Tribunal’. Another example is found in the case of Streicher, publisher of *Der Stürmer*, an anti-Semitic weekly newspaper. Streicher was convicted for ‘incitement of the German people to active persecution’. There was no evidence that he had ever committed war crimes or ‘that he was ever within Hitler’s inner circle of advisers; nor during his career was he closely connected with the formulation of the policies which led to war’. Nevertheless he was convicted of persecution as a crime against humanity (in connection with war crimes)”.

<sup>15</sup> Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity of 20 December 1945, 3 OFFICIAL GAZETTE CONTROL COUNCIL FOR GERMANY 50–55 (1946).

<sup>16</sup> Olivia Swaak-Goldman, in I SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW. THE EXPERIENCE OF INTERNATIONAL AND NATIONAL COURTS 141, 159–160 (Gabrielle Kirk McDonald & Olivia Swaak-Goldman, eds., 2000).

This elimination was not unanimously accepted. Some military tribunals continued to require the war *nexus* because of the reference to the Nuremberg Charter in Article 1 of CCL 10.<sup>17</sup> Another reason given was that “the only purpose of the Charter was to bring to trial ‘major war criminals’.”<sup>18</sup> In contrast, the judges of Military Tribunal III accepted the elimination of the war *nexus* in the *Justice case*.<sup>19</sup> It is significant, however, that they nevertheless felt that “crimes against humanity [...] must be strictly construed to exclude isolated cases of atrocity or persecution”. Thus, they introduced a new element to this end, namely: “[P]roof of conscious participation in systematic government organised or approved procedures”.<sup>20</sup> The *Justice case* indicates for the first time that what is required under international law is not a *specific* context element but one that excludes isolated crimes.

German courts which applied CCL 10<sup>21</sup> in a great number of cases<sup>22</sup> used a similar context element which, however, had a wider scope than the one in the *Justice case*. To turn a particular criminal conduct into a crime against humanity they required only that it be committed in “context [*Zusammenhang*] with the system of power and tyranny as it existed in the National-Socialist Period”.<sup>23</sup> The war *nexus* played no role in their judgments. Together with the *Justice case* these decisions represent the beginning of a tendency in national and international practice which tries to distinguish crimes against humanity from ordinary crimes by requiring – instead of the war *nexus* – a link to some kind of authority.

<sup>17</sup> *United States of America v. Flick et al.*, 3 L.R.T.W.C. 1212–1214 (1952). See Darryl Robinson, *Crimes Against Humanity: Reflections on State Sovereignty, Legal Precision and the Dictates of the Public Conscience*, in I ESSAYS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 139, 145 (Flavia Lattanzi & William A. Schabas, eds., 1999). For reference to further cases see Beth van Schaack, *supra* note 7, pp. 814–819.

<sup>18</sup> *United States v. Flick*, *ibid.*, p. 1213.

<sup>19</sup> *Justice Case*, *supra* note 10, p. 974.

<sup>20</sup> *Ibid.*, p. 982.

<sup>21</sup> On the competence of German courts to apply this law, see Ulrich Vultejus, *Verbrechen gegen die Menschlichkeit*, 12 STRAFVERTEIDIGER 602 (1992).

<sup>22</sup> The German Supreme Court in the British occupied zone alone decided an estimated 100 published cases concerning crimes against humanity.

<sup>23</sup> German Supreme Court in the British occupied zone, Judgment of 20 May 1948 – StS 3/48, 1 ENTSCHEIDUNGEN DES OBERSTEN GERICHTSHOFES FÜR DIE BRITISCHE ZONE 11, 14 (1949), authors’ translation (“Zusammenhang mit der Gewalt- und Willkürherrschaft, wie sie in nazistischer Zeit bestanden hat”); see also German Supreme Court in the British occupied Zone, judgment of 21 Dec. 1948 – StS 139/48, 1 ENTSCHEIDUNGEN DES OBERSTEN GERICHTSHOFES FÜR DIE BRITISCHE ZONE 203, 206 (“*Weller Case*”) (Berlin, Hamburg 1949).

(ii) *Developments after World War II (1950–1996)*. In its 1950 Nuremberg Principles,<sup>24</sup> the International Law Commission repeated the war *nexus* in the formulation of the Nuremberg Charter. The *nexus* requirement introduced by the 1951 Draft Code of offenses against the peace and security of mankind<sup>25</sup> one year later was considerably broader, as it no longer considered necessary that the *nexus* exist with regard to a war related crime (as in the Nuremberg Charter). It was held sufficient for there to be a *nexus* to any of the crimes contained in the Draft Code, including, for example, “encouragement [. . .] of terrorist activities in another State”.<sup>26</sup> However the 1951 *nexus* fulfilled the same purpose as the original one because all of the Draft Code’s crimes – except genocide – concerned incursions into the sovereign sphere of another state. This transnational character rendered the respective crime an international matter in the classical sense and, thus, provided for some kind of link to international law. Indeed, it seems as if the ILC was guided by the same concerns with regard to the principle of non-intervention as the drafters of the Nuremberg Charter.

These concerns evidently had disappeared when the 1954 Draft Code of offenses against the peace and security of mankind, instead of requiring a *nexus* to another crime of the same draft, introduced the requirement that the perpetrator act “at the instigation or with toleration of [state] authorities”.<sup>27</sup> This formulation continued the development initiated by the courts applying CCL 10 which replaced the war *nexus* with a link to authority. The new approach, thus, focussed rather on the relationship between official authorities and individuals, a situation that is also subject to international human rights law. Once this body of law emerged as binding rules of international law, it would serve as the link to international law that formerly may have been provided by the law of warfare. The Draft Code’s only reminder of the humanitarian law origin of crimes against humanity is its definition of possible victims as “civilian population”. This term, as well, disappeared in later ILC Drafts. However, it was revived by the drafters of the ICTY Statute and after that included in the definition of crimes against humanity in the statutes or other constitutive documents of all modern international criminal tribunals and courts.

<sup>24</sup> Principle IV (c) of the Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, II YEARBOOK INT’L L. COMM’N 374 (1950).

<sup>25</sup> *Draft Code of Crimes against the Peace and Security of Mankind*, II YEARBOOK INT’L L. COMM’N 134 (1951), art. 2(10).

<sup>26</sup> *Ibid.*, art. 2(6).

<sup>27</sup> *Draft Code of Crimes against the Peace and Security of Mankind*, II YEARBOOK INT’L L. COMM’N 151 (1954), art. 2(11), chapeau.

The next landmark in the development of crimes against humanity was the 1968 Convention of the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.<sup>28</sup> According to article 1(b) of the Convention, it applies to “[c]rimes against humanity whether committed in time of war *or in time of peace* as they are defined in the Charter of the International Military Tribunal, Nurnberg” (emphasis added). Obviously, the Convention does not consider the war *nexus* a requirement of crimes against humanity. Moreover, the Convention explicitly states that the crimes against humanity to which it refers are the same crimes which are “defined in the Charter” of the International Military Tribunal. This evidently implies that the Nuremberg Charter’s crimes against humanity can be committed in time of peace. Therefore, it is clear that the Convention views the war *nexus* of article 6(c) of the Nuremberg Charter not as a material element of crimes against humanity but merely as a jurisdictional restriction of the IMT’s competence.

The shift of the context element from a war *nexus* to a link with some kind of official authority, which had started in the post World War II decisions under CCL 10 and was continued by the 1954 Draft Code, was later affirmed by some judgments of national courts. In the *Menten case*, the Dutch Supreme Court held in 1981 that the concept of crimes against humanity requires that the crimes “form part of a system based on terror or constitute a link in a consciously pursued policy directed against particular groups of people”.<sup>29</sup> This definition shows some similarity with the formulation in the *Justice case* and judgments of German courts under CCL 10. In 1985, the French Court of Cassation ruled in the *Barbie case* that crimes against humanity must be “committed in a systematic manner in the name of a State practising a policy of ideological supremacy”.<sup>30</sup> This ruling was repeated in 1992 in *Touvier*.<sup>31</sup> A few years later, in 1994, the Supreme Court of Canada ruled in the *Finta case*: “What distinguishes a crime against humanity from any other criminal offence under the Canadian *Criminal Code* is that the cruel and terrible actions which are essential elements of the offence were undertaken in pursuance

---

<sup>28</sup> 754 U.N.T.S. 73.

<sup>29</sup> *Menten Case*, 75 I.L.R. 362, 362–363 (Dutch Supreme Court).

<sup>30</sup> *Barbie Case*, 78 I.L.R. 136, 137 (French Court of Cassation).

<sup>31</sup> *Touvier Case*, 100 I.L.R. 350, 352 (French Court of Cassation). The very specific language of the context element in these cases may be aimed at excluding acts of the Vichy regime or of French officials in Algeria from the scope of crimes against humanity, see pp. 353–355 where the Court explains that the Vichy regime collaborated with Germany only for pragmatic reasons and not for reasons of ideological supremacy. Also: Guyora Binder, *Representing Nazism: Advocacy and Identity at the Trial of Klaus Barbie*, 98 YALE L.J. 1321, 1336–1338 (1989).



of a policy of discrimination or persecution of an identifiable group or race".<sup>32</sup>

Article 21 of the ILC's 1991 Draft Code of crimes against the peace and security of mankind which renamed crimes against humanity "systematic or mass violations of human rights", took a slightly different approach with regard to the trend to require a link with authority. It declared punishable any "individual who commits or orders the commission of any of the following violations of human rights: – murder, – torture [...] in a systematic manner or on a mass scale [...]".<sup>33</sup> This formulation differs significantly from previous and subsequent formulations: it requires that the perpetrator commit or order a multiplicity of crimes on a "systematic or mass scale" *on his or her own*. It is not sufficient (as, for example, in section 5.1 of Reg. 15/2000) that he or she commit a single act or merely a few acts in the context of a broader attack. Therefore the Draft considered as possible perpetrators of crimes against humanity only persons in a position to act on a large scale. This must be kept in mind when considering the ILC's commentary pointing out that private individuals can also commit the crime.<sup>34</sup> The ILC listed as examples of such individuals persons with "*de facto* power or organised in criminal gangs or groups".<sup>35</sup> Thus, the draft, in fact, retains the need for some kind of authority, or at least power, behind the crimes, simply clarifying that a non-state actor can also meet this element.<sup>36</sup> Finally, the Draft Code is remarkable in that it does not require, like its successor,<sup>37</sup> that the victims of crimes against humanity be civilians.

The most recent result of the ILC's work on crimes against humanity, the 1996 Draft Code of crimes against the peace and security of mankind,<sup>38</sup> does not, as its predecessor, require that the perpetrator personally commit a multiplicity of crimes, but it reintroduces the context-related structure.

<sup>32</sup> *R. v. Finta*, [1994] 1 S.C.R. 701, 812 (Supreme Court of Canada, per Cory J.).

<sup>33</sup> *Draft Code of Crimes against the Peace and Security of Mankind*, II(2) YEARBOOK INT'L L. COMM'N 94 (1991), art. 21.

<sup>34</sup> *Ibid.*, Commentary on Article 21, para. 5.

<sup>35</sup> *Ibid.*

<sup>36</sup> For a critical opinion on a too broad definition of the organisation which implements the policy to commit crimes against humanity, see Claus Kress, *Der Jugoslawien-Strafgerichtshof im Grenzbereich zwischen internationalem bewaffneten Konflikt und Bürgerkrieg*, in *VÖLKERRECHTLICHE VERBRECHEN VOR DEM JUGOSLAWIEN-TRIBUNAL, NATIONALEN GERICHTEN UND DEM INTERNATIONALEN STRAFGERICHTSHOF* 15, 54–55 (Horst Fischer & Sascha Rolf Lüder, eds., 1999).

<sup>37</sup> Article 18 of the *Draft Code of Crimes against the Peace and Security of Mankind*, II(2) YEARBOOK INT'L L. COMM'N 15 (1996).

<sup>38</sup> *Ibid.*

Accordingly, the systematic manner or large scale commission of crimes is required only as background for the individual criminal conduct.<sup>39</sup> However, it is similar to the 1991 Draft Code in that the authority behind the crimes need not be a state in the sense of public international law. It is sufficient that the crimes be “instigated or directed by a Government or any organisation or group”.<sup>40</sup> A war *nexus* was deliberately excluded by the ILC.<sup>41</sup> Finally, it is worthwhile noting that the formulation “in a systematic manner or on a large scale” greatly influenced the jurisprudence of the ICTY and ICTR, both of which, in the wake of the 1996 Draft Code, have required a “widespread or systematic attack”. However, it is equally possible that the 1996 Draft was influenced by the language of the ICTR Statute which expressly requires a “widespread or systematic attack”. The drafters of the Rome Statute and of Regulation 15/2000 also adopted the widespread or systematic attack requirement.

(iii) *The ad hoc International Criminal Tribunals.* The wording of article 5 of the ICTY Statute<sup>42</sup> of 1993 brought a renaissance of the humanitarian law origins of crimes against humanity. It required for the first time since 1951 a new version of the war *nexus* and reintroduced the requirement that possible victims of crimes against humanity be civilians.<sup>43</sup> The explanation of both of these aspects may be found in the Report of the Secretary General<sup>44</sup> accompanying the draft Statute of the ICTY. In explaining the inclusion of crimes against humanity in the ICTY Statute, the report refers exclusively to common article 3 of the four Geneva Conventions,<sup>45</sup> apparently (and incorrectly) considering the prohibition of war crimes in

<sup>39</sup> At least this seems to be the interpretation given in *Tadic*, *supra* note 9, para. 649.

<sup>40</sup> 1996 *Draft Code*, *supra* note 37, chapeau of article 18.

<sup>41</sup> *Ibid.*, commentary on article 18(6).

<sup>42</sup> Statute of the International Tribunal for the Former Yugoslavia, U.N. Doc. S/RES/827 (1993).

<sup>43</sup> The Statute’s drafters, in article 5, gave the *ad hoc* Tribunal jurisdiction over “[t]he following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (a) murder [...]”.

<sup>44</sup> Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704.

<sup>45</sup> *Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949*, 75 U.N.T.S. 31; *Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949*, 75 U.N.T.S. 85; *Geneva Convention (III) Relative to the Treatment of Prisoners of War of 12 August 1949*, 75 U.N.T.S. 135; *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War of 12 August 1949*, 75 U.N.T.S. 287.

internal armed conflict as identical with the prohibition of crimes against humanity.<sup>46</sup>

In this context it should also be noted that the ICTY Statute's war *nexus* differs significantly from that of the Nuremberg Charter in two respects. On the one hand, the Nuremberg Charter was narrower than the Statute in that it required not only a commission of the crimes "in armed conflict" but a more specific *nexus* to one of the other war crimes enumerated in the Charter. On the other hand, the Charter had a wider scope than the ICTY Statute in that it extended the *nexus* to the mere preparation of an aggressive war. Considered together with the drafting history of the ICTY Statute, the differences between the Nuremberg war *nexus* and the war *nexus* of the ICTY Statute make it difficult to argue that the Statute's war *nexus* is required by customary international law as expressed in the Nuremberg Charter.<sup>47</sup>

Indeed, in one of its first rulings, – the *Tadic Jurisdictional Appeal* – the ICTY Appeals Chamber held that "there is no logical or legal basis for [a war *nexus*] and it has been abandoned in subsequent State practice with respect to crimes against humanity".<sup>48</sup> Moreover, it stated: "It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed [...] customary international law may not require a connection between crimes against humanity and any conflict at all. Thus [...] the Security Council may have defined the crime in Article 5 more narrowly than necessary under customary international law".<sup>49</sup> In a later decision, the Appeals Chamber went one step further pronouncing that "the armed

---

<sup>46</sup> According to the Report, *supra* note 44, para. 49 (footnote omitted): "Crimes against humanity were first recognised in the Charter and Judgment of the Nuremberg Tribunal, as well as in Law No. 10 of the Control Council for Germany. Crimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character". Footnote 9 reads: "In this context, it is to be noted that the International Court of Justice has recognised that the *prohibitions contained in common article 3 of the 1949 Geneva Conventions* are based on 'elementary considerations of humanity' and cannot be breached in an armed conflict, regardless of whether it is international or internal in character". (reference omitted; emphasis added).

<sup>47</sup> This is all the more true if it is accepted that the Nuremberg war *nexus* was a merely jurisdictional element.

<sup>48</sup> *Prosecutor v. Tadic* (Case no. IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 140.

<sup>49</sup> *Ibid.*, para. 141. Part of this phrase was cited by the International Law Commission in explaining its reasons for the exclusion of the war *nexus* in its 1996 Draft Code, *supra* Note 37, commentary on article 18(6).

conflict requirement is a *jurisdictional* element”<sup>50</sup> which “is satisfied by proof that *there was* an armed conflict; that is all that the Statute requires, and in so doing, it requires more than does customary international law”.<sup>51</sup> This view has also been expressed in the *Kordic case*.<sup>52</sup>

Another clear indication that the war *nexus* is not required under customary international law is the wording of the chapeau of article 3 of the ICTR Statute<sup>53</sup> which does not require any link to an armed conflict. In fact, it seems that the ICTR did not even deliberate as to whether it should require a war *nexus* as an element of crimes against humanity, since there are no decisions dealing with the issue. Instead, the context element introduced by the ICTR Statute is the first codification of the element of “widespread or systematic attack against any civilian population”. It was later repeated almost verbatim in the chapeau of article 7(1) of the Rome Statute and finally became part of section 5.1 of Regulation 15/2000. A last noteworthy aspect of article 3 of the ICTR Statute is the requirement of a discriminatory intent.

In sum, the judges of both tribunals replaced the war *nexus* with a context element which has been the blueprint for the immediate predecessor of section 5.1 of Regulation 15/2000, namely article 7(1) of the Rome Statute.<sup>54</sup> For this reason, the jurisprudence of the *ad hoc* Tribunals is of considerable relevance to interpretation of the crimes against humanity provision in UNTAET Regulation 15/2000.

(iv) *Conclusions.* The most striking conclusion that can be drawn from the above survey of the context element’s evolution is that it has continued to change throughout its history. In a way, the only common denominator is the fact that some kind of context has been required by every drafter or judge dealing with crimes against humanity. In addition, after the abandonment of the war *nexus*, a *link to an authority or power*, be it a state, organisation or group, was required by most formulations of crimes against humanity as well as by the case law of the *ad hoc* Tribunals.

It can be concluded that no specific details of the context element are required, but rather only its general existence. Moreover, there is a strong tendency to include a link to an authority. Thus, it seems that the fluctuations of the past definitions of the context element leave wide discretion

<sup>50</sup> *Prosecutor v. Tadic* (Case no. IT-94-1-A), Judgment, 15 July 1999, para. 249.

<sup>51</sup> *Ibid.*, para. 251.

<sup>52</sup> *Prosecutor v. Kordic* (Case no. IT-95-14/2-T), Judgment, 26 February 2001, para. 33.

<sup>53</sup> Statute of the International Criminal Tribunal for Rwanda, U.N. Doc. S/RES/955 (1994), annex.

<sup>54</sup> Rome Statute of the International Criminal Court, *supra* note 2. The Rome Statute was adopted on 17 July 1998 and entered into force on 1 July 2002.

to the drafters of international criminal law in their interpretation of the content of the context element under customary international law. Another important observation regards the origin of crimes against humanity in the law of war or humanitarian law. In particular, the qualification of the population attacked as “civilian” derives from these origins. A war *nexus*, however, if it ever was an element of crimes against humanity at all, is no longer required.

*b. The Rationale of the Context Element as a Guideline for Interpretation*

The reason for the inclusion of a context element in crimes against humanity is to distinguish ordinary crimes under national law from international crimes which are criminal under international criminal law even if national law does not punish them. The context element is the “international element”<sup>55</sup> in crimes against humanity which renders certain criminal conduct a matter of international concern.<sup>56</sup> The exact nature of this international concern, the rationale why these crimes are considered important enough to deal with them on an international level, is a very important aid in the interpretation of these crimes and, must therefore be briefly analysed here.

There are two possible reasons why the international community may treat a crime as a matter of international law. Firstly, a crime can obtain an international character since it cannot be prosecuted effectively on a national level and there is a common interest of states to prosecute. This practical reason applies to piracy, probably the most ancient international crime,<sup>57</sup> or damaging submarine telegraph cables.<sup>58</sup> The second reason is the extreme gravity of certain crimes<sup>59</sup> which is usually accompanied by the unwillingness or inability of national criminal systems to prosecute them. This is the rationale for the criminalisation of crimes

---

<sup>55</sup> *Prosecutor v. Tadic* (Case no. IT-94-1-A and IT-94-1-A bis), Separate Opinion of Judge Shahabuddeen, 26 January 2000; M. Cherif Bassiouni, *supra* note 9, p. 243 (cf. the title of Chapter 6: “The International or Jurisdictional Element”).

<sup>56</sup> Claus Kress, *supra* note 36, p. 53; Beth van Schaack, *supra* note 7, p. 819; Matthew Lippman, *supra* note 10, p. 183 quoting Robert H. Jackson, head of the United States delegation at the London Conference in 1945, where the Nuremberg Charter was negotiated.

<sup>57</sup> ROBERT JENNINGS & ARTHUR WATTS, I OPPENHEIM’S INTERNATIONAL LAW 746 (9th ed., 1992); M. Cherif Bassiouni, *The Sources and Content of International Criminal Law: A Theoretical Framework*, in I INTERNATIONAL CRIMINAL LAW, CRIMES 3, 83 (M. Cherif Bassiouni, ed., 1999); Brigitte Stern, *A propos de la compétence universelle . . .*, in LIBER AMICORUM JUDGE MOHAMED BEDJAOUI 735, 736, 744 *et seq.* (Emile Yakpo & Tahar Boumedra, eds., 1999).

<sup>58</sup> Robert Jennings & Arthur Watts, *supra* note 57, p. 761 (§ 311).

<sup>59</sup> Margaret McAuliffe de Guzman, *supra* note 13, p. 376.

against humanity under international law. Particularly grave violations of individual rights by action or deliberate inaction of official authorities has been an issue of international law since the concept of human rights began to develop at the end of the nineteenth century.<sup>60</sup> This concept gained the status of “hard law”, at the latest, with the adoption of the Charter of the United Nations.<sup>61</sup> Thus, it was a logical consequence to criminalise the worst human rights violations, which coincide with the gravest crimes known to mankind.

The specific seriousness in relation to ordinary crimes (*e.g.*, fraud) and “normal” human rights violations (*e.g.*, denial of the right to associate in trade unions<sup>62</sup>) is constituted by two characteristics of crimes against humanity. They comprise only the most severe violations of human rights (for example violations of dignity, life or freedom) and, in addition, must be committed in a multiplicity of cases, either in a systematic or a widespread manner. Accordingly, it has been emphasised repeatedly, *inter alia* by the International Law Commission and by case law,<sup>63</sup> that the context element serves to single out random acts of violence from the scope of crimes against humanity.

The multiple commission of crimes required for crimes against humanity increases the gravity of the single crime as it increases the *danger* of the individual perpetrator’s conduct.<sup>64</sup> For example, a victim who is attacked in the broader context of a widespread or systematic attack is much more vulnerable. A victim of ordinary criminal conduct has far better means of defense. He or she can call police or neighbours or even defend himself or herself without having to fear that the perpetrator calls to his or her peers for support. A perpetrator of crimes against humanity also poses a greater threat because ordinary social correctives cannot function properly. Public disapproval of criminal behaviour, a strong counterincentive against criminal conduct, is not available. On the contrary, collective action tolerated or supported by the authorities helps to overcome natural inhibi-

---

<sup>60</sup> Robert Jennings & Arthur Watts, *supra* note 57, pp. 849–850; also pp. 995–998, where the authors consider crimes against humanity in the context of human rights.

<sup>61</sup> ALFRED VERDROSS & BRUNO SIMMA, *UNVIVERSELLES VÖLKERRECHT. THEORIE UND PRAXIS* 162 (3rd ed., 1984); German Constitutional Court (*Bundesverfassungsgericht*), Decision of 13 December 1977, Case no. 2 BvM 1/76, 46 *ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS* 342, 362.

<sup>62</sup> International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, art. 22.

<sup>63</sup> 1996 *Draft Code*, *supra* note 37, commentary on article 18(5); *Justice Case*, *supra* note 19, p. 982; *Prosecutor v. Tadic*, *supra* note 9, paras. 646, 648, 653; *Prosecutor v. Akayesu* (Case no. ICTR-96-4-T), Judgment, 2 September 1998, para. 579.

<sup>64</sup> Günter Heine & Hans Vest, *Murder/Wilful Killing*, in *SUBSTANTIVE AND PROCEDURAL ASPECTS*, *supra* note 16, pp. 175, 194.

tions. Yet another reason for the magnified danger of the single perpetrator has been pointed out by Judge Cassese who noted that, in contrast to the perpetrator of an ordinary crime, a perpetrator committing a crime against humanity may not fear punishment.<sup>65</sup> What is more, not only the danger by the single perpetrator is increased but his or her participation in the attack also helps to constitute the attack itself, and, thus, helps to constitute the atmosphere and the environment for the crimes of others.

Thus, the rationale of the context element can be summarised as the protection of human rights<sup>66</sup> against the most serious and most dangerous violations. This rationale at the same time serves to distinguish crimes against humanity from the less serious national law crimes.

## 2. Elements of the Context Element

### a. Widespread or Systematic Attack

The requirement of a widespread or systematic attack was codified for the first time in the ICTR Statute and subsequently in the Rome Statute.<sup>67</sup> It is repeated in section 5.1 of Regulation 15/2000. Despite its absence in the ICTY Statute, the ICTY has adopted this element as well. In the *Tadic* and the *Blaskic* cases it was argued that the requirement of a widespread or systematic attack was implied in the requirement that the object of such crimes must be a “population”.<sup>68</sup> In addition, both judgments refer to the 1996 ILC Draft Code which requires the commission of crimes “in a systematic manner or on a large scale”. Finally, *Blaskic* considers the Statutes of the ICTR and the ICC as well as other case law of the Tribunals.<sup>69</sup>

<sup>65</sup> *Prosecutor v. Tadic* (Case no. IT-94-1-A and IT-94-1-A bis), Separate Opinion of Judge Cassese, 26 January 2000, para. 14.

<sup>66</sup> “[Crimes against humanity] are intended to safeguard basic human values by banning atrocities directed against human dignity”: *Prosecutor v. Kupreskic*, *supra* note 14, para. 547.

<sup>67</sup> On negotiations concerning the term “widespread or systematic attack” at the Rome Diplomatic Conference, see Darryl Robinson, *Defining “Crimes against Humanity” at the Rome Conference*, 93 AM. J. INT’L L. 43, 47–51 (1999).

<sup>68</sup> “[E]ither a finding of widespreadness, which refers to the number of victims, or systematicity, indicating that a pattern or methodical plan is evident, fulfils this requirement (that the acts must be directed against a civilian population)”. *Prosecutor v. Tadic*, *supra* note 9, para. 648. “It is appropriate, however, to note that the words ‘directed against any civilian population’ and some of the sub-characterisations set out in the text of the Statute imply, both by their very nature and by law, an element of being widespread or organised, whether as regards the acts or the victims. ‘Extermination’, ‘enslavement’ and ‘persecutions’ do not refer to single events”. *Prosecutor v. Blaskic* (Case no. IT-95-14-T), Judgment, 3 March 2000, para. 202.

<sup>69</sup> *Prosecutor v. Blaskic*, *ibid.*, para. 202.

(i) *Attack*. The notion of “attack” as part of the concept of a “widespread or systematic attack” concerns the nature of the action directed against any civilian population. The particular language of the chapeau of section 5.1 may give the wrong impression, suggesting that the attack and conduct directed against a civilian population are two different concepts. The first explicit definition of attack was presented in the *Akayesu* judgment of ICTR Trial Chamber I:

The concept of attack may be defined as an unlawful act of the kind enumerated in Article 3(a) to (i) of the Statute, like murder, extermination, enslavement etc. An attack may also be non-violent in nature, like imposing a system of apartheid, which is declared a crime against humanity in Article 1 of the Apartheid Convention of 1973, or exerting pressure on the population to act in a particular manner, may come under the purview of an attack, if orchestrated on a massive scale or in a systematic manner.<sup>70</sup>

This definition is repeated by the Trial Chamber in *Rutaganda*<sup>71</sup> and *Musema*.<sup>72</sup> Its first part is slightly misleading as it paraphrases “attack” as “unlawful act”. However, a little earlier the decision expressly sets out that “the [individual] act must be committed *as part* of a widespread or systematic attack”.<sup>73</sup> Thus it is clear that the general notion of attack and the (individual) criminal acts, *e.g.*, murder or torture, are not put on the same footing. Rather, the Chamber defines an attack as a multiplicity of such acts “orchestrated on a massive scale or in a systematic manner”.

Trial Chamber II in *Kayishema* seems to adopt a similar standard but clarifies that an attack need not consist of a multiplicity of the *same* crimes (for example murder) but can also consist of an accumulation of *different* crimes: “The attack is the event in which the enumerated crimes must form part. Indeed, within a single attack, there may exist a combination of the enumerated crimes, for example murder, rape and deportation”.<sup>74</sup>

The *Kupreskic* decision of an ICTY Trial Chamber refers to “acts” that “were part of a widespread or systematic occurrence of crimes”.<sup>75</sup>

Thus, the Tribunals understand an attack as the multiple commission of acts which fulfil the requirements of the enumerated inhumane acts. This approach fits well with the rationale of crimes against humanity, *i.e.*, to criminalise only the most serious human rights violations. It also is

<sup>70</sup> *Prosecutor v. Akayesu*, *supra* note 63, para. 581.

<sup>71</sup> *Prosecutor v. Rutaganda* (Case no. ICTR-96-3-T), Judgment, 6 December 1999, para. 70.

<sup>72</sup> *Prosecutor v. Musema* (Case no. ICTR-96-13-T), Judgment and Sentence, 27 January 2000, para. 205.

<sup>73</sup> *Prosecutor v. Akayesu*, *supra* note 63, para. 578 (emphasis added).

<sup>74</sup> *Prosecutor v. Kayishema & Ruzindana* (Case no. ICTR-95-1-T), Judgment, 12 May 1999, para. 122.

<sup>75</sup> *Prosecutor v. Kupreskic*, *supra* note 14, para. 544.



compatible with article 7(2)(a) Rome Statute, according to which attack is “a course of conduct involving the multiple commission of acts referred to in paragraph 1”. It is true that this definition of attack has been omitted from section 5.2 of Regulation 15/2000. However, in the light of the case law of the *ad hoc* Tribunals, this omission cannot support the inclusion of acts which are *not* among the enumerated inhumane acts into the definition of attack under Regulation 15/2000. As a consequence, other human rights violations like denial of fair trial or infringements on property do not, in general,<sup>76</sup> constitute an attack, even if committed on a widespread basis or systematically. On the other hand, it must be borne in mind that among the enumerated inhumane acts are “other inhumane acts” including, for example, severe beatings. Moreover, according to the jurisprudence of the Tribunals, persecution may comprise acts not otherwise enumerated among the enumerated inhumane acts, including the destruction of homes.

A further important characteristic of the attack is that it need not necessarily be executed by a multiplicity of perpetrators, nor does a single perpetrator have to act at different times.<sup>77</sup> For example, if a single perpetrator poisons the water for a large population, he or she would thereby commit a multiplicity of killings with a single conduct. The same holds true for the attacks of 11 September in the United States. Every single killing, under the doctrine of concurrence of offences (*concoure idéal, Idealkonkurrenz*), amounts to a separate crime thus constituting the multiplicity of crimes required for the attack.<sup>78</sup> The general introduction of the Draft Elements of Crimes for the ICC states: “A particular conduct may constitute one or more crimes”.<sup>79</sup>

Finally, the above discussions leave no doubt that the attack need not be a military attack.<sup>80</sup>

<sup>76</sup> But see *ibid.*, para. 631.

<sup>77</sup> Simon Chesterman, *An Altogether Different Order: Defining the Elements of Crimes against Humanity*, 10 DUKE J. COMP. INT'L L. 307, 316 (2000).

<sup>78</sup> *Prosecutor v. Kupreskic*, *supra* note 14, para. 712; Kai Ambos & Steffen Wirth, *Commentary on Prosecutor v. Kayishema and Ruzindana*, in ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS. THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 1994–1999 701 (André Klip & Göran Sluiter, eds., 2001), Ruth Rissing-van Saan, in STRAFGESETZBUCH. LEIPZIGER KOMMENTAR. GROSSKOMMENTAR § 52 mn. 36 (Burkhard Jähnke, Heinrich Wilhelm Laufhütte & Walter Odersky, eds., 28th delivery, 1999); Alicia Gil Gil, *Comentario a la primera sentencia del Tribunal Supremo Alemán condenando por el delito del genocidio*, 4 REVISTA DE DERECHO PENAL Y CRIMINOLOGÍA 771, 788 *et seq.* (1999).

<sup>79</sup> Finalized Draft Text of the Elements of Crimes, U.N. Doc. PCNICC/2000/INF/3/Add.2, general introduction, para. 9.

<sup>80</sup> Rodney Dixon, *Article 7*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT. OBSERVERS' NOTES, ARTICLE BY ARTICLE mn. 8 (Otto Triffterer, ed., 1999).

It has been repeated many times by both international Tribunals that an attack need not be widespread *and* systematic but only *either* widespread *or* systematic.<sup>81</sup> As this is consistent with the wording of section 5.1 the matter need not be given further consideration here.

(ii) *Systematic Attack*. According to the *Tadic* trial judgment, a systematic attack requires the existence of a “pattern or methodical plan”.<sup>82</sup> *Akayesu* defined a systematic attack “as thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources”.<sup>83</sup> Thereby, it added to the *Tadic* definition *inter alia* the requirements that the organisation of the attack be “thorough” and that “substantial resources” be used. ICTR Trial Chamber II, in *Kayishema*, gave a shorter definition emphasising the relation between the systematic nature of the attack and the policy: “A systematic attack means an attack carried out pursuant to a preconceived policy or plan”.<sup>84</sup> Similarly, *Kunarac* very recently held: “The adjective ‘systematic’ signifies the organised nature of the acts of violence and the improbability of their random occurrence”.<sup>85</sup> All decisions rely on the 1996 ILC Draft Code which defined a systematic attack as committed “pursuant to a preconceived plan or policy”.<sup>86</sup>

It is unclear what the basis is for the “thoroughly organised and following a regular pattern” and the “substantial resources” requirements of *Akayesu*. Therefore, these terms should not be regarded so much as strict requirements of a systematic attack but rather as an illustration referring to typical situations in which an attack exists. It cannot be convincingly assumed that the ICTR Trial Chamber intended to exclude an attack on innocent persons from the scope of the systematic variant<sup>87</sup> of

<sup>81</sup> *Prosecutor v. Tadic*, *supra* note 9, para. 646–648; *Prosecutor v. Akayesu*, *supra* note 63, para. 579; *Prosecutor v. Kayishema*, *supra* note 74, para. 123; *Prosecutor v. Rutaganda*, *supra* note 71, paras. 67–68; *Prosecutor v. Musema*, *supra* note 72, paras. 202–203; *Prosecutor v. Blaskic*, *supra* note 68, para. 207; *Prosecutor v. Kunarac et al.* (Case no. IT-96-23 and IT-96-23/1), Judgment, 22 February 2001, para. 427; *Prosecutor v. Kordic*, *supra* note 52, para. 178; *Prosecutor v. Bagilishema* (Case no. ICTR-95-1A-T), Judgment, 7 June 2001, para. 77.

<sup>82</sup> *Prosecutor v. Tadic*, *supra* note 9, para. 648.

<sup>83</sup> *Prosecutor v. Akayesu*, *supra* note 63, para. 580. The same Chamber confirms this holding in *Prosecutor v. Rutaganda*, *supra* note 71, para. 69 and *Prosecutor v. Musema*, *supra* note 72, para. 204.

<sup>84</sup> *Prosecutor v. Kayishema*, *supra* note 74, para. 123.

<sup>85</sup> *Prosecutor v. Kunarac*, *supra* note 81, para. 429.

<sup>86</sup> 1996 Draft Code, *supra* note 37, commentary on article 18(3).

<sup>87</sup> A widespread attack requires a larger number of victims than a systematic attack. Therefore it cannot fully fill a gap in the definition of the systematic attack.

crimes against humanity for the sole reason that it was committed with very limited resources – for example machetes – or that it was sloppily organised.<sup>88</sup>

ICTY Trial Chamber I, in *Blaskic*, adopted a set of four different criteria which must be fulfilled to render an attack systematic:

- the existence of a political objective, a plan pursuant to which the attack is perpetrated or an ideology, in the broad sense of the word, that is, to destroy, persecute or weaken a community
- the perpetration of a criminal act on a very large scale against a group of civilians or the repeated and continuous commission of inhumane acts linked to one another;
- the preparation and use of significant public or private resources, whether military or other;
- the implication of high-level political and/or military authorities in the definition and establishment of the methodical plan.<sup>89</sup>

The Chamber's somewhat hypertrophic definition of "systematic" is derived from an accumulation of material from several different sources, including the ILC Drafts of 1991 and 1996, and the quoted passages in *Tadic* and *Akayesu*.<sup>90</sup> Such a method is questionable in itself because the result of this accumulation is a new definition of "systematic" which cannot be attributed to any of the sources (as none of them require *all* of the named criteria).

Therefore, only the first criterion from the *Blaskic* catalogue, which has also been adopted by *Kayishema* and *Kunarac*, can be regarded as a genuine element of the systematic attack. As to the second criterion in the catalogue, the *Blaskic* Trial Chamber adduced no source at all for its first alternative, namely that the crimes must be committed on a "very large scale". Rather, this seems to belong to the definition of the *widespread* attack which is different from the systematic attack in that it requires a large number of victims. But also the second alternative of the second criterion, the repeated and continuous commission of inhumane acts, was named by the ILC only as an example, that is, as a *possible* result of the

---

<sup>88</sup> Thus the view expressed by Suzannah Linton, *Regulation 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences*, unpublished paper (on file with the authors) who takes the *Akayesu* formula verbatim and requires that the prosecution prove that the attacks be "thoroughly organised and following a regular pattern", is not shared by the authors.

<sup>89</sup> *Prosecutor v. Blaskic*, *supra* note 68, para. 203 (footnotes omitted); these requirements are repeated in *Prosecutor v. Kordic*, *supra* note 52, para. 179.

<sup>90</sup> *Prosecutor v. Blaskic*, *supra* note 68, para. 203, fn. 379–381.

implementation of a plan or policy.<sup>91</sup> Thus, it seems that the inclusion of the whole second criterion is not well founded. The same applies to the third criterion which is taken from *Akayesu* and has been dealt with above. The fourth and last criterion, finally, is formulated too narrowly, as will be explained.

In conclusion, the common denominator in the various definitions of a systematic attack is that “a systematic attack is one carried out pursuant to a preconceived policy or plan”.<sup>92</sup> More explicitly, what constitutes the *systematic* character of the attack is the *guidance* provided for the individual perpetrators as to the envisaged object of the attack, namely the group of victims.

(iii) *Widespread Attack*. With regard to the widespread attack, most of the decisions of the *ad hoc* Tribunals simply focus on the scale of the attack or, equivalently, on the number of victims. Thus, the *Tadic* Trial Chamber, following the ILC’s 1996 Draft Code,<sup>93</sup> defined the widespread attack as referring “to the [large] number of victims”.<sup>94</sup> Very similarly, *Kayishema* held that a widespread attack must be “directed against a multiplicity of victims”.<sup>95</sup> *Blaskic* explained, quoting the ILC: “A crime may be widespread or committed on a large-scale by ‘the cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude’.”<sup>96</sup> And the Chamber in *Kunarac* noted: “The adjective ‘widespread’ connotes the large-scale nature of the attack and the number of its victims”.<sup>97</sup> In contrast to these concise formulations, *Akayesu* provided a much longer and more complicated definition, holding that a “massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims” is required.<sup>98</sup>

---

<sup>91</sup> 1996 Draft Code, *supra* note 37, commentary on article 18(3).

<sup>92</sup> *Prosecutor v. Bagilishema*, *supra* note 81, para. 77.

<sup>93</sup> 1996 Draft Code, *supra* note 37, commentary on article 18(4).

<sup>94</sup> *Prosecutor v. Tadic*, *supra* note 9, para. 648.

<sup>95</sup> *Prosecutor v. Kayishema*, *supra* note 74, para. 123.

<sup>96</sup> *Prosecutor v. Blaskic*, *supra* note 68, para. 206, quoting the International Law Commission’s Commentary to the 1996 Draft Code, *supra* note 37, commentary on article 18(4). The Trial Chamber in *Prosecutor v. Kordic*, *supra* note 52, para. 179, follows closely.

<sup>97</sup> *Prosecutor v. Kunarac*, *supra* note 81, para. 428; see also *Prosecutor v. Tadic*, *supra* note 9, para. 648; *Prosecutor v. Blaskic*, *supra* note 68, para. 202; *Prosecutor v. Krnojelac et al.* (Case no. IT-97-25-T) Judgment, 15 March 2002, para. 57.

<sup>98</sup> *Prosecutor v. Akayesu*, *supra* note 63, para. 580; the definition is repeated in *Prosecutor v. Rutaganda*, *supra* note 71, para. 69, and *Prosecutor v. Musema*, *supra* note 72, para. 204.

Again, all judgments mentioned draw on the ILC's Commentary and their common denominator is the ILC's formulation. Thus, it may be concluded that all that a widespread attack requires is a large number of victims which, as stated in *Blaskic*, can also be attacked by a single conduct "of extraordinary magnitude". The additions to this core definition in *Akayesu* do not contribute substantially to this definition and may, as above, be regarded as merely illustrative.

Finally, as to the numbers of victims, the Tribunal's jurisprudence and other sources imply that for a widespread attack a *larger* number of victims is required than for a systematic attack.

#### b. Any Population

The rationale of the requirement that the object of the attack must be a population is the same as the one for the widespread or systematic attack, *i.e.*, to exclude single or random acts of violence.<sup>99</sup> In the *Tadic* trial judgment the Chamber held that this element also implies the collective nature of the crimes.<sup>100</sup> However, the word "collective" must not be understood as requiring that the victims of the attack be victimised *because* of their membership in a certain group.<sup>101</sup> This interpretation was rejected by the Appeals Chamber in *Tadic*, which held that the Trial Chamber was wrong in requiring discriminatory intent for crimes against humanity. The element "population", therefore, simply requires that a multiplicity of victims exists and, thus, means exactly the same as the element (widespread or systematic) attack, namely, that an isolated single crime which is not part of an attack against a multiplicity of victims does not constitute a crime against humanity. Indeed, the judges of the ICTY deduced the very requirement of the widespread or systematic attack from the term "population". Consequently, if an instrument such as the Rome Statute or Regulation 15/2000 explicitly requires a widespread or systematic attack, the term "population" does not add anything to this requirement. It is only meaningful insofar as it is qualified by the adjective "civilian" in the phrase "any civilian population". Therefore, the incorporation of the term "population" in these texts should be understood rather as a historical reminiscence to a time honoured phrase than as adding any substantial element to crimes against humanity.<sup>102</sup>

---

<sup>99</sup> See also *Prosecutor v. Kunarac*, *supra* note 81, para. 422.

<sup>100</sup> *Prosecutor v. Tadic*, *supra* note 9, para. 644; the same assertion was made in *Prosecutor v. Bagilishema*, *supra* note 81, para. 80.

<sup>101</sup> Margaret McAuliffe de Guzman, *supra* note 13, p. 362; Simon Chesterman, *supra* note 77, p. 325.

<sup>102</sup> Margaret McAuliffe de Guzman, *supra* note 13, pp. 362–364.

The word “any” which qualifies the term “population” originally was intended to clarify that the victims need not be nationals of a foreign state.<sup>103</sup> Such clarification was necessary as long as crimes against humanity had not been fully emancipated from the laws of war. At present, the qualifier “any” only emphasises that no part of the civilian population is excluded from the protection provided by the prohibition of crimes against humanity.<sup>104</sup> Moreover, it implies that a broad interpretation of the term “civilian” is required.<sup>105</sup>

The term “any [. . .] population”, thus denotes merely a multiplicity of victims. As this is already implied in the term “attack”, it does not add any distinct element to the requirements of crimes against humanity.

### c. *Civilian*

The attack must be directed against a “civilian population”. In this respect, two questions arise. In the first place it must be clarified which individuals fall within the definition of civilians. Secondly, it is necessary to examine the circumstances under which a population, *i.e.*, a multiplicity of individuals, must be regarded as “civilian”.

The requirement that the victims of crimes against humanity must be civilians is a relic of the origins of crimes against humanity in the laws of war. Moreover, its inclusion in modern codifications of international criminal law is most probably based on a confusion of common article 3 of the Geneva Conventions with the law of crimes against humanity (see above). If the scope of crimes against humanity was ever limited to the protection of (civilian) war victims this is no longer the case. At present, the prohibition of crimes against humanity serves the protection of human rights of civilians in general. However, not only the human rights of civilians but also those of soldiers can be violated. The ICTY described this dilemma as follows: “One fails to see why only civilians and not also combatants should be protected by these rules (in particular by the rule prohibiting persecution), given that these rules may be held to possess a broader humanitarian scope and purpose than those prohibiting war crimes”.<sup>106</sup> Whereas the Tribunal felt that it could not ignore the wording of its Statute – which explicitly requires the element “civilian” – it nevertheless concluded that a wide interpretation of the term was required.<sup>107</sup>

<sup>103</sup> Darryl Robinson, *supra* note 67, p. 51; also *Prosecutor v. Tadic*, *supra* note 9, para. 635; *Prosecutor v. Kunarac*, *supra* note 81, para. 423.

<sup>104</sup> Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), U.N. Doc. S/1994/674, para. 77.

<sup>105</sup> *Prosecutor v. Blaskic*, *supra* note 68, para. 208.

<sup>106</sup> *Prosecutor v. Kupreskic*, *supra* note 14, para. 547.

<sup>107</sup> *Ibid.*

Indeed an extensive interpretation is strongly supported by case law starting with the decisions of German courts under CCL 10. In a case of the German Supreme Court in the British Occupied Zone, the defendants were convicted for having sentenced to death and ordered the execution of two (German) soldiers who had deserted in the last days of the war. The court noted that the crime against the soldiers was not committed against the civilian population but ruled this was not necessary since crimes against humanity can be committed against soldiers as well.<sup>108</sup> In another case, the same court convicted a defendant for sentencing to death two (German) soldiers who had committed the “crime” of demoralisation of the armed forces (*Wehrkraftzersetzung*).<sup>109</sup> Both decisions support the view that crimes against humanity can be committed against soldiers of the same nationality as the perpetrators.

Moreover, the *ad hoc* Tribunals<sup>110</sup> have frequently referred to the *Barbie case* in which the French *Cour de Cassation* decided that members of the Resistance could be victims of crimes against humanity.<sup>111</sup> The Commission of Experts, which prepared a legal analysis of the situation in the former Yugoslavia for the Security Council, considered that the term “civilians”, meaning non-combatants, included a head of family who “tries to protect his family gun-in-hand”.<sup>112</sup>

The *ad hoc* Tribunals have followed the Commission of Experts and adopted a wide definition of civilian. The *Vukovar* decision held: “Although according to the terms of Article 5 of the Statute of this Tribunal combatants in the traditional sense of the term cannot be victims of a crime against humanity, this does not apply to individuals who, at one particular point in time, carried out acts of resistance”.<sup>113</sup> Consequently, the Tribunal ruled that former resistance fighters who had laid down their

<sup>108</sup> German Supreme Court in the British Occupied Zone, Judgment, Case no. StS 111/48, 7 December 1948, in 1 ENTSCHIEDUNGEN DES OBERSTEN GERICHTSHOFES DER BRITISCHEN ZONE IN STRAFSACHEN 219, 228 (1948).

<sup>109</sup> German Supreme Court in the British Occupied Zone, judgment, Case no. StS 309/49, 18 October 1949, in 2 ENTSCHIEDUNGEN DES OBERSTEN GERICHTSHOFES DER BRITISCHEN ZONE IN STRAFSACHEN 231 (1948).

<sup>110</sup> *Prosecutor v. Mrksic et al* (Case no. IT-95-13-R61), Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 3 April 1996, para. 29; *Prosecutor v. Tadic*, *supra* note 9, para. 614; *Prosecutor v. Blaskic*, *supra* note 68, para. 212; *Prosecutor v. Kupreskic*, *supra* note 14, para. 548; also *Prosecutor v. Akayesu*, *supra* note 63, para. 582, quoting *Prosecutor v. Mrksic* in footnote 146.

<sup>111</sup> *Barbie Case*, *supra* note 30, p. 140. The court also held, at p. 137, that crimes against humanity could be committed “against the opponents of [a policy of ideological supremacy], whatever the form of their opposition”.

<sup>112</sup> Commission of Experts, *supra* note 104, para. 78.

<sup>113</sup> *Prosecutor v. Mrksic*, *supra* note 110, para. 29.

arms and were now hospital patients could be victims of crimes against humanity.<sup>114</sup> In *Tadic*, the Trial Chamber opined that “those actively involved in a resistance movement can qualify as victims of crimes against humanity”.<sup>115</sup>

A more comprehensive definition is given by *Akayesu*: “Members of the civilian population are people who are not taking any active part in the hostilities, including members of the armed forces who laid down their arms and those persons placed *hors de combat* by sickness, wounds, detention or any other cause”.<sup>116</sup> This definition has been reformulated and clarified in *Blaskic*:

Crimes against humanity therefore do not mean only acts committed against civilians in the strict sense of the term but include also crimes against two categories of people: those who were members of a resistance movement and former combatants – regardless of whether they wore a uniform or not – but who were no longer taking part in hostilities when the crimes were perpetrated because they had either left the army or were no longer bearing arms or, ultimately, had been placed *hors de combat*, in particular, due to their wounds or their being detained. It also follows that the specific situation of the victim at the moment the crimes were committed, rather than his status, must be taken into account in determining his standing as a civilian.<sup>117</sup>

The latter formulation summarises and structures the jurisprudence of the Tribunals regarding the term “civilian”. There are two aspects which support this interpretation of the term “civilian”. First, the element stems from humanitarian law. Consequently, it must be understood to be at least as comprehensive as the definition of “civilian” under humanitarian law. Second, crimes against humanity are no longer linked to the laws of war but rather to human rights law. Against this background, an effective protection of *any* individual against inhumane acts is required. It is therefore necessary to find an interpretation of the term “civilian” which covers at least all persons not protected by humanitarian law. In time of peace, the prohibition of crimes against humanity is – apart from the very narrow law of genocide – the only applicable (criminal) law to protect human rights. Thus, in time of peace, the term “civilian” must be interpreted even more broadly than in time of war, when humanitarian law provides some protection.

<sup>114</sup> *Ibid.*, para. 32.

<sup>115</sup> *Prosecutor v. Tadic*, *supra* note 9, para. 643; the same definition is used in *Prosecutor v. Kupreskic*, *supra* note 14, para. 549.

<sup>116</sup> *Prosecutor v. Akayesu*, *supra* note 63, para. 582; *Prosecutor v. Rutaganda*, *supra* note 71, para. 72; *Prosecutor v. Musema*, *supra* note 72, para. 207; *Prosecutor v. Krnojelac*, *supra* note 97, para. 56.

<sup>117</sup> *Prosecutor v. Blaskic*, *supra* note 68, para. 214.



In conclusion, the definition of “civilian” in the elements of crimes against humanity must fully encompass the definition of “civilian” in humanitarian law. At the same time it must be wider than that because it must also cover all persons which are not protected by humanitarian law, especially in time of peace.<sup>118</sup> Indeed, many of the *ad hoc* Tribunals’ decisions base their interpretation of the term “civilian” on humanitarian law.<sup>119</sup> In addition the *Tadic* Trial Chamber emphasised that the definition of humanitarian law is not directly applicable to crimes against humanity but may provide useful guidance.<sup>120</sup>

The passage from *Blaskic* reprinted above seems to be in full accordance with the interpretation developed here. It equates the wide concept of non-combatants in common article 3 of the Geneva Conventions<sup>121</sup> with the term “civilian” as an element of crimes against humanity. Despite the fact that common article 3 is intended only for *non-international* armed conflict, *Blaskic* applies this definition without distinguishing between the different kinds of armed conflict or between armed conflict and peace. Moreover, the Trial Chamber clarified that the (formal) status of an individual is not decisive but rather the individual’s “specific situation”. This statement has been recently confirmed.<sup>122</sup> It meets the needs of comprehensive protection of human rights very well since everyone except an active combatant of a hostile armed force is in a “specific situation” requiring the protection of his or her human rights. This view is in full accordance with the decisions of the German Supreme Court in the British Occupied Zone mentioned above: the Court convicted the defendants for crimes against humanity against soldiers who belonged to the German forces, *i.e.*, to military forces not hostile towards the perpetrator.

In light of the case law and the foregoing analysis, the opinion of the ICTR Trial Chamber in *Kayishema* excluding, *inter alia*, members of the police as possible victims of crimes against humanity must be considered erroneous.<sup>123</sup> Members of the police are non-combatants as they are responsible for the maintenance of *civil* order. Unless a police member takes up arms and joins a hostile military force he or she may not be considered a non-civilian for purposes of application of crimes against humanity. Thus, in sum, every individual, regardless of his or her formal

<sup>118</sup> *Prosecutor v. Kayishema*, *supra* note 74, para. 127.

<sup>119</sup> *Prosecutor v. Tadic*, *supra* note 9, para. 643; *Prosecutor v. Akayesu*, *supra* note 63, para. 582, fns 146 and 147.

<sup>120</sup> *Prosecutor v. Tadic*, *supra* note 9, para. 639.

<sup>121</sup> The language of common article 3 is used almost verbatim in *Prosecutor v. Blaskic*, *supra* note 68, para. 214.

<sup>122</sup> *Prosecutor v. Bagilishema*, *supra* note 81, para. 79.

<sup>123</sup> *Prosecutor v. Kayishema*, *supra* note 74, para. 127.

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

The second important issue with regard to “civilian population” is the question of whether a certain number of hostile combatants among a group of non-combatants deprives such a group, or multiplicity of individuals, of their civilian character. The question has been addressed and answered many times by the Tribunals in the sense that the character of a predominantly civilian population is not altered by “the presence of certain non-civilians in their midst”.<sup>124</sup> No further consideration of the issue is required.

#### d. *Policy Element*

As has been shown, the “international element” of crimes against humanity has shifted away from the war *nexus* and turned to the requirement that the single crime must somehow be linked to state (or organisational) authority. Such an element was required by the ILC Draft Codes of 1954<sup>125</sup> and 1996<sup>126</sup> and probably also the Draft Code of 1991. Similar language can be found in several judicial decisions in the period between World War II and the establishment of the *ad hoc* Tribunals. The jurisprudence of the *ad hoc* Tribunals, which will be discussed below, has introduced the term “policy element” to describe this requirement. It is explicitly codified in article 7(2)(a) Rome Statute<sup>127</sup> but has been deliberately omitted from section 5.2 of Regulation 15/2000.

(i) *The Entity behind the Policy*. At present, there is no doubt that the entity behind the policy does not have to be a state in the sense of public international law. It is sufficient that the entity be an organisation which exercises *de facto* power in a given territory. This was the position of the ILC Draft Codes of 1991 and 1996 and has been codified in article 7(2) Rome Statute which requires a “State *or* organisational policy” (emphasis added).

<sup>124</sup> *Prosecutor v. Tadic*, *supra* note 9, para. 638; affirmed in *Prosecutor v. Akayesu*, *supra* note 63, para. 582; *Prosecutor v. Kayishema*, *supra*, note 74, para. 128; *Prosecutor v. Rutaganda*, *supra* note 71, para. 72; *Prosecutor v. Musema*, *supra* note 72, para. 207; *Prosecutor v. Kupreskic*, *supra* note 14, para. 549; *Prosecutor v. Kunarac*, *supra* note 81, para. 325; *Prosecutor v. Kordic*, *supra* note 52, para. 180; *Prosecutor v. Bagilishema*, *supra* note 81, para. 79; *Prosecutor v. Krnojelac*, *supra* note 97, para. 56.

<sup>125</sup> 1954 Draft Code, *supra* note 27, article 2(11).

<sup>126</sup> 1996 Draft Code, *supra* note 37, chapeau of article 18.

<sup>127</sup> On the negotiations of the Rome Statute, see Darryl Robinson, *supra* note 67, pp. 47–51.

After consideration of the 1996 Draft Code according to which not only a government but “any organisation or group” can be behind the policy, the ICTY concluded in *Tadic*: “[A]lthough a policy must exist to commit these acts, it need not be the policy of a State”.<sup>128</sup> *Kupreskic* held that behind the policy must be an “entity holding *de facto* authority over a territory”.<sup>129</sup> The Chamber went on to explain that the policy need not be conceived on the highest level in the state or organisation.<sup>130</sup> Similarly, the *Nikolic* Rule 61 Decision held as early as 1995: “[The crimes] need not be related to a policy established at State level, in the conventional sense of the term [...]”.<sup>131</sup> Indeed, every level in the respective state or other organisation which, as such, exercises the *de facto* power in a given territory can also develop an explicit or implicit policy with regard to the commission of crimes against humanity in this territory.

It may be noted that the above definition does not include an organisation which, while being able to exercise a certain power, is not the *de facto* authority over a territory because there is a higher or more powerful entity which controls it. The relevant authority is rather the entity which exercises the *highest de facto* authority in the territory and can – within limits – control all other holders of power and all individuals. Thus, a criminal organisation in a state which still exercises the power over the territory (e.g., through normal police forces) where the organisation is active would not qualify as the entity behind the policy. If such an organisation, according to its policy, commits multiple crimes, this, as such, will not turn these crimes into crimes against humanity. The situation will be different, however, if the highest *de facto* authority over the territory, for example the state, at least tolerates these crimes in pursuance of its policy (see below).

(ii) *The Content of the Policy and the Form of its Adoption.* As to the form of the policy, it has been repeatedly stated by the *ad hoc* Tribunals that “[t]here is no requirement that this policy must be adopted formally as the policy of a state”,<sup>132</sup> nor must the policy or plan “necessarily be

<sup>128</sup> *Prosecutor v. Tadic*, *supra* note 9, para. 655; confirmed in *Prosecutor v. Kayishema*, *supra* note 74, para. 126; *Prosecutor v. Kupreskic*, *supra* note 14, para. 551; *Prosecutor v. Blaskic*, *supra* note 68, para. 205; *Prosecutor v. Bagilishema*, *supra* note 81, para. 78.

<sup>129</sup> *Prosecutor v. Kupreskic*, *supra* note 14, para. 552.

<sup>130</sup> *Prosecutor v. Blaskic*, *supra* note 68, para. 205.

<sup>131</sup> *Prosecutor v. Nikolic* (Case no. IT-94-2-R61), Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 20 October 1995, para. 26.

<sup>132</sup> *Prosecutor v. Akayesu*, *supra* note 63, para. 580; also *Prosecutor v. Tadic*, *supra* note 9, para. 653; *Prosecutor v. Rutaganda*, *supra* note 71, para. 69; *Prosecutor v. Musema*,

declared expressly or even stated clearly and precisely”.<sup>133</sup> Consequently, an implicit or *de facto* policy is sufficient.

The *content* of the policy must be to commit crimes against humanity,<sup>134</sup> *i.e.*, to commit a multiplicity of the enumerated individual criminal acts against a civilian population.<sup>135</sup>

(iii) *The Need for a Policy Element and the Conduct Required.* The most significant question with regard to the policy element is whether, under current international law, it is required at all and, if so, whether it is required for both the widespread and systematic alternative or only the systematic. This question also demands clarification as to whether a policy always requires active conduct from the entity behind the policy or if a policy of toleration is sufficient.

The first pronouncement of the *ad hoc* Tribunals on the policy element was the 1995 Rule 61 decision in *Nikolic* which stated that “[a]lthough [the crimes] need not be related to a policy established at State level, in the conventional sense of the term, they cannot be the work of isolated individuals alone”.<sup>136</sup> The *Tadic* Trial Chamber took a more restrictive view and opined:

[T]he reason that crimes against humanity so shock the conscience of mankind and warrant intervention by the international community is because they are not isolated, random acts of individuals but rather result from a deliberate attempt to target a civilian population. Traditionally this requirement was understood to mean that there must be some form of policy to commit these acts.<sup>137</sup>

Thus, the judges in *Tadic* required a policy, even if the attack is only widespread and not, at the same time, systematic. In contrast, the *Akayesu* Trial Chamber mentioned the policy element only with regard to the systematic alternative. It first defined the concept of widespread as requiring a multiplicity of victims – without mentioning a policy – and then went on to explain: “The concept of systematic may be defined as thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources”.<sup>138</sup>

*supra* note 72, para. 204; *Prosecutor v. Kupreskic*, *supra* note 14, para. 551; *Prosecutor v. Blaskic*, *supra* note 68, para. 204.

<sup>133</sup> *Prosecutor v. Blaskic*, *supra* note 68, para. 204.

<sup>134</sup> Cf. *e.g.*, *Prosecutor v. Tadic*, *supra* note 9, para. 653.

<sup>135</sup> Article 7(2)(a) of the Rome Statute.

<sup>136</sup> *Prosecutor v. Nikolic*, *supra* note 131, para. 26.

<sup>137</sup> *Prosecutor v. Tadic*, *supra* note 9, para. 653; in support, the Chamber cited the Dutch *Menten Case* which is mentioned above.

<sup>138</sup> *Prosecutor v. Akayesu*, *supra* note 63, para. 580; confirmed in *Prosecutor v. Rutaganda*, *supra* note 71, para. 69 and *Prosecutor v. Musema*, *supra* note 72, para. 204.

The next decision dealing with the issue, the *Kayishema* judgment, seems to return to the position of *Tadic* as it develops the policy element as an implication of the “attack against any civilian population”: “[T]he requirement that the attack must be committed against a ‘civilian population’ inevitably demands some kind of plan and, the discriminatory element of the attack is, by its very nature, only possible as a consequence of a policy”.<sup>139</sup> As the requirement “attack against any civilian population” is valid for both widespread *and* systematic attacks this ruling seems to imply that a policy would also be required for a widespread attack. However, the reasons given in *Kayishema* are not convincing: It has already been stated that the term “population” need not be interpreted as requiring the attack on a particular group of victims. Moreover, unlike article 3 of the ICTR Statute, customary international law does not require a discriminatory intent for the commission of crimes against humanity. Thus, at least in theory, there is no need for any process of selection of the victims which would require any kind of planning and policy.

Subsequent decisions, unlike *Kayishema* and *Tadic*, have adopted a fairly critical attitude towards the policy. *Kupreskic* holds that whereas crimes against humanity necessarily imply a policy element “there is some doubt as to whether it is strictly a *requirement*, as such, for crimes against humanity”.<sup>140</sup> The ICTR shared this doubt in *Bagilishema*.<sup>141</sup> Whereas both decisions accept that a policy is not an element of crimes against humanity they claim that, whenever the elements of crimes against humanity are fulfilled, a policy must exist as well. However, in *Kordic*, ICTY Trial Chamber III went even further and stated (after agreeing with the quoted passage from *Kupreskic*): “In the Chamber’s view, the existence of a plan or policy should better be regarded as indicative of the systematic character of offences charged as crimes against humanity”.<sup>142</sup> This decision views the policy rather as an indicator and, what is more, as an indicator (only) for a *systematic* attack.<sup>143</sup>

<sup>139</sup> *Prosecutor v. Kayishema*, *supra* note 74, para. 124.

<sup>140</sup> *Prosecutor v. Kupreskic*, *supra* note 14, para. 551. However, it must be noted that the decision is somehow inconsistent as, with regard to the mental element, it relies on a passage from *Prosecutor v. Kayishema*, *supra* note 74, para. 134 which requires that the “accused must know that his act(s) is part of a widespread or systematic attack on a civilian population and pursuant to some kind of policy or plan”. The Chamber seems to have overlooked the doubts it expressed regarding the requirement that a policy element has necessary implications for the mental elements of the crime.

<sup>141</sup> *Prosecutor v. Bagilishema*, *supra* note 81, para. 78.

<sup>142</sup> *Prosecutor v. Kordic*, *supra* note 52, para. 182.

<sup>143</sup> However, the decision quotes the same passage of *Kayishema* as *Kupreskic*, thus contradicting its holding that the policy element is not required for crimes against humanity.

Thus, it is fair to say that the jurisprudence of the *ad hoc* Tribunals shows a wide range of opinions regarding the policy element. However, in more recent decisions a tendency is discernable to omit it altogether and to regard existence of a policy merely as an indicator for the existence of a (systematic) attack. Regulation 15/2000 supports this trend inasmuch as paragraph (2)(a) of article 7 of the Rome Statute, which requires a policy element, has been deliberately omitted from section 5.2 of the Regulation.<sup>144</sup>

This new development is fairly unproblematic with regard to the *systematic* attack, as any kind of systematic conduct requires, however small, a degree of organisation which, in turn, requires a policy and an entity powerful enough to implement it. Thus, the “systematic attack” element indeed inevitably implies a policy element.

This is not the case, however, with regard to a *widespread* attack; an issue that has drawn little attention so far because, up to now, no decision exists which has had to rely exclusively on a widespread (and not, at the same time, systematic) attack. The widespread element is fulfilled if there exists a great number of crime victims. If no further requirement were necessary a town with an extraordinarily high level of criminality – resulting in a great number of victims – could qualify as a crime-site for crimes against humanity. This, obviously, cannot be true because the context element would be unable to exclude ordinary crimes from the scope of the crime.<sup>145</sup> On this issue, the Commission of Experts noted “that the ensuing upsurge in crimes that follows a general breakdown of law and order does not qualify as crimes against humanity”.<sup>146</sup>

Moreover, human rights, the value protected by the prohibition of crimes against humanity, are norms which consider the relationship between state (or other authorities exercising *de facto* power in a given territory) and individual: “Human rights law is essentially born out of the abuses of the state over its citizens and out of the need to protect the latter from state-organised or state-sponsored violence”.<sup>147</sup> In contrast, an ordinary criminal who robs or even kills his or her victim, at least under a classical perspective<sup>148</sup> of human rights, does not violate the victim’s

<sup>144</sup> Morten Bergsmo, *supra* note 3, p. 2.

<sup>145</sup> Similar concerns are expressed by M. Cherif Bassiouni, *supra* note 9, p. 245.

<sup>146</sup> Commission of Experts, *supra* note 104, para. 84. The Commission added: “However, a general breakdown in law and order may be a premeditated instrument, a situation carefully orchestrated to hide the true nature of the intended harm”.

<sup>147</sup> *Prosecutor v. Kunarac*, *supra* note 81, para. 470.

<sup>148</sup> The position taken here may be considered semi-classical as we accept that also non-state actors are bound by human rights law if they exercise the functions of a state (*de facto* power) in a territory where no state effectively exercises its jurisdiction.

human rights even if many similar crimes happen at the same time. It is rather the state which violates the victim's human rights if it does not protect<sup>149</sup> the victim from being robbed or killed despite its ability to do so. Therefore, it is important to retain some link to state or *de facto* authority, not only with regard to a systematic but also a widespread attack. As the omission of the policy element in section 5.2 of Reg. 15/2000) does not alter the need for such a link, nothing should be implied from this omission.

Given that a policy element is required even for a widespread attack it is necessary to examine how an attack can be merely widespread, *i.e.*, not systematic, and still somehow connected to a state or organisational authority. In other words, it must be explained how a multiplicity of criminal acts which are not organised or planned can still be the object of a policy. Otherwise, the well established rule that the attack can be either systematic or widespread would be violated.<sup>150</sup>

The only solution to this problem is to accept that a policy can also consist in the deliberate denial of protection for the victims of widespread but unsystematic crimes, *i.e.*, in the tolerance of these crimes.<sup>151</sup> This can be the case, for example, if a government consciously refrains from putting a stop to the activity of criminals who, on a very large scale, kill the inhabitants in a certain area to gain easier access to its natural resources. The government's motive for inaction could be that these persons, at the same time, oppose the government's politics. In such a case the government

---

<sup>149</sup> For example, under the Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention on Human Rights"), 213 U.N.T.S. 212, it is accepted that States are under an obligation to actively protect human rights. ARTHUR HAEFLINGER & FRANK SCHÜRMAN, *DIE EUROPÄISCHE MENSCHENRECHTSKONVENTION UND DIE SCHWEIZ* 55–57 (2nd ed., 1999). *Prosecutor v. Kunarac*, *supra* note 81, para. 470, held: "In the human rights context, the state is the ultimate guarantor of the rights protected and has both duties and a responsibility for the observance of those rights. In the event that the state violates those rights *or fails in its responsibility to protect* the rights, it can be called to account and asked to take appropriate measures to put an end to the infringements" (emphasis added).

<sup>150</sup> With regard to the interpretation of codified law (*e.g.*, Regulation 15/2000 which provides expressly that the attack must be widespread *or* systematic), the Appeals Chamber in *Prosecutor v. Tadic*, *supra* note 50, para. 284, noted: "It is an elementary rule of interpretation that one should not construe a provision or part of a provision as if it were superfluous and hence pointless".

<sup>151</sup> The present paper, consequently, would seem not to be in full accord with Bergsmo's analysis, *supra* note 3, p. 2, that the policy requirement in article 7(2)(a) Rome Statute turns the alternative formulation of the chapeau of article 7(1) ("widespread *or* systematic") into a cumulative requirement (widespread *and* systematic): An attack "pursuant to or in furtherance of a State or organisational policy" (Rome Statute, art. 7(2)(a)) can be widespread and still, at the same time, *not* systematic if the official policy consists in the mere *toleration* of an (unsystematic) widespread attack.

would be content that someone else is doing the “dirty work”. Another example – more relevant for East Timor – would be that small groups of unorganised militia carry out small uncoordinated missions which, however, viewed in their totality, involve sufficient victims to qualify as widespread. If this conduct were in line with the intentions of the government or the *de facto* power in the territory and would, therefore, remain unopposed (*i.e.*, tolerated), the policy not to oppose the attacks would meet the requirements of the policy element.<sup>152</sup> According to the view of the authors, it would therefore not be necessary to prove that such militia were actively supported or instructed by a state or organisation (as may be the case in East Timor). However, if it could be proven, the active support would render the attack a systematic one.

This interpretation is also in conformity with the rulings in *Kupreskic*. ICTY Trial Chamber II explicitly included toleration, approval, endorsement etc. as possible methods to implement a policy: “The need for crimes against humanity to have been at least *tolerated* by a State, Government or entity is also stressed in national and international case-law [...]”<sup>153</sup> (emphasis added). Moreover, “[t]he available case-law seems to indicate that in these cases some sort of explicit or *implicit approval or endorsement* by State or governmental authorities is required [...]”<sup>154</sup> (emphasis added).

It should be noted that mere negligence on the part of an authority would not suffice to render a multiplicity of crimes which remain unopposed by such authority a widespread attack. The same holds true if the authorities are not able to oppose the crimes (*ultra posse nemo obligatur*). However, a policy of toleration adopted by a government which has the ability to prevent the crimes but nevertheless chooses to tolerate them – for example, because it expects political disadvantages in opposing them – would fulfil the requirements of the policy element with regard to a widespread attack.

Moreover, it is obvious that the entity must also be under a legal obligation, based for example on international human rights law, to provide protection against the attack. At least for purposes of defining the elements of crimes against humanity a (foreign) state not exercising legitimate or *de*

<sup>152</sup> M. Cherif Bassiouni, *supra* note 9, p. 264: “[W]henver [public] officials with the intent that certain crimes be committed, knowingly or intentionally fail to carry out their duties to enforce criminal laws equally and fairly [...] then such public officials are criminally accountable for the conduct of others”. However, it must be noted that the issue at hand is not the criminal responsibility of the individuals who tolerate the attack but the question of whether a *policy* can consist in the mere toleration of crimes.

<sup>153</sup> *Prosecutor v. Kupreskic*, *supra* note 14, para. 552.

<sup>154</sup> *Ibid.*, para. 555.



*facto* power in a certain territory cannot, in general, be considered under a legal obligation to halt human rights violations in this territory.

A final issue which must be considered is the complicated wording of the Elements of Crimes for the ICC. The third paragraph of the Introduction to the Elements concerning article 7 reads: “It is understood that ‘policy to commit such attack’ requires that the State or organisation *actively* promote or encourage such an attack against a civilian population”.<sup>155</sup> This statement contradicts the result of the above analysis, that a policy can be implemented by mere toleration. However, a footnote attached to this sentence provides: “A policy which has a civilian population as the object of the attack would be implemented by State or organizational action. Such a policy may, in exceptional circumstances, be implemented *by a deliberate failure to take action*, which is consciously aimed at encouraging such attack. The existence of such a policy cannot be inferred solely from the absence of governmental or organisational action” (emphasis added).

The text of the Element and the footnote obviously contradict each other. Whereas the Element requires active conduct with regard to the attack the footnote provides that failure to take action may suffice as well. This lack of clarity – the result of a compromise achieved during the Fourth Session (13 to 31 March 2000) of the Preparatory Commission (“PrepCom”) – is not resolved by the qualification that inactivity may suffice only in “exceptional circumstances”.

However, even if the limitation (“actively promote or encourage”) is not invalidated by the contradictory footnote, it cannot vitiate our analysis, since in any case it has no legal effect. First, the ICC itself is not bound by the formulation in the Elements of Crimes because it is inconsistent with the Statute and therefore legally void.<sup>156</sup> It has been argued above that a policy with respect to a widespread but not, at the same time, systematic attack can only consist in the deliberate denial of protection against a widespread attack, *i.e.*, in inaction on the part of the responsible state or organisation. The Rome Statute, like section 5.1 of Regulation 15/2000 and customary international law, clearly provides for widespread and systematic in the alternative. To require an active policy for crimes against humanity, however, would amount to deleting the “widespread” alternative from the Statute.<sup>157</sup> Second, the problematic Element need not

<sup>155</sup> Elements of Crimes, *supra* note 79 (emphasis added).

<sup>156</sup> Article 9 reads: “1. Elements of Crimes shall *assist* the Court in the interpretation and application of articles 6, 7 and 8 [ . . . ] 3. The Elements of Crimes and amendments thereto shall be *consistent with this Statute*” (emphasis added).

<sup>157</sup> Darryl Robinson, *supra* note 67, pp. 50–51, is of the opinion that a systematic attack, as codified in the Rome Statute, requires a very high degree of organisation. However,

be followed by the Serious Crimes Panel because, in addition to the reasons given above, it is not bound by the decisions of the PrepCom but only by Regulation 15/2000 and customary international law (in this regard article 10 of the Rome Statute explicitly provides that customary international law shall not be influenced “in any way” by the formulation of the crimes in Part 1 of the Statute).

In conclusion, both a systematic and a widespread attack require some kind of link with a state or a *de facto* power in a certain territory by means of the policy of this entity. The policy in the case of a systematic attack would be to provide at least certain guidance regarding the prospective victims in order to coordinate the activities of the single perpetrators. A systematic attack thus requires active conduct from the side of the entity behind the policy. However, extensive or repeated activity is not required. Rather, what counts is whether the conduct suffices to trigger and direct the attack. Thus, for example, the identification of possible victims by the authorities and an (implicit or explicit) announcement of impunity would be sufficient.

A widespread attack which is not at the same time systematic must be one that lacks any guidance or organisation. The policy behind such an attack may be one of mere deliberate inaction (*toleration*). Such a policy, however, can only exist if the entity in question is able and, moreover, legally obligated to intervene.<sup>158</sup>

*e. The Individual Act and the Context Element*

The relation between the individual act and the context element is largely a subjective one and will be discussed below. However, the wording of the context element in the ICTY Statute also gives rise to the question of the objective relationship between the conduct of the single perpetrator and the context. The relevant passage of the chapeau of article 5

---

in support of this view he adduces the *Akayesu* formula, rejected above. In fact, any multiplicity of crimes which is centrally organised must be considered a systematic attack, regardless of the degree of organisation. This is because a systematic attack requires fewer victims than a widespread attack. For example, if in a period of several years a few hundred people in a large country were killed, this would hardly qualify as a *widespread* attack. If, however all of the victims belonged to a small community of homosexuals, and state officials had made known that they have no intention of prosecuting any crimes committed against these homosexuals, the crimes amount clearly to a *systematic* attack. However all the organisation required for the attack is the selection of the victims and the announcement of impunity.

<sup>158</sup> Members of governments which implement a policy by tolerance may be responsible themselves under the doctrine of command responsibility, see Kai Ambos, *Superior Responsibility (Art. 28)*, in THE ROME STATUTE OF THE ICC: A COMMENTARY 812–813, 836–839 (Antonio Cassese et al., eds., 2002).

provides that a person is responsible “for the following crimes when committed in armed conflict [. . .] and directed against any civilian population” (emphasis added). This formulation (specifically the “and”) – if taken literally – could be read to require that the perpetrator personally must direct the crime against a civilian population (*i.e.*, not only one or a few single victims) and, thus, commit a multiplicity of acts.

However, as early as 1996, Trial Chamber I of the ICTY decided that “as long as there is a link with the widespread or systematic attack against any civilian population, a single act could qualify as a crime against humanity”.<sup>159</sup> This has become the invariable practice of both Tribunals.<sup>160</sup> It was reformulated in the clearest possible way in *Kunarac*: “The underlying offence does not need to constitute the attack but only to form a part of the attack”.<sup>161</sup>

The wording of both the chapeau of article 3 of the ICTR Statute and article 7(1) of the Rome Statute leaves no doubt about the relationship between the single crime and the context element: they provide that the enumerated criminal acts must be “committed *as part* of a widespread or systematic attack directed against any civilian population” (emphasis added).

Unfortunately, the wording of the chapeau of section 5.1 of Regulation 15/2000 combines the formulation of the Rome Statute and the ICTY Statute in such a way as to require that the single act be “committed *as part* of a widespread or systematic attack *and* directed against any civilian population” (emphasis added). In effect, the “and” of the ICTY Statute is inserted into the formulation of the Rome Statute. The outcome is confusing for two reasons. First, the language, if taken literally, would separate the attack from its very object, namely the civilian population, suggesting that both are two different concepts. Secondly, for the same reasons as in the case of the ICTY Statute, section 5.1 seems to provide that a single criminal act by a perpetrator does not suffice for criminal responsibility for crimes against humanity to be incurred.<sup>162</sup> Bergsmo<sup>163</sup> reports that the change of the wording in section 5.1 was not intended by the drafters but is simply an error and recommends that it should be corrected, deleting the word “and”. To follow this recommendation would

<sup>159</sup> *Prosecutor v. Mrksic*, *supra* note 110, para. 30.

<sup>160</sup> *Prosecutor v. Tadic*, *supra* note 9, para. 649; *Prosecutor v. Kayishema*, *supra* note 74, para. 135; *Prosecutor v. Kupreskic*, *supra* note 14, para. 550; *Prosecutor v. Kunarac*, *supra* note 81, para. 417; *Prosecutor v. Kordic*, *supra* note 52, para. 178; *Prosecutor v. Bagilishema*, *supra* note 81, para. 82.

<sup>161</sup> *Prosecutor v. Kunarac*, *supra* note 81, para. 417.

<sup>162</sup> Morten Bergsmo, *supra* note 3, pp. 1–2.

<sup>163</sup> *Ibid.*

help to avoid confusion, simplify the argumentation of both the prosecution and the Court and, thus, save resources. In any case, section 5.1 must be *applied* in such a corrected form because the “new” – verbatim – meaning would be in contradiction with customary international law and nonsensical.

With regard to the nature of the link between the enumerated inhumane criminal act and the attack, *Kayishema* requires that “[t]he crimes [...] must form part of [...] an attack”.<sup>164</sup> And the *Kunarac* Chamber held: “It is sufficient to show that the act took place in the context of an accumulation of acts of violence which, individually, may vary greatly in nature and gravity”.<sup>165</sup>

A more precise definition of the required link between the act and the attack may be derived from the rationale of crimes against humanity. It consists in the protection against the particular dangers of multiple crimes supported or unopposed by the authorities. If the dangerousness of an individual criminal is increased *because* his or her conduct occurs in such a context the act must be regarded objectively as a part of the attack. For example, a person who, because of the attack and the policy behind it, could not turn to the police for help suffers the specific risk created by the attack. If this person is killed, the killing is part of the attack. On the other hand, a person who is killed in the course of an ordinary burglary is not a victim of crimes against humanity if the police would have been willing to protect the person (but arrived too late). Such a person suffers only the general risk to become a crime victim but not the special risk created by the attack. Thus, an adequate test to determine whether a certain act was part of the attack is to ask whether the act would have been less dangerous for the victim if the attack and the policy had not existed.

#### f. *Knowledge of the Attack*

Section 5.1 of Regulation 15/2000 requires that the perpetrator has “knowledge of the attack”. The exact meaning of this term is not easily determined since both the meaning of “knowledge” and the question how much the perpetrator must “know” pose complicated questions.

In general, a person incurs criminal responsibility for a certain (objective) conduct only if a mental element with respect to this conduct exists (*actus non facit reum nisi mens sit rea*<sup>166</sup>). With regard to the

<sup>164</sup> *Prosecutor v. Kayishema*, *supra* note 74, para. 135.

<sup>165</sup> *Prosecutor v. Kunarac*, *supra* note 81, para. 419.

<sup>166</sup> “An act does not make a culprit unless the mind is culpable as well”. It may be noted that this phrase equates mental element and culpability; however, modern civil

commission of international crimes mere negligence is in most cases insufficient. These crimes require a state of mind which in civil law jurisdictions is referred to as *dolus* or intent.<sup>167</sup> *Dolus* exists in the following forms: *dolus directus* first degree (also called *dolus directus*), *dolus directus* second degree (or *dolus indirectus*) and *dolus eventualis*. The corresponding forms of mental states in Anglo-American law are described by the Model Penal Code<sup>168</sup> as purpose, knowledge and recklessness.<sup>169</sup> Purpose and knowledge are similar to *dolus directus* first and second degree. Recklessness, however, while similar to *dolus eventualis*, appears to cover a wider range of mental states than *dolus eventualis*.<sup>170</sup>

The *Blaskic* Trial Chamber rendered a complete definition of the three degrees of intent when dealing with the subjective side of the context element. Quoting a definition from a Belgian textbook,<sup>171</sup> the Chamber held that there is “intent” or “direct malicious intent” if “the agent *seeks* to commit the sanctioned act which is either his *objective* or at least the method of achieving his objective”; there is “indirect malicious intent” if “the agent did not deliberately seek the outcome but knew that it would be the result”; and there is “recklessness” if “the outcome is foreseen by the perpetrator as only a probable or possible consequence”.<sup>172</sup>

However, *Blaskic* does not equate the term “knowledge” with what the Chamber calls indirect malicious intent. Applying the definition of another

---

law jurisdictions, in principle, distinguish between mental elements and culpability; cf. HANS-HEINRICH JESCHECK & THOMAS WEIGEND, *LEHRBUCH DES STRAFRECHTS. ALLGEMEINER TEIL* 430 (5th ed., 1996).

<sup>167</sup> Note, however, that the term “intent” is also used, in a narrower sense, to denote only the highest degree of *dolus* or intent in a broader sense; namely *dolus directus* first degree, as defined below.

<sup>168</sup> *American Law Institute Model Penal Code. Official Draft*, 1962, reprinted in SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW, CASES AND MATERIALS* 1127–1192 (6th ed., 1995).

<sup>169</sup> WAYNE R. LAFAVE, *CRIMINAL LAW* 227 (3rd ed., 2000).

<sup>170</sup> According to German legal doctrine, a perpetrator acts with *dolus eventualis* if two conditions are fulfilled. Firstly he or she must consider the prohibited result (*e.g.*, a death) as a possible but not certain effect of his or her conduct. Secondly he or she must accept or approve of the forbidden result, or – in other words – if he or she hopes that, despite the risk, the prohibited result will not occur her mental state is not regarded as *dolus eventualis* but as conscious negligence. Kai Ambos, *General Principles of Criminal Law in the Rome Statute*, 10 *CRIM. L. FORUM* 1, 21 (1999), with further references; Hans-Heinrich Jescheck & Thomas Weigend, *supra* note 166, pp. 299–301. As Anglo-American law requires only the first of both named elements for recklessness, Wayne R. LaFave, *supra* note 169, p. 254, this definition is wider than *dolus eventualis*.

<sup>171</sup> CHRISTIANE HENNAU & JACQUES VERHAEGEN, *DROIT PÉNAL GÉNÉRAL* (1991).

<sup>172</sup> *Prosecutor v. Blaskic*, *supra* note 68, para. 254 (footnotes omitted).

text book,<sup>173</sup> the judges opined that “knowledge also includes the conduct ‘of a person taking a deliberate risk in the hope that the risk does not cause injury’”.<sup>174</sup> This finding was repeated in *Kunarac*.<sup>175</sup> It is also compatible with the German doctrine according to which all three forms of mental state mentioned above require a volitional and an intellectual element.<sup>176</sup> The intellectual element requires that the perpetrator has certain (*dolus directus* second degree) or at least uncertain (*dolus directus* first degree and *dolus eventualis*) knowledge that the prohibited result will occur or the circumstance exists.

In the jurisprudence of the Tribunals there is no dispute that, with regard to the context element, *dolus directus* first degree (intent in the narrower sense, purpose) is not required, *i.e.*, the perpetrator need not seek to participate in the attack.<sup>177</sup> All decisions agree that knowledge is sufficient and most even expressly include “constructive knowledge”.<sup>178</sup> Constructive knowledge, though, is an inherently unclear concept.<sup>179</sup> It was first used in *Tadic* where, however, the Chamber introduced it for the first time in the summary<sup>180</sup> of its deliberations concerning the necessary mental state regarding the context element. The Chamber did not make clear to which of the various qualifications of the concept of knowledge in the judgment the term “constructive knowledge” refers. Most probably it was referring to a quotation from the Canadian *Finta case*<sup>181</sup> holding that wilful blindness with regard to the context is sufficient.<sup>182</sup> A perpetrator is wilfully blind if he or she wishes to remain ignorant and therefore does not engage in

<sup>173</sup> FRANCIS LE GUNEHÉC, *LE NOUVEAU CODE PÉNAL ILLUSTRÉ* (1996).

<sup>174</sup> *Prosecutor v. Blaskic*, *supra* note 68, para. 254 (footnotes omitted).

<sup>175</sup> *Prosecutor v. Kunarac*, *supra* note 81, para. 434.

<sup>176</sup> Hans-Heinrich Jescheck & Thomas Weigend, *supra* note 166, p. 293.

<sup>177</sup> This is stated explicitly in *Prosecutor v. Blaskic*, *supra* note 68, para. 251. No (other) decision of the *ad hoc* tribunals requires *dolus directus* first degree or an analogous state of mind.

<sup>178</sup> *Prosecutor v. Tadic*, *supra* note 9, paras. 656–659; *Prosecutor v. Tadic*, *supra* note 50, para. 248 (does not mention constructive knowledge); *Prosecutor v. Kayishema*, *supra* note 74, paras. 133–134; *Prosecutor v. Rutaganda*, *supra* note 71, para. 71; *Prosecutor v. Kupreskic*, *supra* note 14, paras. 556–557; *Prosecutor v. Musema*, *supra* note 72, para. 206; *Prosecutor v. Ruggiu* (Case no. ICTR-97-32-I), Judgment and Sentence, 1 June 2000, para. 20; *Prosecutor v. Kordic*, *supra* note 52, para. 185.

<sup>179</sup> Wayne R. LaFave, *supra* note 169, pp. 237–238.

<sup>180</sup> *Prosecutor v. Tadic*, *supra* note 9, para. 659.

<sup>181</sup> *R. v. Finta*, *supra* note 32.

<sup>182</sup> *Prosecutor v. Tadic*, *supra* note 9, para. 657; Simon Chesterman, *supra* note 101, also seems to think that the judges used the term “constructive knowledge” synonymously with “wilful blindness”.

further inquiry.<sup>183</sup> As LaFave explains, the concept is very closely linked to a provision in the Model Penal Code which provides that knowledge of the existence of a fact can be equated with the awareness of a high probability of the existence of a fact.<sup>184</sup> This concept – in turn – is close to *dolus eventualis* and even recklessness, which both require that the perpetrator be aware of a risk, *i.e.*, aware of a probability that a circumstance exists or a result will occur.

Therefore, the clear and also practical definition of knowledge given in *Blaskic*, namely that the term “knowledge” includes knowledge of a risk, is not in contradiction with other decisions but a useful clarification of the obscure concept of constructive knowledge. To summarise, under customary international law, a perpetrator has knowledge of the attack if he or she is aware of the risk that his or her conduct is objectively part of a broader attack.

The customary law standard which is required by the Tribunals may be inapplicable under Regulation 15/2000. Section 18.3 of Regulation 15/2000 (which is very similar to article 30 of the Rome Statute)<sup>185</sup> defines “knowledge” as follows:

18.3. For the purposes of the present Section, “knowledge” means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. “Know” and “knowingly” shall be construed accordingly.

Under this standard awareness of a mere *risk* would not be sufficient.<sup>186</sup>

However, it is clear that the mental standard of section 18 has been replaced by the more specific requirement in section 5.1, namely “knowledge of the attack” (*lex specialis derogat legi generali*). On the other hand, section 5.1 does not provide a definition for “knowledge”. Therefore, the question arises whether the term “knowledge of the attack” in section 5.1 must be interpreted in line with the narrow requirements of section 18.3 or according to the broader customary international law applied by the *ad hoc* Tribunals. Two reasons support the latter approach: first, the definition of knowledge in section 18 is expressly given only “[f]or the purposes of the present Section”. Second, the general introduction to the Elements of

<sup>183</sup> Wayne R. LaFave, *supra* note 169, p. 232.

<sup>184</sup> *Ibid.*, quoting Model Penal Code, *supra* note 168, s. 2.02(2)(b)(ii). Moreover it has been noted that the concept of knowledge in United States law is close to the concept of *dolus eventualis*, NIKLAUS SCHMID, STRAFVERFAHREN UND STRAFRECHT IN DEN VEREINIGTEN STAATEN. EINE EINFÜHRUNG 184 (2nd ed., 1993).

<sup>185</sup> For a detailed analysis of articles 30 and 32 see: KAI AMBOS, DER ALLGEMEINE TEIL EINES VÖLKERSTRAFRECHTS. ANSÄTZE EINER DOGMATISIERUNG, at 757 et seq. (2002).

<sup>186</sup> Kai Ambos, *supra* note 170, pp. 21–22.

Crimes for the ICC explains: “Where *no* reference is made in the Elements of Crimes to a mental element [. . .] it is understood that the relevant mental element [. . .] set out in article 30 [of the Rome Statute] applies” (emphasis added).<sup>187</sup> However, knowledge of the attack is mentioned separately in the Elements for each of the enumerated criminal acts of crimes against humanity. It appears, therefore, that the drafters of the Elements of Crimes considered knowledge of the attack to be a standard independent of the general provision in article 30 of the Rome Statute which is equivalent to section 18 of Regulation 15/2000. Consequently, the knowledge requirement in the chapeau of section 5.1 must be interpreted in accordance with the customary international law requirement of knowledge as developed above.

The drafters of the Elements perceived a particular problem in cases where the perpetrator commits his or her crimes at the very beginning of the attack, *i.e.*, at a time where still too few crimes have been committed to reach the threshold necessary for a widespread or systematic attack. The Elements of Crimes provide that in such a situation it is sufficient that the perpetrator intends “to further such an attack”,<sup>188</sup> or intends “the conduct to be part of a[n . . .] attack”. The drafters obviously intended that in such situations the requirement of knowledge should be replaced by the perpetrator’s desire to bring about the relevant facts. It is worth while pointing out that the concept of knowledge developed by the *ad hoc* Tribunals makes this clause superfluous<sup>189</sup> since according to the Tribunals it is sufficient that the perpetrator be aware of the *risk* that his or her conduct is (or will become) part of an attack.

In summary, “knowledge of the attack” in section 5.1 of Regulation 15/2000 must be interpreted as requiring (only) awareness of the *risk* that the conduct be objectively part of a broader attack. A recklessness or *dolus eventualis* standard is thus sufficient with regard to the context element. (However, it is important to note that this is not the case with respect to the single inhumane act, where section 18 remains fully applicable.)

The *ad hoc* Tribunals have agreed that the perpetrator must know of both the attack and the link which renders the individual criminal act part of the attack.<sup>190</sup> As the *Tadic* Trial Chamber held: “[T]he perpetrator must

<sup>187</sup> Elements of Crimes, *supra* note 79, general introduction, para. (2).

<sup>188</sup> *Ibid.*, introduction to the Elements of article 7(2).

<sup>189</sup> In any case, every crime which can be committed with *dolus directus* second degree can, in general, also be committed with *dolus directus* first degree.

<sup>190</sup> *Prosecutor v. Tadic*, *supra* note 9, para. 659; *Prosecutor v. Kayishema*, *supra* note 74, para. 133; *Prosecutor v. Rutaganda*, *supra* note 71, para. 171; *Prosecutor v. Kupreskic*, *supra* note 14, para. 557 (citing *Prosecutor v. Kayishema*); *Prosecutor v. Musema*, *supra*



know that there is an attack on the civilian population [and] know that his act fits in with the attack”.<sup>191</sup> The language of this and other rulings suggests that the perpetrator need not have detailed knowledge of the particularities of the attack but simply be aware (of the risk) that an attack *exists*. This view is confirmed by *Kunarac* which noted that the knowledge requirement does not “entail knowledge of the details of the attack”.<sup>192</sup> Moreover, the Elements of Crimes provide that no proof is required “that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organisation”.<sup>193</sup>

Indeed, such an interpretation of the knowledge element is also in accordance with the rationale of crimes against humanity. For the particular dangerousness of crimes against humanity a crime need not be perpetrated with knowledge of details of a widespread or systematic attack (*e.g.*, the number of attacks, perpetrators or victims). It is sufficient that the perpetrator knows the facts related to the attack which increase the dangerousness of his or her conduct or which render this conduct a contribution to the crimes of others. Thus it is sufficient, for example, if the perpetrator understands that his or her act is part of a collective criminal conduct which renders the victims more vulnerable. Moreover he or she may also hope that the collective nature of the crimes will provide impunity.

The same holds true with regard to the increased culpability of a perpetrator of crimes against humanity.<sup>194</sup> It is sufficient that he or she knows that an attack exists and is thus able to understand that his or her conduct is much more serious than the same conduct would be if committed outside the context of a widespread or systematic attack.

In conclusion, the perpetrator must only be aware of the risk that an attack exists and the risk that certain circumstances of the attack render his or her conduct more dangerous than if the attack did not exist or that the conduct creates the atmosphere for other crimes. Knowledge of details is not required.

---

note 72, para. 206; *Prosecutor v. Blaskic*, *supra* note 68, para. 244; *Prosecutor v. Ruggiu*, *supra* note 178, para. 20; *Prosecutor v. Kunarac*, *supra* note 81, para. 434; *Prosecutor v. Kordic*, *supra* note 52, para. 185.

<sup>191</sup> *Prosecutor v. Tadic*, *supra* note 9, para. 659.

<sup>192</sup> *Prosecutor v. Kunarac*, *supra* note 81, para. 434.

<sup>193</sup> Elements of Crimes, *supra* note 79, introduction to the Elements of article 7(2).

<sup>194</sup> Margaret McAuliffe de Guzman, *supra* note 13, p. 380; *Prosecutor v. Kayishema*, *supra* note 74, para. 134, noting that it is necessary that the perpetrator knew of the attack in order to be culpable; quoted in *Prosecutor v. Blaskic*, *supra* note 68, para. 249; *Prosecutor v. Ruggiu*, *supra* note 178, para. 20.

Another question is whether the perpetrator must know only of the attack or also of the policy behind the attack. McAuliffe de Guzman notes that the wording of article 7(1) of the Rome Statute merely requires “knowledge of the attack”.<sup>195</sup> She, therefore, argues that the perpetrator need not know about the exact content of the attack (but merely of its existence) to incur culpability for crimes against humanity. As, in her view, the policy is a mere detail of the attack, she concludes that the perpetrator need not know of the existence of the policy.

Indeed, the question is whether the policy element must be considered among the details of the attack which the perpetrator need not know or whether it is a distinct material element of crimes against humanity. In the latter case the doctrine of *actus non facit reum nisi mens sit rea* applies, and the same *dolus* is required as for the attack.

The point has already been made that the policy element is necessary to distinguish crimes against humanity from ordinary crimes and moreover to safeguard the link of crimes against humanity with human rights violations. Therefore it is an indispensable material element of crimes against humanity which is distinct from the attack. Consequently, a perpetrator who does not know of this element, does not know all the necessary facts to incur culpability for crimes against humanity. On the other hand, as noted above, the perpetrator need not be absolutely sure: it is sufficient to be aware of a *risk* that a policy exists. The offender need not know details of the policy.

The decisions of the Tribunals come to the same conclusion. *Kayishema*, without giving further reasons, requires that the “accused must know that his act(s) is part of a widespread or systematic attack on a civilian population *and pursuant to some kind of policy or plan*” (emphasis added).<sup>196</sup> This holding has been repeated by virtually all judgments dealing with the matter.<sup>197</sup>

---

<sup>195</sup> Margaret McAuliffe de Guzman, *supra* note 13, p. 380.

<sup>196</sup> *Prosecutor v. Kayishema*, *supra* note 74, para. 134.

<sup>197</sup> *Prosecutor v. Rutaganda*, *supra* note 71, para. 71; *Prosecutor v. Kupreskic*, *supra* note 14, para. 556; *Prosecutor v. Musema*, *supra* note 72, para. 206; *Prosecutor v. Blaskic*, *supra* note 68, para. 249; *Prosecutor v. Ruggiu*, *supra* note 178, para. 20; *Prosecutor v. Kordic*, *supra* note 52, para. 185.

## II. THE INDIVIDUAL INHUMANE ACTS

### 1. *The Mental State Required with Regard to The Individual Criminal Acts*

Section 18 of Regulation 15/2000 is reasonably clear with regard to the required mental elements. The perpetrator must mean to engage in a certain conduct (s. 18(2)(a)), he or she must mean to bring about the criminalised consequence (*e.g.*, a death) or be aware that it will occur in the ordinary course of events and must be aware that necessary circumstances exist (*e.g.*, that the torture victim is under his or her control). As has been argued above, section 18 does not apply to the perpetrator's knowledge of the (widespread or systematic) attack.

Where awareness is required that the consequence will occur in the ordinary course of events or that a circumstance exists (s. 18(2)(b) and (3)), it is not sufficient that the person consider the occurrence of the consequence to be a mere possibility.<sup>198</sup> This must be emphasised for the following reasoning: as one can never be absolutely sure what happens in the future (the perpetrator's grenade may fail to explode), the highest possible certainty with regard to future events is the one described in section 18(2)(b) and (3), namely that the consequence will (not "may") occur "in the ordinary course of events". Thus, the phrase "in the ordinary course of events" cannot be read in such a way as to include mere possibilities where the perpetrator is not sure whether the result will occur, even if everything goes normally. Consequently, under Regulation 15/2000 recklessness or *dolus eventualis* are not sufficient.<sup>199</sup>

There has been much discussion as to whether crimes against humanity can only be committed if the perpetrator acts with a discriminatory intent. The *Tadic* Trial Chamber doubted whether discriminatory intent was an indispensable requirement for crimes against humanity because it had not been included in the ICTY Statute and for other reasons. However, the Chamber felt forced to require discriminatory intent because the Report

<sup>198</sup> Kai Ambos, *supra* note 170, pp. 21–22. See, however, the wider interpretation of the term awareness of Donald Piragoff, *Article 30*, in COMMENTARY ON THE ROME STATUTE, *supra* note 80, margin no. 25–27.

<sup>199</sup> The same view is taken by the German expert working group which prepared the German Draft Code on International Crimes: ENTWURF EINES GESETZES ZUR EINFÜHRUNG DES VÖLKERSTRAFGESETZBUCHES 31(2001), available at <<http://www.bmj.bund.de/images/10185.pdf>>. For translations of the official govt. draft in all United Nations languages see <[www.iuscrim.mpg.de/forsch/online\\_pub.html#legaltxt](http://www.iuscrim.mpg.de/forsch/online_pub.html#legaltxt)>.

of the Secretary General on the establishment of the ICTY<sup>200</sup> and some members of the Security Council considered it necessary.<sup>201</sup> This holding was criticised in the literature<sup>202</sup> and was reversed by the *Tadic* appeal decision:

The ordinary meaning of Article 5 makes it clear that this provision does not require all crimes against humanity to have been perpetrated with a discriminatory intent. Such intent is only made necessary for one sub-category of those crimes, namely “persecutions” provided for in Article 5 (h).

Moreover, the Appeals Chamber contended that an interpretation in the light of the humanitarian goals of the drafters<sup>203</sup> and a review of the relevant state practice led to the same result.<sup>204</sup> This holding has become the ICTY’s invariable practice.<sup>205</sup>

With regard to the ICTR, the problem is more difficult. The chapeau of article 3 of the ICTR Statute expressly requires that the crimes be “committed as part of a widespread or systematic attack against any civilian population *on national, political, ethnic, racial or religious grounds*” (emphasis added). The judges of the ICTR have taken notice of the *Tadic* appeal but have held that the wording of their Statute forces them to require discriminatory intent for the commission of crimes against humanity.<sup>206</sup> Recently, the *Akayesu* appeals decision<sup>207</sup> and the *Bagilishema* trial judgment have ruled that “the qualifier ‘on national, political, ethnic, racial or religious grounds’, which is peculiar to the ICTR Statute should, as a matter of construction, be read as a characterisation of the nature of the ‘attack’ rather than of the *mens rea* of the perpetrator”.<sup>208</sup> This opinion was explained: “Had the drafters of the Statute sought to characterise the individual actor’s intent as discriminatory, they would have inserted the relevant phrase immediately after the word ‘committed’, or they would have used punctuation to set aside the intervening description of the attack”.<sup>209</sup>

<sup>200</sup> Report of the Secretary-General, *supra* note 44, para. 48.

<sup>201</sup> *Prosecutor v. Tadic*, *supra* note 9, para. 652.

<sup>202</sup> Margaret McAuliffe de Guzman, *supra* note 13, pp. 364-368.

<sup>203</sup> *Prosecutor v. Tadic*, *supra* note 50, para. 284.

<sup>204</sup> *Ibid.*, paras. 288–292.

<sup>205</sup> *Prosecutor v. Kupreskic*, *supra* note 14, para. 558; *Prosecutor v. Blaskic*, *supra* note 68, para. 260; *Prosecutor v. Kordic*, *supra* note 52, para. 186.

<sup>206</sup> See, e.g., *Prosecutor v. Rutaganda*, *supra* note 71, paras. 75–76.

<sup>207</sup> *Prosecutor v. Akayesu* (Case no. ICTR-96-4-A), Judgment, 1 June 2001, para. 469, cited after *Prosecutor v. Bagilishema*, *supra* note 81, para. 81, fn. 80 (the English text of the decision is not yet available).

<sup>208</sup> *Prosecutor v. Bagilishema*, *supra* note 81, para. 81.

<sup>209</sup> *Ibid.*, fn. 79.

Thus, it may be stated that the current law of crimes against humanity – with the exception of persecution – does not require any discriminatory intent.

The last matter with regard to the mental elements of crimes against humanity is the question of whether the motives of the perpetrator are of importance. The *Tadic* Trial Chamber held: “[W]hile personal motives may be present they should not be the sole motivation for the act”.<sup>210</sup> And: “[T]he act must not be taken for purely personal reasons unrelated to the armed conflict”.<sup>211</sup>

This holding, like the *Tadic* Chamber’s opinion on discriminatory motives, was quashed by the Appeals Chamber, which, after thorough consideration concluded: “[T]he relevant case-law and the spirit of international rules concerning crimes against humanity make it clear that under customary law, ‘purely personal motives’ do not acquire any relevance for establishing whether or not a crime against humanity has been perpetrated”.<sup>212</sup> All subsequent decisions of the ICTY dealing with crimes against humanity as well as the most recent decision of the ICTR have followed this view.<sup>213</sup>

Only *Kayishema* held: “The elements of the attack effectively exclude from crimes against humanity, acts carried out for purely personal motives and those outside of a broader policy or plan”.<sup>214</sup> However, this ruling must be considered erroneous for two reasons. First, it deduces the exclusion of personal motives from the discriminatory intent which it wrongly considers necessary. Second, even if a discriminatory intent were required this would not exclude that the perpetrator acted for purely personal reasons. The *Tadic* Appeals Chamber gave an example in which “a high-ranking SS official [...] claims that he participated in the genocide of the Jews and Gypsies for the ‘purely personal’ reason that he had a deep-seated hatred of Jews and Gypsies and wished to exterminate them, and for no other reason”.<sup>215</sup> This example shows that discriminatory intent does not exclude personal motives. Consequently the *Tadic* Appeals Chamber revised the Trial Chamber.<sup>216</sup> Personal motives are irrelevant with regard to the elements of crimes against humanity.

---

<sup>210</sup> *Prosecutor v. Tadic*, *supra* note 9, para. 658.

<sup>211</sup> *Ibid.*

<sup>212</sup> *Prosecutor v. Tadic*, *supra* note 50, para. 270.

<sup>213</sup> *Prosecutor v. Kupreskic*, *supra* note 14, para. 558 (noting that the issue was “free from dispute”); *Prosecutor v. Kunarac*, *supra* note 81, para. 433; *Prosecutor v. Kordic*, *supra* note 52, para. 187; *Prosecutor v. Bagilishema*, *supra* note 81, para. 95.

<sup>214</sup> *Prosecutor v. Kayishema*, *supra* note 74, para 122.

<sup>215</sup> *Prosecutor v. Tadic*, *supra* note 50, para. 269.

<sup>216</sup> *Ibid.*

## 2. Murder (s. 5.1(a))

Section 5.1(a) of Regulation 15/2000 provides that murder is one of the inhumane acts which may amount to a crime against humanity. The section reiterates article 7(1)(a) of the Rome Statute.<sup>217</sup> Therefore, provisions which assist in the interpretation of article 7 should also be applicable in the interpretation of section 5. The core elements of article 7(1)(a) have been articulated in the Elements of Crimes. In relation to murder as a crime against humanity, the Elements of article 7(1)(a) provide only (and not very helpfully) that in addition to proof of core elements of a crime against humanity (namely, the context element), murder requires that the perpetrator kill<sup>218</sup> one or more persons. This absence of a specific definition of the elements of murder as a crime against humanity in article 7(1)(a) or elsewhere has the result that reliance has to be placed on other provisions of Regulation 15/2000 (and the Rome Statute) and the general sources of international law<sup>219</sup> in order to ascertain these requirements, including particularly the requisite state of mind of the accused.

Murder is one of the crimes defined in article 6(c) of the Nuremberg Charter as a crime against humanity. These crimes constituted crimes in the world's major criminal law systems prior to adoption of the Charter in 1945<sup>220</sup> and have been replicated in the primary formulations of crimes against humanity that have been developed since Nuremberg, *i.e.*, article 5 of the ICTY Statute, article 3 of the ICTR Statute and article 7 of the Rome Statute.<sup>221</sup> These crimes can be deemed to be "general principles of

<sup>217</sup> The mutuality of the two provisions is noted by Linton, *supra* note 88, p. 10.

<sup>218</sup> The first Element to article 7(1)(a) provides: "For the purposes of this definition the term 'killed' is interchangeable with the term 'caused death'. This footnote applies to all elements which use either of these concepts".

<sup>219</sup> This issue is not addressed at length here. In summary, article 21 of the Rome Statute (followed, but not in identical terms, in section 3 of Reg. 15/2000) establishes a hierarchy for the applicable law for interpretation of the Statute. The absence however of a definition of murder in the Rome Statute and in Regulation 15/2000 (as well as the other international instruments relating to murder as a crime against humanity) has the result that, in order to define murder, resort must be had, *inter alia*, to decisions of international tribunals and the common elements of the crime of murder in different legal systems.

<sup>220</sup> M. Cherif Bassiouni, *supra* note 9, 293. The methodology by which this is established is set out at 294–300. For analysis of the main characteristics of relevant provisions of national penal codes of the world's major legal systems see similarly Günter Heine & Hans Vest, *supra* note 64, pp. 176 *et seq.*, esp. at p. 195.

<sup>221</sup> See also M. Cherif Bassiouni, *supra* note 9, p. 290; Olivia Swaak-Goldman, *supra* note 16, pp. 148 *et seq.*, in relation to the codification and evolution of article 6(c) in customary international law. Article 6(c) was also replicated in article 5(c) of the Tokyo Charter (Charter of the International Military Tribunal for the Far East of 1946, reproduced in BENJAMIN B. FERENCZ, 1 DEFINING INTERNATIONAL AGGRESSION: THE SEARCH

law”.<sup>222</sup> The ILC has acknowledged that “murder is a crime that is clearly understood and well defined in the national law of every State”.<sup>223</sup> This prohibited act does not require any further explanation.

According to the customary practice of states, murder – if understood as the umbrella term for all provisions which criminalise the taking of a life – is not merely intentional killing without lawful justification (*i.e.*, without the legal justifications, excuses and defenses known to the world’s major legal systems) but rather is more broadly defined in its “*largo sensu*” meaning as the creation of *life-endangering conditions likely to result in death* according to reasonable human experience.<sup>224</sup> Bassiouni concludes that given this broad definition of murder in the world’s major criminal justice systems, murder as intended in article 6(c) (and *a fortiori* in the clauses in other instruments that are framed in the same terms) includes a closely related form of unintentional but foreseeable death that in common law systems is called “manslaughter”,<sup>225</sup> and in the Romanist-Civilist-Germanic systems is homicide with *dolus* (*Vorsatz*) and homicide with *culpa* (*Fahrlässigkeit*).<sup>226</sup>

Within the international law of murder (and generally in international criminal law) developed by the *ad hoc* Tribunals, murder has been classified according to the common law conception of a crime based on core criteria of *actus reus* and *mens rea*. This approach to the conception of criminal acts within international law was approved in *Celebici* which noted that, “while the terminology utilised varies, these two elements have been described as ‘universal and persistent in mature systems of

---

FOR WORLD PEACE 522–527 (1975)) and article II(1)(c) of CCL 10, and both of these instruments are in the same or similar terms as article 6(c) and certainly refer to the same offences as article 6(c).

<sup>222</sup> M. Cherif Bassiouni, *supra* note 9, p. 300. See also Olivia Swaak-Goldman, *supra* note 16, pp. 143 *et seq.*

<sup>223</sup> 1996 Draft Code, *supra* note 37, article 18(7). Noted in *Prosecutor v. Kupreskic*, *supra* note 14, para. 821; endorsed in *Prosecutor v. Akayesu*, *supra* note 63, para. 587.

<sup>224</sup> M. Cherif Bassiouni, *supra* note 9, pp. 300–302. The phrase “according to reasonable human experience” has the same meaning as “. . . according to the known or foreseeable expectations of a reasonable person in the same circumstances” which Bassiouni uses in his discussion of this issue. The definition of murder noted here is “the widespread common understanding of the meaning of murder” and arises “notwithstanding the technical differences in the definitions of various forms of intentional and unintentional killing in the world’s major criminal justice systems”.

<sup>225</sup> *Ibid.* (in both of its common law forms, *i.e.*, voluntary and involuntary manslaughter).

<sup>226</sup> *Ibid.* This definition allows an examination of motive, which is important in order to link the offence with prerequisite legal elements of carrying out the “state action or policy” (the *nexus* that establishes murder as an international crime). This extended definition is particularly relevant to “extermination”, *i.e.*, murder on a large scale.

law’ ”.<sup>227</sup> Murder has been summarily defined by the *ad hoc* Tribunals as the unlawful, intentional killing of a human being.<sup>228</sup> Their case law has considered the following as necessary elements of murder as a crime against humanity:<sup>229</sup>

- The victim must be dead.<sup>230</sup>
- In relation to homicide of all natures the *actus reus* is the death of the victim as the result of the unlawful acts or omissions by the accused<sup>231</sup> or a subordinate.<sup>232</sup>
- The conduct of the accused or a subordinate must be a substantial cause of the death of the victim.<sup>233</sup>
- 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 as to whether death ensues or not (*mens rea*).<sup>234</sup>

While the ICTY and ICTR have not considered the *actus reus* element of the definition to be controversial, the *mens rea* element has been extended and extensively discussed. In *Kupreskic*, purporting to follow *Akayesu*, it was held that the requisite *mens rea* for murder as a crime against humanity is the intent to kill or the intent to inflict serious injury in reckless disregard of human life.<sup>235</sup> An indication of the meaning of

<sup>227</sup> *Prosecutor v. Delalic et al.* (Case no. IT-96-21-T), Judgment, 16 November 1998, paras. 473–474, at footnote 433 noting *Morissette v. United States*, 342 U.S. 246 (1952). The Chamber apparently overlooks the main alternative conception which would be based on the Roman-Germanic conception: *Tatbestand, Rechtswidrigkeit und Schuld*.

<sup>228</sup> *Prosecutor v. Akayesu*, *supra* note 63, para. 589 followed in *Prosecutor v. Rutaganda*, *supra* note 71, para. 80 and *Prosecutor v. Musema*, *supra* note 72, para. 215.

<sup>229</sup> *Prosecutor v. Akayesu*, *supra* note 63, para. 589, approved in *Prosecutor v. Kupreskic*, *supra* note 14, para. 560, *Prosecutor v. Blaskic*, *supra* note 68, para. 217, *Prosecutor v. Rutaganda*, *supra* note 71, para. 80 and *Prosecutor v. Musema*, *supra* note 72, para. 215.

<sup>230</sup> *Prosecutor v. Akayesu*, *supra* note 63, para. 589.

<sup>231</sup> *Prosecutor v. Delalic*, *supra* note 227, para. 424.

<sup>232</sup> *Prosecutor v. Akayesu*, *supra* note 63, para. 589. However, this issue is better dealt with in connection with individual responsibility and, more specifically, command responsibility; see Simon Chesterman, *supra* note 101, p. 331.

<sup>233</sup> *Prosecutor v. Delalic*, *supra* note 227, para. 424. Followed in *Prosecutor v. Blaskic*, *supra* note 68, para. 153 and in *Prosecutor v. Kordic*, *supra* note 52, para. 229 in relation to wilful killing (ICTY Statute, art. 2), adding that for the purposes of this article the victim must be a “protected person”, and at para. 230 in relation to murder (ICTY Statute, art. 3) noting that the offence is against a person “taking no active part in the hostilities”.

<sup>234</sup> *Prosecutor v. Akayesu*, *supra* note 63, para. 589; *Prosecutor v. Kvočka et al.* (Case no. IT-98-30/1-T), Judgment, 2 November 2001, para. 132.

<sup>235</sup> *Prosecutor v. Kupreskic*, *supra* note 14, para. 561.



“reckless disregard of human life” is provided in *Blaskic*. In confirming that the intent, or *mens rea*, needed to establish the offence of wilful killing exists once it has been demonstrated that the accused intended to cause death or serious bodily injury, the Trial Chamber added “which, as it is reasonable to assume, he had to understand was likely to lead to death”.<sup>236</sup> The Chamber considered that “recklessness” is a concept “which may be likened to serious criminal negligence”.<sup>237</sup>

In *Blaskic*, the Trial Chamber considered further that the accused must have acted “in the reasonable knowledge that the attack was likely to result in death”.<sup>238</sup> This phrase was followed in *Kordic*. Here the Trial Chamber held that *mens rea* would be satisfied if, in addition to the accused intending to kill the victim, or to cause grievous bodily harm, he or she also intended to inflict serious injury in the reasonable knowledge that the attack was likely to result in death.<sup>239</sup>

The formulation of the *mens rea* for murder as a crime against humanity in *Kupreskic*, *Blaskic* and *Kordic* is analogous to the definition of *mens rea* as stated in *Celebici*<sup>240</sup> in which the issue was the necessary intent required to establish the crimes of wilful killing and murder as war crimes within the Geneva Conventions. The Trial Chamber held that *mens rea* is present where an intention is demonstrated on the part of the accused to kill or inflict serious injury in reckless disregard of human life.<sup>241</sup> The use of the same formula for the requirement of *mens rea* in *Kupreskic* and *Celebici* is striking and demonstrates the willingness of the ICTY at least to treat

---

<sup>236</sup> *Prosecutor v. Blaskic*, *supra* note 68, para. 153. This specific requirement is in addition to the general requirement of proof for the general elements of article 2.

<sup>237</sup> *Prosecutor v. Blaskic*, *supra* note 68, para. 152. For the reasons noted below, this comment is applicable to the *mens rea* for murder as a crime against humanity although the context of this comment is article 2 of the ICTY Statute. Thus the *mens rea* constituting all the violations of article 2 of the Statute includes both guilty intent and recklessness which may be likened to serious criminal negligence.

<sup>238</sup> *Prosecutor v. Blaskic*, *supra* note 68, para. 217.

<sup>239</sup> *Prosecutor v. Kordic*, *supra* note 52, para. 236; *Prosecutor v. Kupreskic*, *supra* note 14, paras. 560–561; *Prosecutor v. Blaskic*, *supra* note 68, para. 217; *Prosecutor v. Akayesu*, *supra* note 63, para. 589.

<sup>240</sup> *Prosecutor v. Delalic*, *supra* note 227, para. 439.

<sup>241</sup> In formulating this definition, the Trial Chamber emphasised (*Prosecutor v. Delalic*, *supra* note 227, paras. 431 and 438) the importance of considering the nature and purpose of the prohibition contained in the Geneva Conventions and relevant principles of interpretation of the Statute and Rules (of the ICTY) which requires taking into account the objects of the Statute and the social and political considerations which give rise to its creation (see paras. 160 ff., especially para. 170). This decision as to the requirement of wilful killing was followed in *Prosecutor v. Kordic*, *supra* note 52, para. 229.

murder and wilful killing as the same offences whether they are crimes against humanity or war crimes.

Homicide (as a general, neutral term used here to describe unlawful taking of life) as used in the major instruments which relate to international criminal law is characterised as follows:

- As a crime against humanity, homicide is referred to as “murder”. Murder has been listed as the first crime against humanity in every international instrument defining crimes against humanity, namely article 6(c) of the Nuremberg Charter, article 5(c) of the Tokyo Charter, article II(1)(c) of CCL 10, Principle VI(c) of the ILC’s Nuremberg Principles,<sup>242</sup> article 10 of the ILC’s 1954 Draft Code,<sup>243</sup> article 5(a) of the ICTY Statute, article 3(a) of the ICTR Statute, article 18(a) of the 1996 Draft Code<sup>244</sup> and article 7 of the Rome Statute. This use of murder as a crime against humanity is replicated in section 5 of Regulation 15/2000.
- Similarly, as a war crime contemplated by common article 3 of the four Geneva Conventions, homicide is referred to as “murder”. Common article 3 totally prohibits “. . . violence to life of a person, in particular murder of all kinds, mutilation, cruel treatment and torture . . .”. For use of a provision in these terms (through the incorporation of common article 3), see article 3 of the ICTY Statute, article 4 of the ICTR statute and article 8(c) of the Rome Statute. This use of murder as an offence in breach of common article 3 is replicated in s. 6.1(c)(i) of Regulation 15/2000.
- As a war crime amounting to a “grave breach”, homicide is referred to as “wilful killing”. Grave breaches are formulated by common articles to the four 1949 Geneva Conventions and relate only to international armed conflicts. The offences within the grave breaches regime are “. . . those involving any of the following acts if committed against persons or property protected by the Convention: wilful killing . . .”. See ICTY article 2, Rome Statute article 8(a). This use of wilful killing as a grave breach is replicated in s. 6.1(a)(i) of Regulation 15/2000.
- As a crime amounting to genocide, homicide is referred to as the “killing (of) members of the group” in the Genocide Convention.<sup>245</sup>

---

<sup>242</sup> *Supra* note 24.

<sup>243</sup> *Supra* note 27.

<sup>244</sup> *Supra* note 37.

<sup>245</sup> Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277.

This clause has been replicated in article 4 of the ICTY Statute, article 2 of the ICTR Statute and article 5 of the Rome Statute. A provision in the same terms is contained in section 4(a) of Regulation 15/2000.

In *Celebici*, it was noted that undue regard should not be given to the difference between these alternative descriptions of homicide, and for the purposes of proof of the constituent elements of the substantive offence itself (as opposed to the context in which it occurs, as a crime against humanity or war crime), nothing turns on whether the offence is “murder” or “wilful killing”.<sup>246</sup> Support for this proposition can be found in *Blaskic* where the Trial Chamber, agreeing with *Celebici*, held that the content of the offence of murder under article 3 is the same as for wilful killing under article 2.<sup>247</sup> Similarly, albeit in a different context, Judge Cassese, in considering the application of duress to the “killing of innocents”, stated: “I do not consider that, as far as this issue is concerned, it makes any difference whether one refers to such an offence as ‘killing’, ‘unlawful killing’, or ‘murder’ provided that it is understood that it is the killing of innocents without lawful excuse or justification (except, possibly, the defence of duress) with which we are concerned”.<sup>248</sup>

The homogenisation of murder and wilful killing, independently of whether it is as a war crime or crime against humanity, has been taken a step further in *Kordic*. Here the Chamber stated that the elements for murder as a crime against humanity “are similar to those required in connection to wilful killing under article 2 and murder under article 3 of the Statute, with the exception that in order to be characterised as a

---

<sup>246</sup> The Trial Chamber, in *Prosecutor v. Delalic*, *supra* note 227, considered the definition of homicide for the purposes of “wilful killing” as a war crime constituting a “grave breach” (the French text version is “*l’homicide intentionnel*”) and “murder” as a war crime within Common article 3 Geneva Conventions (the French text version is “*meurtre*”). The Chamber sought to determine whether there is a qualitative difference between the two terms (para. 421). It concluded that no difference of consequence flows from the use of “wilful killing” in place of “murder” for the purposes of prosecution of offences which incorporate these terms (para. 433). In the result, the Trial Chamber concluded that the *mens rea* required to establish the crimes of wilful killing and murder, as recognized in the Geneva Conventions, is the same (para. 439).

<sup>247</sup> *Prosecutor v. Blaskic*, *supra* note 68, para. 181, following the Trial Chamber in *Prosecutor v. Delalic*, *supra* note 227, para. 422. Followed in *Prosecutor v. Kordic*, *supra* note 52, para. 229.

<sup>248</sup> *Prosecutor v. Erdemovic* (Case no. IT-96-22), Judgment, 7 October 1997, Separate and Dissenting Opinion of Judge Antonio Cassese, para. 12, fn. 8. The context of these comments was an indictment that charged the accused with a crime against humanity (murder) and, alternatively, a violation of the laws or customs of war (murder).

crime against humanity a ‘murder’ must have been committed as part of a widespread or systematic attack against a civilian population”.<sup>249</sup>

This general relationship between the offences is consistent with earlier comments by the Trial Chamber in *Kupreskic* on the relationship between murder as a crime against humanity and murder as a war crime. The Chamber considered that the two offences are not in a relationship of “reciprocal speciality”<sup>250</sup> and that the prohibition of murder as a crime against humanity is *lex specialis* in relation to the prohibition of murder as a war crime.<sup>251</sup> In considering the nature of the values that are protected by each offence the Chamber found that articles 3 and 5 of the ICTY Statute are part of the common general framework of the Statute. They share the same general objectives and protect the same general values in that they are designed to ensure respect for human dignity, whatever their specific aims and values may be.<sup>252</sup> Thus, the Chamber felt that the difference between the values protected by articles 3 and 5 would seem to be inconsequential.<sup>253</sup> It considered in all these circumstances that the prohibition of murder as a crime against humanity may only be found if the requirements of murder under both articles 3 and 5 are proved.<sup>254</sup> Accordingly once the core elements of the offence of murder as a war crime are established, the foundation is laid for proof of murder as a crime against humanity as long as the additional core element of widespread or systematic attack against a civilian population is established.

Notwithstanding the harmonisation of the international law of homicide, there has been controversy in the *ad hoc* Tribunals’ jurisprudence arising from the use of the word “murder” in the English text of

<sup>249</sup> *Prosecutor v. Kordic*, *supra* note 52, para. 236. As authority for this proposition the Tribunal referred to *Prosecutor v. Delalic*, *supra* note 227, para. 439, fn. 318.

<sup>250</sup> *Prosecutor v. Kupreskic*, *supra* note 14, para. 701: “while murder as a crime against humanity requires proof of elements that murder as a war crime does not require (the offence must be part of a systematic or widespread attack on the civilian population), this is not reciprocated”.

<sup>251</sup> *Prosecutor v. Kupreskic*, *supra* note 14, para. 701 noting at footnote 958 that this result is borne out by *Prosecutor v. Tadic*, *supra* note 48, para. 91, as to the scope and application of common article 3 quoted above (noted also in *Prosecutor v. Delalic*, *supra* note 227, paras. 125, 136).

<sup>252</sup> *Prosecutor v. Kupreskic*, *supra* note 14, para. 702.

<sup>253</sup> *Ibid.*, para. 703. See also on this issue Olivia Swaak-Goldman, *supra* note 16, pp. 164 *et seq.* for discussion as to the relative seriousness of crimes against humanity and war crimes.

<sup>254</sup> *Prosecutor v. Kupreskic*, *supra* note 14, para. 704. This is a brief (and incomplete) summation of the Trial Chamber’s deliberations. The background of the formulation of the law concerning this issue and the terms used in this analysis is noted in *Prosecutor v. Kupreskic*, *supra* note 14, paras. 680–695.

the Statutes<sup>255</sup> and the use of the word “*assassinat*” in the corresponding French text. This has important implications for the *mens rea* requirement of murder as a crime against humanity. The problem as to the proper meaning of murder as a crime against humanity arises because of the different meanings in law of each of these terms. The central issue that has caused difficulty in the Tribunal’s jurisprudence is whether it is only murder (“*meurtre*”) as a crime of general intent, and not premeditated murder (“*assassinat*”), which must be the underlying offence of a crime against humanity.<sup>256</sup>

The nature of the problem was stated in *Kayishema*: “[T]he debate has arisen because the *mens rea* for murder, as it is defined in most common law jurisdictions, includes but does not require premeditation; whereas, in most civil law systems, premeditation is always required for *assassinat*”.<sup>257</sup> As the Tribunal noted in *Blaskic*, “the French version of the Statute uses the term ‘*assassinat*’ – a crime with a very precise meaning in French national law”. According to article 221–223 of the French Criminal Code (*Nouveau Code Pénal*) “*assassinat*” means a premeditated murder – “*meurtre commis avec préméditation*”<sup>258</sup> – and corresponds to “*meurtre aggravé*” (aggravated murder).<sup>259</sup> The definition of premeditation in the Code is “the intention formed before the action to commit a crime of a given offense”.<sup>260</sup> On the other hand, the English version adopts the word “murder” which translates in French as “*meurtre*”.<sup>261</sup> The effect of the distinction is that if the *mens rea* element of “*assassinat*” is required for proof of murder as a crime against humanity then the application of section 5(1)(a) of Regulation 15/2000 would be restricted only to intentional premeditated killings, thus excluding “reckless” murder<sup>262</sup> as well as general intent murder. This is clearly contrary to the line of cases on the formulation of *mens rea* for murder noted above. The *ad hoc* Tribunals have taken different positions in relation to this issue and the outcome for the *mens rea* requirement is not clear.

<sup>255</sup> Article 3(a) of the ICTR Statute and article 5(a) of the ICTY Statute

<sup>256</sup> *Prosecutor v. Blaskic*, *supra* note 68, para. 216.

<sup>257</sup> *Prosecutor v. Kayishema*, *supra* note 74, para. 137.

<sup>258</sup> See article 221–223 of the *Nouveau Code pénal* of 1 March 1994: “Le meurtre commis avec préméditation constitue un assassinat”. See also *Prosecutor v. Blaskic*, *supra* note 68, para. 216 fn. 414; *Prosecutor v. Kayishema*, *supra* note 74, para. 137, fn. 37.

<sup>259</sup> Simon Chesterman, *supra* note 101, p. 329.

<sup>260</sup> See article 132–172 of the *Nouveau Code pénal*: “La préméditation est le dessein formé avant l’action de commettre un crime ou un délit déterminé”.

<sup>261</sup> *Prosecutor v. Blaskic*, *supra* note 68, para. 216.

<sup>262</sup> Simon Chesterman, *supra* note 101, p. 329, draws this conclusion in relation to article 5(a) of the ICTY Statute and article 3(a) of the ICTR Statute.

In *Akayesu*, Trial Chamber I held that customary international law dictates that it is the act of “murder” (“*meurtre*”) that constitutes a crime against humanity and not “*assassinat*”. In a short explanation of its reasons, the Chamber considered that this position of customary international law meant that the inclusion of “*assassinat*” in the French version must have come about due to an error in translation. This constituted sufficient reasons in the opinion of the Chamber to find that the French text should not be followed.<sup>263</sup> This finding as to the customary international law on this issue was approved in *Rutaganda* and *Musema*.<sup>264</sup> The same conclusion was reached in *Blaskic*, where the Tribunal noted the decision of the Trial Chamber in *Akayesu*, and further that article 7(1)(a) of the ICC Statute and article 18 of the ILC Code of Crimes Against the Peace and Security of Mankind refer to murder (“*meurtre*”). The Trial Chamber concluded that it is murder (“*meurtre*”) and not premeditated murder (“*assassinat*”) which must be the underlying offence of a crime against humanity.<sup>265</sup>

In *Kayishema* however, in relation to the interpretation of the ICTR Statute, Trial Chamber II held, *inter alia*, that the solution in *Akayesu* that there was an error in translation was too simple and not convincing as both the French and the English versions of the Statute are originals.<sup>266</sup> The reasoning of the Chamber is opposed to that in *Akayesu* and the cases on this point are not reconcilable.<sup>267</sup> The Trial Chamber noted:

When interpreting a term from one language to another, one may find that there is no equivalent term that corresponds to all the subtleties and nuances. This is particularly true with legal terms that represent jurisprudential concepts. Here, the *mens rea* for murder in common law overlaps with both *meurtre* and *assassinat* (that is, a *meurtre* aggravé) in civil systems.<sup>268</sup> The drafters chose to use the term *assassinat* rather than *meurtre*. As a matter

<sup>263</sup> *Prosecutor v. Akayesu*, *supra* note 63, para. 588.

<sup>264</sup> *Prosecutor v. Rutaganda*, *supra* note 71, para. 79; *Prosecutor v. Musema*, *supra* note 72, para. 214. Both cases simply noted that “[c]ustomary international law dictates that the offence of ‘Murder’, and not ‘Assassinat’, constitutes a crime against humanity”.

<sup>265</sup> *Prosecutor v. Blaskic*, *supra* note 68, para. 216. Simon Chesterman, *supra* note 101, p. 329 argues that this finding as to the requirement of customary international law is correct and notes as support for the proposition the fact that murder (*meurtre*) is used in article 7(1) of the Rome Statute.

<sup>266</sup> *Prosecutor v. Kayishema*, *supra* note 74, para. 138, fn. 40. Thus the French version is as authoritative as the English edition. The equal status of the English and French editions is noted by Simon Chesterman, *supra* note 101, p. 329, fn. 120. This is due to Rule 41 of the Provisional Rules of Procedure of the Security Council, as amended on 21 December 1982, U.N. Doc. S/96/Rev.7.

<sup>267</sup> See for a similar conclusion, Simon Chesterman, *supra* note 101, p. 329.

<sup>268</sup> Thus the Chamber explained at footnote 39 (para. 138): “For example, at the high end of murder the *mens rea* corresponds to the *mens rea* of *assassinat*, i.e., unlawful killing with

of interpretation, the intention of the drafters should be followed so far as possible and a statute should be given its plain meaning.<sup>269</sup>

According to the Chamber, contrary to the views expressed in *Akayesu*, the ICTR and ICTY Statutes did not reflect customary international law at the time of drafting. Thus the Chamber found that it may be presumed that the drafters intended to use “*assassinat*” alongside murder, and by doing so may have intended that only the higher standards of *mens rea* for murder will suffice.<sup>270</sup> Further, the Chamber considered that when in doubt, a matter of interpretation should be decided in favour of the accused.<sup>271</sup> The Chamber continued:

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

In a footnote to the last sentence of this paragraph the Chamber noted: “This explanation conforms to the French jurisprudence of the criminal court and to the United States Supreme Court case law”. The Chamber went on:

The result is intended when it is the actor’s purpose, or the actor is aware that it will occur in the ordinary course of events.

The accused is guilty of murder if he, engaging in conduct which is unlawful,

1. causes the death of another
2. by a *premeditated* act or omission
3. *intending* to kill any person or,
4. *intending* to cause grievous bodily harm to any person.

premeditation. Conversely, at the low end of murder where mere intention or recklessness is sufficient and premeditation is not required, the *mens rea* of murder corresponds to the *mens rea* of *meurtre*”.

<sup>269</sup> *Prosecutor v. Kayishema, supra* note 74, para. 138. In explanation the Chamber noted, at footnote 40: “Notably the text was drafted in English and French, both being original and authentic. The Statute was then translated into the four remaining official UN languages. Therefore, between English and French there was no translation. Accordingly, there can be no ‘error in translation’ as such; there can only be a mistake in the drafting of an original text. Notably, the term used in the ICTY Statute is also *assassinat* (ICTY Statute article 5(a))”.

<sup>270</sup> *Ibid.*, para. 138. The Chamber noted in this regard, at footnote 41: “Of course, in common law, there is no crime of unlawful killing that provides for a higher standard of *mens rea* than that of murder. Therefore, even if the drafters intended that only the standard of *mens rea* for *assassinat* would suffice, the drafters would still need to use the term murder in English”. This is not completely correct since traditional common law knew the term “malice aforethought”.

<sup>271</sup> *Ibid.*, para. 139.

Thus, a premeditated murder that forms part of a widespread or systematic attack against civilians on discriminatory grounds will be a crime against humanity. Also included will be extra-judicial killings, that is ‘unlawful and deliberate killings carried out with the order of a Government or with its complicity or acquiescence’.<sup>272</sup>

In *Kupreskic*, the Trial Chamber followed the decision in *Akayesu* in confirming the constituent elements of the *actus reus* of murder under article 5(a) of the Statute. The Chamber then defined murder for the purposes of the ICTY Statute as follows: “It can be said that the accused is guilty of murder if he or she engaging in conduct which is unlawful, intended to kill another person or to cause this person grievous bodily harm, and has caused the death of that person”.<sup>273</sup> The Chamber, however, was ambivalent in relation to the definition of the *mens rea* of murder. Its primary definition is consistent with *Akayesu* and *Celebici* and the harmonisation of the definition of *mens rea* between murder and wilful killing as a crime against humanity or as a war crime. Thus, the Chamber said: “The requisite *mens rea* of murder under article 5(a) is the intent to kill or the intent to inflict serious injury in reckless disregard of human life”.<sup>274</sup> However, the Chamber then specifically noted and apparently adopted the *mens rea* requirement in *Kayishema* without indicating explicit approval or rejection.<sup>275</sup> It said:

In *Kayishema* it was noted that the standard of *mens rea* required is intentional and premeditated killing. The result is premeditated when the actor formulated his intent to kill after a cool moment of reflection. The result is intended when it is the actor’s purpose, or the actor is aware that it will occur in the ordinary course of events.<sup>276</sup>

The problem, as noted above, is that a premeditated act cannot also be reckless and requires more than a mere general intent. Hence the adoption of both positions by the Trial Chamber is problematic. Notwithstanding this apparently clear divergence in the meaning of *mens rea* for the purposes of murder as a crime against humanity, subsequently in *Kordic* an ICTY Trial Chamber maintained that “it is now settled that premeditation is *not* required in order to define the term ‘murder’ as it is used in article 5 ICTY statute”.<sup>277</sup> This conclusion can only be reached by *not* following the clear articulation of the requirement of *mens rea* in *Kayishema* (and – though more ambiguously – *Kupreskic*), yet the Trial Chamber did not satisfactorily explain its reasons for not doing so. Rather, confusingly, the

<sup>272</sup> *Ibid.*, paras. 139, 140 (emphasis added).

<sup>273</sup> *Prosecutor v. Kupreskic*, *supra* note 14, para. 560.

<sup>274</sup> *Ibid.*, para. 561.

<sup>275</sup> See on this issue the criticism of Simon Chesterman, *supra* note 101, p. 333.

<sup>276</sup> *Prosecutor v. Kupreskic*, *supra* note 14, para. 561.

<sup>277</sup> *Prosecutor v. Kordic*, *supra* note 52, para. 235. Emphasis added.



Trial Chamber cited *Kayishema* in support of its preferred statement of the law without attempting to explain or distinguish this decision. The Trial Chamber cited, as support for its proposition, the part of the *Kayishema* decision in which the Trial Chamber established its position *against* the reasoning of *Akayesu*.<sup>278</sup> The purported reliance upon *Kayishema* is therefore questionable. In relation to *Kupreskic*, the Tribunal distinguished the decision by noting that although the Chamber defined murder as an “intentional and premeditated killing, it did not refer to the latter element in its factual findings”.<sup>279</sup> On the other hand, the Tribunal found support for its statement of the law in *Blaskic*.<sup>280</sup>

What is the result of this divergence? Writing before the Trial Chamber decision in *Kordic*, Chesterman suggests that the case law demonstrates that “for the purposes of the ICTY and ICTR statutes the act or omission must be premeditated”.<sup>281</sup> This is not the current position of the law as stated in *Kordic* and is to this extent inaccurate. However, the exact position of the law is far from clear and the issue needs to be clarified by the Tribunals. It seems that the Tribunals will have to make an election as to which text and which meaning of homicide is preferred. Certainly, the English word “murder” provides a more flexible definition of homicide and to the extent that it embraces premeditation but is not restricted to it, is a preferable alternative. It is consistent with the formulation of “murder” as developed in international law since the Nuremberg trials and reflects the notion of homicide as understood within the world’s major criminal justice systems.

Further, there may be a problem with the reasoning behind the Trial Chamber’s formulation of “murder” in *Kayishema*, which suggests it should be limited to its own facts and not followed. It is questionable why an accused should be guilty of murder if the only premeditation is an intention to cause grievous bodily harm. There is an ambiguity here which is directly linked to the requirement of premeditation. If the intent to cause grievous bodily harm is formulated “after a moment of cool reflection” then the only *mens rea* that can be attributed to the accused is an intent to effect this purpose. The premeditated purpose will not be the death of the

<sup>278</sup> *Ibid.* In support of its statement, the Trial Chamber notes the case law of the ICTY and ICTR, including *Kayishema*, but does not attempt to distinguish the different interpretation of the application of murder and *assassinat* used in this case. See footnote 314 which lists the case law without differentiation.

<sup>279</sup> *Ibid.*, fn. 314, referring to *Prosecutor v. Kupreskic*, *supra* note 14, para. 818.

<sup>280</sup> *Ibid.*, fn. 315, noting: “Most recently the Blaskic Trial Chamber held that ‘it is murder (“*meurtre*”) and not premeditated murder (“*assassinat*”) which must be the underlying offence of a crime against humanity’.”

<sup>281</sup> Simon Chesterman, *supra* note 101, p. 334.

victim but the grievous bodily harm. This does not fulfil the requirements of premeditated murder.

For these reasons, the correct interpretation of the international law of homicide is achieved by the adoption of the English meaning of the word “murder”. Thus the *mens rea* requirement of murder as a crime against humanity is the formulation originally conceived in *Akayesu* and subsequently adopted, approved and supplemented in the cases following it.

The jurisprudence of the *ad hoc* Tribunals has not been informed by statutory provisions as to the meaning of intent for the purposes of ascertaining *mens rea*. Unlike the Rome Statute and Regulation 15/2000, the ICTY and ICTR Statutes do not have a provision to this effect. For the purposes of ascertaining the international law of murder as a crime against humanity in East Timor, the Special Panel has to take cognizance of s. 18 of Regulation 15/2000.

This provision, however, is narrower than the case law developed by the Tribunals in two respects. First, as has been seen above, section 18 excludes recklessness or *dolus eventualis*. Second, the object of the mental element must be the death of the victim since the death (or the killing<sup>282</sup>) must be the result or consequence intended by (or known to) the perpetrator. This is the material element of murder in the sense of section 18.1 of Regulation 15/2000. Therefore it is not possible to consider the mere intent to cause grievous bodily harm sufficient for the commission of the crime of murder (it may constitute other inhumane acts, however; moreover, if the perpetrator is convicted for other inhumane acts the death of the victim can still be given due consideration in the sentencing stage<sup>283</sup>). Every other interpretation would turn murder into a strict liability crime punishing the mere creation of a danger (for the life of the victim) under the objective condition (*objektive Bedingung der Strafbarkeit*) that, regardless of the perpetrator’s intent, it turns later into actual damage (death).

As to the requirement of premeditation, the situation is also different from that for the *ad hoc* Tribunals. The problem which sparked the debate, the formulation of the French version of the ICTY’s and the ICTR’s Statutes (“*assassinat*”), does not exist with regard to proceedings under

<sup>282</sup> The first Element to article 7(1)(a) of the Rome Statute, *supra* note 83, reads: “The perpetrator killed one or more persons”.

<sup>283</sup> The harmfulness of the crime constituting the objective side of the crime’s gravity is the most important sentencing factor, Jan C. Nemitz, *Sentencing in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia and Rwanda*, in INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW. CURRENT DEVELOPMENTS 605, 616 (Horst Fischer, Claus Kress & Sascha Rolf Lüder, eds., 2001).

Regulation 15/2000 and the Rome Statute. This is because the French version of the Rome Statute does not use the term “*assassinat*” but the term “*meurtre*” (art. 7(1)(a) of the Rome Statute). With regard to Regulation 15/2000, a French version simply does not exist. Therefore, there can be no doubt that premeditation is not required for the crime against humanity of murder under Regulation 15/2000.

### 3. *Deportation or Forcible Transfer of Population (s. 5.1(d))*

Sections 5.1(d) and 5.2(c) have exactly the same wording as articles 7(1)(e) and 7(2)(d) of the Rome Statute. The latter provides the first codified definition of deportation or forcible transfer of population. As far as can be seen, deportation was first dealt with thoroughly in a criminal context in the *Milch case* of Nuremberg Military Tribunal II. In a concurring opinion, Judge Phillips considered that “[d]isplacement of groups of persons from one country to another is the proper concern of international law as far as it affects the community of nations. International law has enunciated certain conditions under which the fact of deportation of civilians from one nation to another during times of war becomes a crime”.<sup>284</sup> Judge Phillips summarized these conditions holding that “deportation of the population is criminal whenever there is no [legal] title in the deporting authority or whenever the purpose of the displacement is illegal or whenever the deportation is characterized by inhumane or illegal methods”.<sup>285</sup>

According to this definition – which was adopted by Military Tribunal III in the *Krupp case*<sup>286</sup> – forced transfer of persons is illegal only under special circumstances. However, under current international law this view must be considered too narrow. At present, forcible transfer is not only prohibited if additional conditions are present, rather it is generally prohibited and may be justified only under exceptional circumstances, *i.e.*, it must be shown that international law, explicitly or implicitly, permits it.

Humanitarian law expressly enumerates situations where such permission exists. Article 49 of the Fourth Geneva Convention provides that:

total or partial evacuation of a given area [is permissible] if the security of the population or imperative military reasons so demand. [. . .] Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.<sup>287</sup>

Also, article 17 of Additional Protocol II provides that displacement of civilian population is permissible only if “the security of the civilians

<sup>284</sup> *United States of America v. Milch*, 2 T.W.C. 355, 865 (1950).

<sup>285</sup> *Ibid.*, Concurring Opinion by Judge Phillips.

<sup>286</sup> *United States of America v. Krupp et al.*, 9 T.W.C. 1432 (1950).

<sup>287</sup> *Supra* note 45.

involved or imperative military reasons so demand”.<sup>288</sup> These exceptions must be applicable also with regard to the crime against humanity of deportation or forcible transfer. It would make little sense to permit conduct under humanitarian law and punish it as a crime against humanity. Moreover, as humanitarian law allows forcible transfer if the safety of the transferred persons is at stake, the same should also apply in time of peace, for example, when a natural disaster is imminent. In any case, the persons must be allowed to return if the reasons for the transfer have ceased to exist.

Finally, it is clear that a person’s right to reside in a certain area can only be violated if it exists. Thus, the second Element of the Elements of Crimes<sup>289</sup> for article 7(1)(d) of the Rome Statute specifies that only “persons lawfully present in the area” can be victims of deportation or forcible transfer. The expulsion of other persons is not criminal unless the circumstances of the expulsion meet the requirements of a crime themselves (for example, torture). In any case, any (national) law prohibiting the presence of a person in a certain area or country must be consistent with international law (*e.g.*, article 13 of the Universal Declaration of Human Rights and article 12(1) of the International Covenant on Civil and Political Rights). Otherwise the provision could be easily circumvented by discriminating or otherwise internationally illegal national legislation.

A second issue with regard to the legality of forcible transfer is the way in which it is conducted. Article 49 of the fourth Geneva Convention provides that, if a transfer is exceptionally permissible, it must be ensured “to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated”. Similarly, article 17 of Additional Protocol II requires that “[s]hould such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition”. If the transfer takes place under circumstances which are worse than necessary, it is illegal despite the presence of a permissible purpose.

Judge Phillips’ definition also requires that the victims must be transferred to the territory of another state. This element is no longer needed.

---

<sup>288</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 U.N.T.S. 609.

<sup>289</sup> Elements of Crimes, *supra* note 79.

The Rome Statute defines deportation or forcible transfer of population in article 7(2)(d) as “forced displacement of the persons concerned by expulsion or other coercive acts *from the area* in which they are lawfully present, without grounds permitted under international law” (emphasis added). Clearly, the word “area” cannot be understood to refer to a whole country. Von Hebel and Robinson explain that the words “forcible transfer of population” were inserted to clarify that movements of population within the borders of a country are also sufficient.<sup>290</sup> In addition, a footnote to the Elements of Crimes for article 7(1)(d) states that “[d]eported or forcibly transferred’ is interchangeable with ‘forcibly displaced’”. The word “displacement”, however, is found in article 17 of Additional Protocol II,<sup>291</sup> which contemplates internal displacement.

To date, the judges of the ICTY seem to have dealt with the crime of deportation or forcible transfer only once, in the *Nikolic* Rule 61 decision. *Nikolic* was charged with the unlawful transfer of detainees from Susica camp to Batkovic. Both places are situated within Bosnia and Herzegovina, *i.e.*, within the same country. The Chamber held: “that the [...] facts could be characterised as deportation and, accordingly, come under article 5 [crimes against humanity] of the Statute”.<sup>292</sup>

Moreover, in the *Bosanski Samac* case the accused are charged with “the unlawful deportation and forcible transfer of hundreds of [...] non-Serb civilians [...] to other countries *or to other parts of the Republic of Bosnia and Herzegovina*” (emphasis added).<sup>293</sup> Finally, the official German Draft Code of International Crimes (Art. 1 sect. 7 No. 4)<sup>294</sup> also does not require that the victims be transferred to another state. Since the Draft Code provides for universal jurisdiction (Art. 1 sect 1) and, thus, presupposes that its crimes can be prosecuted regardless of the nationality of the perpetrator and the place of their commission, these crimes (including the crime of deportation or forcible transfer) must be considered to reflect customary international law.

In any case, even if one would (erroneously) hold that the law of deportation or forcible transfer does not apply to transfers within the borders of a state, this does not mean that such internal displacements

---

<sup>290</sup> Herman Von Hebel & Darryl Robinson, *Crimes within the Jurisdiction of the Court in THE INTERNATIONAL CRIMINAL COURT. THE MAKING OF THE ROME STATUTE. ISSUES, NEGOTIATIONS, RESULTS* 79, 99 (Roy S. Lee, ed., 1999); Christopher K. Hall, *Article 7*, in *COMMENTARY ON THE ROME STATUTE*, *supra* note 80, margin no. 33.

<sup>291</sup> *Supra* note 288.

<sup>292</sup> *Prosecutor v. Nikolic*, *supra* note 131, para. 23.

<sup>293</sup> *Prosecutor v. Simic et al.* (Case no. IT-95-9), Second Amended Indictment, 25 March 1999, paras. 36–39.

<sup>294</sup> *Völkerstrafgesetzbuch-Entwurf*, *supra* note 199.

do not constitute a crime against humanity. Such conduct constitutes persecution if committed with discriminatory intent and, in the case of Regulation 15/2000 and the Rome Statute, if the connection requirement (see below) is fulfilled.

The first Element of the Elements of Crimes to article 7(1)(d) of the Rome Statute, regarding deportation or forcible transfer, provides: “1. The perpetrator deported or forcibly transferred, without grounds permitted under international law, one or more persons to another State or location, by expulsion or other coercive acts”. Thus it is clear that the perpetrator need only transfer *one* person. As to the force which must be applied a footnote to the word “forcibly” explains: “The term ‘forcibly’ is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment”.

#### 4. *Imprisonment or Other Severe Deprivation of Liberty (s. 5.1(e))*

Section 5.1(e) of Regulation 15/2000 has been adopted verbatim from article 7(1)(e) of the Rome Statute. It criminalises: “Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law”. From the wording of the provision it is clear that only the liberty of physical movement is covered. The Tribunals have dealt with deprivation of liberty as a crime against humanity only in two decisions: *Kordic* and *Krnjelac*. In *Kordic* the Trial Chamber held that the same individual conduct is required for both, the crime against humanity of imprisonment or other severe deprivations of liberty and the war crime of unlawful confinement.<sup>295</sup> Thus, according to the Chamber, both crimes differ only with regard to the context required for their commission.

Dealing with the war crime of unlawful confinement, *Kordic* identified two issues with regard to the illegality of the deprivation of liberty: “Firstly, whether the initial confinement was lawful. Secondly, regardless of the legality of the initial confinement, whether the confined persons had access to the procedural safeguards regulating their confinement”.<sup>296</sup> A deprivation of liberty can only be considered lawful if both questions are answered in the affirmative. Moreover, Section 5.1(e) of Regulation 15/2000 and article 7(1)(e) of the Rome Statute clarify that the legality of the deprivation of liberty must be determined according to *international law*.

<sup>295</sup> *Prosecutor v. Kordic*, *supra* note 52, para. 301.

<sup>296</sup> *Ibid.*, para. 279.

The Trial Chamber in *Krnojelac* agrees that imprisonment as a crime against humanity is established when the requirements of unlawful confinement as a war crime as set out above are met. But it also considers that imprisonment as a crime against humanity cannot only be established if the requirements of unlawful confinement are met.<sup>297</sup> It held that, in contrast to *Kordic*, 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. However, it concluded that the deprivation of an individual's liberty is only arbitrary if it is imposed without due process of law in light of the international instruments.<sup>298</sup> Therefore, analysing these instruments, both judgments finally come to the same result.

If Geneva law is applicable, article 42(1) of the fourth Geneva Convention governs: "The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary". Article 43(1) provides: "Any protected person who has been interned or placed in assigned residence shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose". Guidance as to conditions of detention is also provided by article 5 of Additional Protocol II.<sup>299</sup>

---

<sup>297</sup> *Prosecutor v. Krnojelac*, *supra* note 97, para. 111.

<sup>298</sup> *Ibid.*, paras. 112, 113.

<sup>299</sup> Since Indonesia has not ratified Protocol II, it may provide only guidance but is not directly applicable. Article 5 reads: "1. In addition to the provisions of Article 4, the following provisions shall be respected as a minimum with regard to persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained: (a) The wounded and the sick shall be treated in accordance with Article 7 [*i.e.*, 'they shall be treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. There shall be no distinction among them founded on any grounds other than medical ones']; (b) The persons referred to in this paragraph shall, to the same extent as the local civilian population, be provided with food and drinking water and be afforded safeguards as regards health and hygiene and protection against the rigours of the climate and the dangers of the armed conflict; (c) They shall be allowed to receive individual or collective relief; (d) They shall be allowed to practise their religion and, if requested and appropriate, to receive spiritual assistance from persons, such as chaplains, performing religious functions; (e) They shall, if made to work, have the benefit of working conditions and safeguards similar to those enjoyed by the local civilian population. 2. Those who are responsible for the internment or detention of the persons referred to in paragraph 1 shall also, within the limits of their capabilities, respect the following provisions relating to such persons: (a) Except when men and women of a family are accommodated together, women shall be held in quarters separated from those of men and shall be under the immediate supervision

Regardless of whether there exists an armed conflict, article 9(1) of the International Covenant on Civil and Political Rights provides: “No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law”. With respect to procedural safeguards, paragraph (4) of the same provision declares: “Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful”. The ICCPR’s provisions on fair trial (art. 14) apply to both the initial decision to deprive a person of liberty and its subsequent review.<sup>300</sup> Moreover, if a person is not deprived of liberty as a result of criminal proceedings but for preventive reasons, the fourth Geneva Convention provides for periodic review (art. 43(1)). It is obvious that the same is also required under the Covenant, since an arrest which is no longer necessary is as arbitrary as an arrest which was illegal from the outset.<sup>301</sup>

Finally, it is very important to note that the Working Group on Arbitrary Detention of the Commission on Human Rights has pointed out that a deprivation of liberty is not only illegal if the procedural standards have not been observed but also if it is imposed solely because the victim exercised his or her human rights.<sup>302</sup> Thus, an imprisonment is illegal if the victim

---

of women; (b) They shall be allowed to send and receive letters and cards, the number of which may be limited by the competent authority if it deems necessary; (c) Places of internment and detention shall not be located close to the combat zone. The persons referred to in paragraph 1 shall be evacuated when the places where they are interned or detained become particularly exposed to danger arising out of the armed conflict, if their evacuation can be carried out under adequate conditions of safety; (d) They shall have the benefit of medical examinations; (e) Their physical or mental health and integrity shall not be endangered by an unjustified act or omission. Accordingly, it is prohibited to subject the persons described in this Article to any medical procedure which is not indicated by the state of health of the person concerned, and which is not consistent with the generally accepted medical standards applied to free persons under similar medical circumstances [...]”.

<sup>300</sup> *Prosecutor v. Kordic*, *supra* note 52, para. 303, considered only the safeguards of Geneva law, as this was sufficient to deal with the case it had to decide.

<sup>301</sup> *Prosecutor v. Krnojelac*, *supra* note 97, para 114.

<sup>302</sup> Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment. Report of the Working Group on Arbitrary Detention, U.N. Doc. E/CN.4/1998/44, Annex I, para. 8: The Working Group stated that a deprivation of liberty is illegal if “the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights”.



was imprisoned because he or she expressed a political opinion, within the limits of the law.<sup>303</sup>

Although not expressly required by *Krnjelac* and *Kordic*, a deprivation of liberty must be severe to be criminal under international criminal law. A first indication is given in section 5.1(e) of Regulation 15/2000 as well as article 7(1)(e) of the ICC Statute, which read: “imprisonment or *other* severe deprivation of physical liberty” (italics added). This implies that imprisonment is a severe deprivation of liberty. Imprisonment must be understood here to be of a duration which usually applies to criminal punishment, *i.e.*, it must be measured at least in weeks. Therefore, as a general guideline, any deprivation of liberty which is at least as grave as imprisonment meets the severity requirement.

However, a closer look reveals that a deprivation of liberty can be severe not only for the duration but also for the conditions of the detention. Article 10 of the International Covenant requires that “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person”. A relatively short house arrest would, normally, not be “severe” whereas imprisonment under good conditions for a period measured in months or in years would clearly be sufficiently grave. Finally, a few days or even a single night in a prison camp with insufficient food and hygiene, no space to sleep and inhuman treatment (like rape or beatings) may constitute the crime of severe deprivation of liberty.

#### 5. *Torture (s. 5.1(f))*

The definition of torture in section 5.2(d) of Regulation 15/2000 is taken verbatim from article 7(2)(e) of the Rome Statute: “‘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”. However, apart from section 5.1(f), Regulation 15/2000 contains three other provisions on torture: sections 6.1(a)(ii) and (c)(i), governing acts of torture as war crimes, and section 7, providing an additional definition of torture taken from the Torture Convention.<sup>304</sup> Article 1(1) of the Convention reads:

For the purposes of this Convention, the term ‘torture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such

<sup>303</sup> International Covenant on Civil and Political Rights, *supra* note 62, art. 19; Universal Declaration of Human Rights, U.N. Doc. A/810 (1948), art. 19.

<sup>304</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (1987) 1465 U.N.T.S. 85.

purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, *when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity*. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions (emphasis added).

The passage in italics was omitted from the text when incorporating it in section 7.1 of Regulation 15/2000. Moreover, s. 7.1 adds the word “humiliating”,<sup>305</sup> before “intimidating or coercing”. It must be noted that s. 7.1 does not create a third type of torture (apart from torture as a crime against humanity and as a war crime). It rather defines torture “[f]or the purposes of the present regulation”. While the provision must be taken into account here, the war crime of torture is not considered in this paper and will only be considered as far as it may contribute to the understanding of the crime against humanity of torture. Finally, as mentioned in the introduction, sexual offences are beyond the scope of this paper and will not be dealt with here despite the fact that they may constitute torture.

The omission of the passage in the Torture Convention requiring that the torturous conduct must be committed, instigated etc. by a “person acting in an official capacity” is consistent with the most recent jurisprudence of the ICTY. Whereas the Chambers in *Akayesu*,<sup>306</sup> *Celebici*<sup>307</sup> and *Furundzija*<sup>308</sup> included the Torture Convention’s official capacity requirement in their definition of torture, *Kunarac* held: “[T]he presence of a state official or of any other authority-wielding person in the torture process is not necessary”.<sup>309</sup> This decision has recently been confirmed in *Kvočka*.<sup>310</sup> Equally, the definitions of torture in article 7(2)(d) of the Rome Statute and in section 5.1(e) of Regulation 15/2000 do not contain the official capacity requirement.<sup>311</sup> It may be argued that, in crimes against humanity, the need to link the crime of torture to some public authority is met by the context element (in war crimes the armed conflict would provide for the necessary international element). In contrast, torture under the Torture Convention does not require a context element.

<sup>305</sup> With regard to the war crime of torture, humiliation was been identified as a possible purpose in *Prosecutor v. Furundzija* (Case no. IT-95-17/1-T), Judgment, 10 December 1998, para. 162.

<sup>306</sup> *Prosecutor v. Akayesu*, *supra* note 63, para. 594.

<sup>307</sup> *Prosecutor v. Delalic*, *supra* note 227, paras. 473–474.

<sup>308</sup> *Prosecutor v. Furundzija* (IT-95-17/1-A), Judgment, 21 July 2000, para. 111.

<sup>309</sup> *Prosecutor v. Kunarac*, *supra* note 81, para. 496.

<sup>310</sup> *Prosecutor v. Kvočka*, *supra* note 234, paras. 138–139.

<sup>311</sup> Herman Von Hebel & Darryl Robinson, *supra* note 290.

A more problematical issue is the question of whether the commission of torture requires a certain purpose. The drafters of the Rome Statute deliberately omitted the purpose requirement from the elements of the crime against humanity of torture.<sup>312</sup> The negotiations of the Elements of Crimes confirm this position<sup>313</sup> and a footnote to the Elements notes: “It is understood that no specific purpose must be proved for [the crime against humanity of torture]”.<sup>314</sup> Instead, the Rome Statute introduces another element to distinguish torture from other attacks on physical or mental integrity, namely the control requirement.

In contrast to the Rome Statute, all relevant decisions of the *ad hoc* Tribunals<sup>315</sup> have referred to article 1(1) of the Torture Convention and adopted its purpose requirement with minor changes as part of the definition of torture under customary international law.<sup>316</sup> However, it has also been observed that the prohibited purpose need not be the sole or main purpose.<sup>317</sup> In any case, as section 7.1 of Regulation 15/2000 explicitly requires purpose, the matter is settled for proceedings under Regulation 15/2000 and needs no further consideration. It should be noted, however, that the *cumulative* requirement of purpose *and* control in Regulation 15/2000 is without precedent in codifications of torture. It is a result of the combination of the definition of torture in the Rome Statute and that of the Torture Convention. In contrast, all other international instruments merely require *either* purpose *or* custody or control over the victim.

As to the content of the purpose requirement, *Kunarac* held: “[T]he following purposes have become part of customary international law: (a) obtaining information or a confession, (b) punishing, intimidating or coercing the victim or a third person, (c) discriminating, on any ground, against the victim or a third person”.<sup>318</sup>

<sup>312</sup> *Ibid.*, p. 98. The German Draft Code on International Crimes, *supra* note 199, § 8 No. 5, does not provide for a purpose requirement either.

<sup>313</sup> Wiebke Rückert & Georg Witschel, *Genocide and Crimes Against Humanity in the Elements of Crimes*, in INTERNATIONAL AND NATIONAL PROSECUTION, *supra* note 283, pp. 59, 79–80.

<sup>314</sup> Elements of Crimes, *supra* note 79, article 7(1)(f), fn. 14.

<sup>315</sup> *Prosecutor v. Akayesu*, *supra* note 63, para. 593; *Prosecutor v. Delalic*, *supra* note 227, para. 456; *Prosecutor v. Kunarac*, *supra* note 81, para. 483.

<sup>316</sup> *Prosecutor v. Akayesu*, *supra* note 63, para. 594; *Prosecutor v. Delalic*, *supra* note 227, para. 494; *Prosecutor v. Furundzija*, *supra* note 305, para. 111; *Prosecutor v. Kunarac*, *supra* note 81, para. 497. The latter decision, for example, required that the torturous conduct must “aim at obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person”.

<sup>317</sup> *Prosecutor v. Delalic*, *supra* note 227, para. 470; *Prosecutor v. Kvočka*, *supra* note 234, para. 153.

<sup>318</sup> *Prosecutor v. Kunarac*, *supra* note 81, para. 485.

The jurisprudence of the Tribunals is not clear as to whether this list of purposes is exhaustive or potentially unlimited. The list in *Akayesu* seems to be a conclusive one.<sup>319</sup> *Kunarac*, however, states at the end of the list: “There are some doubts as to whether other purposes have come to be recognised under customary international law”. The Chamber left the matter open as it considered that “the conduct of the accused [was] appropriately subsumable under the above-mentioned purposes”.<sup>320</sup> Finally, *Celebici* states explicitly: “The use of the words ‘for such purposes’ in the customary definition of torture, indicate that the various listed purposes do not constitute an exhaustive list, and should be regarded as merely representative”.<sup>321</sup> The latter holding has been confirmed by the Trial Chamber in *Kvočka* which agrees that the list is not exhaustive.<sup>322</sup>

In our opinion, if purpose is required at all, the Torture Convention should be regarded as authoritative, since the Tribunals referred to it when developing the purpose requirement. As the Convention’s language (“such purposes as”) clearly supports the view that the listed purposes are only examples, this view should prevail. It is also shared by the German Supreme Court (*Bundesgerichtshof*).<sup>323</sup> Moreover it is supported by the fact that the drafters of Regulation 15/2000 considered it permissible to add a further purpose (humiliation) to the list.

Finally, if the purpose of the infliction of pain is the execution of a lawful sanction, the conduct does not amount to torture. To be lawful, a sanction must be imposed as a result of a fair trial according to the international minimum standards as codified, for example, in articles 14 and 15 of the International Covenant on Civil and Political Rights. Moreover, the sanction itself must comply with general human rights law including the minimum requirements for the treatment of detained persons (cf. for example, article 10 of the International Covenant on Civil and Political Rights<sup>324</sup>).

---

<sup>319</sup> *Prosecutor v. Akayesu*, *supra* note 63, para. 594. Similarly *Prosecutor v. Furundzija*, *supra* Note 305, para. 111.

<sup>320</sup> *Prosecutor v. Kunarac*, *supra* note 81, para. 485.

<sup>321</sup> *Prosecutor v. Delalic*, *supra* note 227, para. 470.

<sup>322</sup> *Prosecutor v. Kvočka*, *supra* note 234, para. 140.

<sup>323</sup> German Supreme Court (Bundesgerichtshof), Judgment of 21 February 2001, Case no. 3 StR 372/00; 46 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN STRAFSACHEN 292, 303–304; reprinted in 54 NEUE JURISTISCHE WOCHENSCHRIFT, 2728, 2731 (2001); see also Kai Ambos, *Immer mehr Fragen im internationalen Strafrecht*, 21 NEUE ZEITSCHRIFT FÜR STRAFRECHT 628, 632 (2001).

<sup>324</sup> Article 10(1) reads: “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person”.

Section 5.2(d) of Regulation 15/2000 and article 7(2)(e) of the Rome Statute require that the torturer's victim must be "in the custody or under the control" of the perpetrator. The rationale of the control requirement is the particular helplessness of a victim, who has no possibility of escape. Thus, the requirement must be given a broad sense; it is, in particular, not synonymous with imprisonment.<sup>325</sup>

It is clear from the wording of section 5.2(d) of Regulation 15/2000 that torture requires a certain degree of severity with regard to "pain or suffering". The Trial Chamber in *Kvočka* stated that it is the level of severity which distinguishes torture from other similar offences.<sup>326</sup> On the other hand, torture is also characterised by the additional elements of purpose and control. Thus, in our opinion, to qualify as torture, an act need not necessarily be more serious than acts which can be subsumed under other inhumane acts (s. 5.1(k) of Regulation 15/2000). For example, the *Furundzija* appeal considered it "inconceivable that it could ever be argued that [...] the rubbing of a knife against a woman's thighs and stomach, coupled with a threat to insert the knife into her vagina, [...] are not serious enough to amount to torture".<sup>327</sup> This statement at the same time confirms that the infliction of physical pain is not a requirement of torture.<sup>328</sup> For example, it may be sufficient to be "forced to watch severe mistreatment inflicted on a relative".<sup>329</sup> In this context it must not be overlooked that "consciously attacking [a particular vulnerability] may well result in greater pain or suffering for that individual than for someone without that characteristic".<sup>330</sup> The fact that subjective criteria are relevant in assessing the gravity of the harm inflicted was confirmed in *Kvočka*.<sup>331</sup>

To conclude, torture under section 5.1(f) requires the infliction of physical or mental pain or suffering which is at least as severe as would be required for other inhumane acts. The victim must be under the control of the perpetrator, *i.e.*, in a situation from which there is no escape. The perpetrator must pursue a certain purpose. These purposes include but are not limited to, obtaining information or a confession, punishing, humiliating, intimidating or coercing the victim or a third person, and

<sup>325</sup> Christopher K. Hall, *supra* note 290, margin no. 105.

<sup>326</sup> *Prosecutor v. Kvočka*, *supra* note 234, para. 142, referring to the *Prosecutor v. Delalic*, *supra* note 227, para. 468, which, however, is not as explicit.

<sup>327</sup> *Prosecutor v. Furundzija*, *supra* note 305, para. 114.

<sup>328</sup> *Prosecutor v. Kvočka*, *supra* note 234, para. 149; Andrew Byrnes, *Torture and Other Offences Involving the Violation of the Physical or Mental Integrity of the Human Person*, in I SUBSTANTIVE AND PROCEDURAL ASPECTS, *supra* note 16, p. 210.

<sup>329</sup> *Prosecutor v. Kvočka*, *supra* note 234, para. 149.

<sup>330</sup> Andrew Byrnes, *supra* note 328, p. 209.

<sup>331</sup> *Prosecutor v. Kvočka*, *supra* note 234, para. 143.

discriminating, on any ground, against the victim or a third person. If the purpose was the execution of a sanction, the requirements of torture are not met, provided that the sanction was imposed lawfully and was compatible with general human rights law.

6. *Persecution (s. 5.1(h))*

The definition of persecution in Regulation 15/2000 is, again, taken almost literally from the Rome Statute (art. 7(1)(h) and (2)(g)). The relevant provisions of Regulation 15/2000 read:

5.1(h): Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in section 5.3 of the present regulation, 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 panels.

5.2(f): ‘Persecution’ means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.

In contrast, articles 4(h) of the ICTY Statute and 3(h) of the ICTR Statute simply provide that “[p]ersecution on political, racial and religious grounds” is a crime against humanity. Thus, the definitions of persecution in the Rome Statute and in Regulation 15/2000 include three important additions to the very short provisions in the Statutes of the *ad hoc* Tribunals: first, the requirement of a connection between the persecutory act and “any act referred to in this paragraph or any crime within the jurisdiction of the [respective court]”; second, the definition of persecution as “deprivation of fundamental [human] rights”; and third, a more comprehensive notion of possible discriminatory grounds – the Rome Statute explicitly includes all grounds which are “impermissible under international law”.

The Rome Statute as well as Regulation 15/2000 require a connection between the persecutory conduct and “any [enumerated inhumane] act [...] or any crime within the jurisdiction of the [respective court]”. This element is similar to the Nuremberg Charter’s *nexus* with “any crime within the jurisdiction of the Tribunal” which, however, was required not only for persecution but for all crimes against humanity. Neither the Nuremberg Charter nor the Statutes of the Tribunals contain a special connection requirement for persecution. This connection requirement must be distinguished from the separate issue of which conduct can amount to persecution. Whereas this was done in *Kupreskic*,<sup>332</sup> *Kordic* apparently mixes both concepts:

<sup>332</sup> *Prosecutor v. Kupreskic*, *supra* note 14, para. 573–581.

Article 5(h) does not contain any requirement of a *connection* between the crime of persecution and other crimes enumerated in the Statute. The jurisprudence of Trial Chambers of the International Tribunal thus far appears to have accepted that the crime of persecution can also *encompass acts* not explicitly listed in the Statute<sup>333</sup> (emphasis added).

Another issue which was considered in particular in *Kupreskic* is whether, under customary international law, a connection between the persecutory act and war crimes is necessary. After a review of the available case law it concludes: “This evolution [. . .] evidences the gradual abandonment of the *nexus* between crimes against humanity and war crimes”.<sup>334</sup> In a second step the Chamber considered whether the broader *nexus* required in the Rome Statute (and now in Reg. 15/2000) reflects customary international law. The Chamber held that “[a]rticle 7(1)(h) [of the Rome Statute] is not consonant with customary international law”.<sup>335</sup> The judges summarised their analysis as follows: “[T]he Trial Chamber rejects the notion that persecution must be linked to crimes found elsewhere in the Statute of the International Tribunal”. The *Kordic* Chamber seems to agree<sup>336</sup> and most other decisions have not mentioned a connection, much less required one. Thus, it may be concluded that under customary international law a connection between a persecutory act and another crime or criminal act is not necessary. Nevertheless, as both Regulation 15/2000 and the Rome Statute require it, the scope of this requirement must be examined.

The connection requirement of the Rome Statute was the result of a compromise. As von Hebel and Robinson explain, some states held the view that a connection requirement had been included in the Nuremberg Charter and, thus, should also be included in the Rome Statute. Other states argued against the connection requirement on the basis that it had not been included in any of the subsequent codifications of crimes against humanity.<sup>337</sup> The compromise finally achieved resulted in a twofold connection requirement. With regard to war crimes and genocide, a link to a (complete) crime is required (“connection with [. . .] any *crime* within the jurisdiction of [the respective Court]” emphasis added). However, with regard to the individual criminal acts enumerated in article 7(1) of the Rome Statute (s. 5.1 of Reg. 15/2000), the connection required need not relate to another crime against humanity but only to “any *act* referred to

<sup>333</sup> *Prosecutor v. Kordic*, *supra* note 52, para. 193.

<sup>334</sup> *Prosecutor v. Kupreskic*, *supra* note 14, para. 577.

<sup>335</sup> *Ibid.*, para. 580.

<sup>336</sup> *Prosecutor v. Kordic*, *supra* note 52, para. 197.

<sup>337</sup> Herman von Hebel & Darryl Robinson, *supra* note 290, p. 101.

in [art. 7(1) of the Rome Statute]” (emphasis added). Consequently, the persecutory conduct must only be connected to a (single) murder and not to a murder which is part of a widespread or systematic attack consisting of other enumerated inhumane acts. Rather, if the persecutory conduct is sufficiently widespread or systematic, the persecutory acts themselves can constitute the context element.<sup>338</sup> In other words, a multiplicity of grave human rights violations (which are not, as such, enumerated among the inhumane acts), *e.g.*, severe attacks on personal property, can be transformed into the crime of persecution by a single connected murder.

A special situation with regard to the connection requirement occurs if the persecutory conduct itself consists in one of the enumerated inhumane acts, for example, a murder committed with discriminatory intent. In such a case, the persecutory murder need not be connected to another murder since the connection requirement would be met by the identity of the persecutory act (murder) and the connected act (murder). As a consequence, there exist two types of persecution. First, persecution may be an autonomous crime, if it is committed through conduct which is not enumerated among the inhumane acts but it is connected with an enumerated inhumane act. Second, persecution can be an aggravated form of an enumerated inhumane act, if the act is committed with discriminatory intent; a further connection to yet another inhumane act is not required.

Considered as a whole, the connection requirement is highly questionable. In the first place, since the disappearance of the war *nexus*, there is no connection requirement in the elements of crimes against humanity and, thus, in persecution.<sup>339</sup> Moreover, the *ad hoc* Tribunals have rejected a connection requirement as inconsistent with customary international law. Finally, from a teleological perspective, a single and isolated murder or beating is hardly sufficient to change the character of conduct so fundamentally as to elevate its status from an ordinary offence to an international crime.

Nevertheless, the unambiguous wording of article 7(1)(h) of the Rome Statute and section 5.1(h) of Regulation 15/2000 requires the connection. Thus it is necessary to examine further what exactly is needed to fulfil this requirement. The connection requirement stems from the war *nexus*<sup>340</sup> which, in its time, constituted the international element of (all) crimes against humanity, *i.e.*, the element which rendered ordinary crimes

---

<sup>338</sup> *Ibid.*, p. 102.

<sup>339</sup> See the international law instruments referred to in *Prosecutor v. Kupreskic*, *supra* note 14, paras. 573–581.

<sup>340</sup> Herman von Hebel & Darryl Robinson, *supra* note 290, p. 101.



international ones. As no other possible purpose can be identified for the connection requirement of the Rome Statute, it must be assumed that it has the same purpose, *i.e.*, to single out less serious crimes from the scope of persecution.

Thus the element, despite its inappropriateness must be interpreted in a way as consistent as possible with this purpose, while, at the same time infringing as little as possible on the main objective of crimes against humanity, namely the protection of human rights. Accordingly, the function of the connection requirement should be understood as to narrow the scope of persecution to cases which are sufficiently serious so that, at least on occasion, enumerated inhumane acts other than persecution occur in connection with them. Moreover, the connection between the persecution and the enumerated criminal act need not be a causal one, as this was not required for the Nuremberg *nexus*. It is sufficient that either the goal of the persecution is somehow objectively supported by the inhumane act or that, *vice versa*, the persecution supports the commission of the inhumane act.

A mental element with regard to an objective element is required if the culpability of a conduct depends, at least in part, on the existence of the element. However, under customary international law no connection is required for the crime of persecution and, as a logical consequence, a mental element is not required either. Thus, under customary international law, such a mental element is not necessary to establish the particular culpability of a perpetrator of the crime of persecution. Therefore, it seems adequate to take the view that the connection requirement serves the sole purpose of limiting the court's jurisdiction to forms of persecution which are of an elevated objective dangerousness. Such a view would be in accordance with the purpose of the connection requirement: if a persecutory conduct is dangerous enough to support the occurrence of, for example, a killing, it does not become less dangerous only because the perpetrator was not fully aware that the killing would occur. This view infringes as little as possible on the main objective of the criminalisation of crimes against humanity, namely the protection of human rights. It can also be reconciled with section 18 of Regulation 15/2000, as the provision requires a mental element only with regard to the material element of the respective crime and not with regard to mere *jurisdictional* elements (objective conditions of punishability).

Moreover, if a mental element were to be required for the connection requirement, it would be very difficult to determine the proper standard for this mental element. For example, if the perpetrator commits the perse-

cutory act before the inhumane act occurs, *e.g.*, a killing, he or she probably is not aware that the killing will occur “in the ordinary course of events”, even if the possibility may have been considered. As the latter would not satisfy the requirements of section 18.2(b) of Regulation 15/2000, a perpetrator cannot be held responsible under the Rome Statute or Regulation 15/2000 despite the fact that his or her conduct was objectively connected to a killing. Thus, the connection must be interpreted to be a merely jurisdictional requirement. The perpetrator need not be aware that the connection exists.

Clearly, all of the inhumane acts enumerated in article 7(1) of the Rome Statute or section 5.1 of Regulation 15/2000 amount to severe deprivation of fundamental rights and can constitute persecution. The ICTY has held several times that acts enumerated in its Statute can be persecutory acts, if committed with discriminatory intent.<sup>341</sup> Finally, it has already been noted that, in such a case, the connection requirement is always fulfilled.

However, as indicated by the definition of persecution in article 7(2)(g) of the Rome Statute and section 5.2(f) of Regulation 15/2000, *any* “severe deprivation of fundamental rights” constitutes persecution<sup>342</sup> if it is committed “by reason of the identity of the group or collectivity”. Both elements require consideration.

To constitute a “severe deprivation of fundamental rights” a persecutory conduct must fulfil two requirements. It must be in violation of international human rights law and, simultaneously, be severe. As to the first requirement, some decisions of the ICTY, in particular *Kupreskic*, have considered that “gross or blatant denials of fundamental human rights can constitute crimes against humanity”.<sup>343</sup> The Chamber went on to state that “[d]rawing upon the various provisions of [human rights instruments] it proves possible to *identify a set of fundamental rights* appertaining to any human being, the gross infringement of which may amount, depending on the surrounding circumstances, to a crime against humanity”.<sup>344</sup> This jurisprudence is in full accordance with the purpose of crimes against humanity, the protection of human rights, and also with article 7(1)(g) of the Rome

<sup>341</sup> *Prosecutor v. Tadic*, *supra* note 9, para. 700; *Prosecutor v. Kupreskic*, *supra* note 14, para. 605; *Prosecutor v. Kordic*, *supra* note 52, para. 202; *Prosecutor v. Kvočka*, *supra* note 234, para. 185.

<sup>342</sup> See on this issue also Olivia Swaak-Goldman, *Persecution*, in I SUBSTANTIVE AND PROCEDURAL ASPECTS, *supra* note 16, pp. 58–60.

<sup>343</sup> *Prosecutor v. Kupreskic*, *supra* note 14, paras. 621 and 627; affirmed by *Prosecutor v. Ruggiu*, *supra* note 178, para. 21; *Prosecutor v. Kordic*, *supra* note 52, para. 195; similarly: *Prosecutor v. Tadic*, *supra* note 9, para. 703.

<sup>344</sup> *Prosecutor v. Kupreskic*, *supra* note 14, para. 621 (emphasis added).

Statute. The *Kupreskic* Chamber even referred explicitly to this provision to support its holding.<sup>345</sup>

The *Kupreskic* approach was considerably modified in *Kordic*. While agreeing with the finding in *Kupreskic* that persecution requires human rights violations,<sup>346</sup> when identifying persecutory acts the Chamber did not refer to human rights instruments but to acts enumerated in the ICTY Statute. Moreover, it also seemed to consider that *all* criminal acts of the Statute – including those contemplated by article 3 of the Statute (war crimes) – can amount to persecutory acts.<sup>347</sup> This approach is problematic because some war crimes are not of sufficient gravity to qualify as persecution.<sup>348</sup> For example, the destruction of a police car would qualify as a war crime (*e.g.*, under article 8(2)(b) (xiii) Rome Statute) whereas it would not meet the gravity threshold of persecution. Moreover, war crimes can only be committed in armed conflict. Consequently, the *Kordic* approach either excludes acts committed in (relative) peace or it factually applies war crimes in the absence of an armed conflict, to the extent that the perpetrator had discriminatory intent. In opting for this approach, the Chamber was probably trying to find a clear definition of persecutory acts. Indeed, the principle of legality requires a sufficiently clear definition of persecution. However, for the reasons outlined above, this goal cannot be reached by the Chamber's method.

As to the second requirement *Kupreskic* clearly states: “[C]rimes against humanity, far from being trivial crimes, are offences of extreme gravity”.<sup>349</sup> And later emphasises: “[N]ot every denial of a human right

---

<sup>345</sup> *Ibid.*, para. 617.

<sup>346</sup> *Prosecutor v. Kordic*, *supra* note 52, para. 195.

<sup>347</sup> *Ibid.*, last sentence of para. 198, paras. 202–207; also paras. 208–210, where all charged acts which were not enumerated in one of the Statute's provision are excluded from the scope of persecution.

<sup>348</sup> This is in any case true for the war crimes governed by Reg. 5.1 because according to s. 6.1 of Regulation 15/2000 the jurisdiction of the serious crime panels with regard to war crimes is unlimited. In contrast, article 8(1), which has been deleted from section 6 of Regulation 15/2000, provides that the ICC “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” (emphasis added). The meaning of this “jurisdictional threshold” remains unclear (see on this issue Timothy McCormack & Sue Robertson, *Jurisdictional Aspects of the Rome Statute for the International Criminal Court*, 23 MELBOURNE U.L. REV. 635, 662 (1999); it is the result of a problematic compromise achieved during the negotiations of the Rome Statute (Herman von Hebel & Darryl Robinson, *supra* note 290, pp. 107–108).

<sup>349</sup> *Prosecutor v. Kupreskic*, *supra* note 14, para. 569.

may constitute a crime against humanity”.<sup>350</sup> Applying the maxim *ejusdem generis*,<sup>351</sup> it holds that a human rights violation must be at least as grave as one of the other, more concrete enumerated inhumane acts.<sup>352</sup> Moreover, “acts of persecution must be evaluated not in isolation but in context, by looking at their *cumulative effect*. Although individual acts may not be inhumane, their overall consequences must offend humanity in such a way that they may be termed ‘inhumane’ ” (emphasis added).<sup>353</sup>

This holding has been confirmed in *Kordic*,<sup>354</sup> *Kvočka*<sup>355</sup> and *Krnjelac*<sup>356</sup> and it appears to be in accordance with the opinion of the *Tadic* Trial Chamber that a repeated and constant denial of fundamental rights is required.<sup>357</sup> In this context it must be noted, though, that both *Kupreskic* and *Kordic* emphasise that, despite the general usage of “persecution” as denoting a series of acts, also “a single act [e.g., a murder] may constitute persecution” if discriminatory intent exists.<sup>358</sup>

But a single act can only constitute persecution if it is, as such, of sufficient gravity. An act which would constitute persecution only if considered together with other similar acts in their cumulative effect cannot be considered persecution if the other similar acts do not exist. Therefore, in conclusion, three levels of seriousness of discriminatory acts may be distinguished: acts which are sufficiently serious to constitute persecution on their own even if only one act is committed; acts which are less serious but which, together with other acts, through their cumulative effect reach the necessary level of gravity; and acts which even cumulatively are not sufficiently serious to amount to persecution.

The phrase “by reason of the identity of the group or collectivity” in article 7(2)(g) of the Rome Statute and section 5.2(f) of Regulation 15/2000 might suggest that persecution can only be committed against a group which has constituted itself as such and has, as a group, a certain identity. However, such a narrow interpretation conflicts with article 7(1)(h) and section 5.1(h). Accordingly, persecution can be committed,

<sup>350</sup> *Ibid.*, para. 617.

<sup>351</sup> The Latin phrase means “of the same kind”. The doctrine had been applied in this context for the first time in *United States v. Flick*, *supra* note 17, 1215.

<sup>352</sup> *Prosecutor v. Kupreskic*, *supra* note 14, para. 620; also *Prosecutor v. Kvočka*, *supra* note 234, para. 197.

<sup>353</sup> *Prosecutor v. Kupreskic*, *supra* note 14, paras. 622, 615.

<sup>354</sup> *Prosecutor v. Kordic*, *supra* note 52, para. 199.

<sup>355</sup> *Prosecutor v. Kvočka*, *supra* note 234, para. 185.

<sup>356</sup> *Prosecutor v. Krnjelac*, *supra* note 97, para. 434.

<sup>357</sup> *Prosecutor v. Tadic*, *supra* note 9, para. 703.

<sup>358</sup> *Prosecutor v. Kupreskic*, *supra* note 14, para. 624; *Prosecutor v. Kordic*, *supra* note 52, para. 199.

for example, by reason of the victim's gender. Persecution of women, however, does not refer to a group in the narrow sense but rather to a group understood as a multiplicity of individuals which share a common feature. The same may be the case if a government persecutes all political opponents even if they have political backgrounds as different as, for example, communists and catholics.<sup>359</sup> In such a case, the only common characteristic of the victims is their opposition to the government. Therefore, the term "identity of the group or collectivity" must be interpreted in a broad sense referring to the common feature according to which the victims were singled out by the perpetrators.

Some of the possible forms of persecutory acts which have been named by the Tribunals are summarised in *Kordic*:

'[T]he seizure, collection, segregation and forced transfer of civilians to camps, calling-out of civilians, beatings and killings'; 'murder, imprisonment, and deportation' and such attacks on property as would constitute 'a destruction of the livelihood of a certain population'; and the 'destruction and plunder of property', 'unlawful detention of civilians' and the 'deportation or forcible transfer of civilians', and physical and mental injury. In *Blaskic*, the Trial Chamber found that the crime of persecution encompasses both bodily and mental harm and infringements upon individual freedom.<sup>360</sup>

Importantly, *Kovack* added "psychological abuses", "humiliation", and "harassment",<sup>361</sup> holding, for example, that psychological abuse may be inflicted on detainees "through having to see and hear torturous interrogations and random brutality perpetrated on fellow inmates".<sup>362</sup>

The *Ruggiu* Chamber, in a particular context, declared as inhumane acts: "[D]irect and public radio broadcasts [...] aimed at singling out and attacking the Tutsi ethnic group and Belgians on discriminatory grounds, by depriving them of the fundamental rights to life, liberty and basic humanity".<sup>363</sup> On the other hand, the *Kordic* decision held that "[e]ncouraging and promoting hatred on political etc. grounds" was not sufficiently grave to constitute crimes against humanity. However, this holding does not necessarily contradict *Ruggiu*, since, in a footnote *Kordic* explains that an act which amounts to *incitement* to persecution may be sufficiently serious to be regarded as criminal under international law.<sup>364</sup>

<sup>359</sup> In this context it should be noted, that *Prosecutor v. Kvočka*, *supra* note 234, para. 195, correctly stated that the criterion to single out the victims of a persecution may also be a negative one (*e.g.*, all non-Serbs).

<sup>360</sup> *Prosecutor v. Kordic*, *supra* note 52, para. 198 (footnotes omitted).

<sup>361</sup> *Prosecutor v. Kvočka*, *supra* note 234, para. 190; in para. 186 the decision provides a similar list to the one developed in *Kordic*.

<sup>362</sup> *Prosecutor v. Kvočka*, *supra* note 234, para. 192.

<sup>363</sup> *Prosecutor v. Ruggiu*, *supra* note 178, para. 22.

<sup>364</sup> *Prosecutor v. Kordic*, *supra* note 52, para. 209, fn. 272.

*Kordic* also excluded the removal of Bosnian Muslims from government positions from the scope of persecution, holding that, “[t]his act would have to amount to an extremely broad policy to fit within Nuremberg jurisprudence, in which economic discrimination generally rose to the level of legal decrees dismissing all Jews from employment and imposing enormous collective fines”.<sup>365</sup> In fact, the Nuremberg judgment when considering these and other acts<sup>366</sup> based its evaluation on their cumulative commission, not on a sole persecutory act (such as, for example, the imposition of a collective fine).<sup>367</sup> Moreover, a later decision, the *Flick case*, applying CCL 10, held with regard to violations of industrial property: “A sale compelled by pressure or duress may be questioned in a court of equity. But, so far as we are informed, such use of pressure, even on racial or religious grounds, has never been thought a crime against humanity”.<sup>368</sup> This decision excludes certain property violations completely from the scope of persecution, regardless of whether there is a cumulative effect or not.

The *Tadic* Chamber noted in this context that there is “a limit to the acts which can constitute persecution”.<sup>369</sup> And *Kupreskic* held: “There may be certain types of property whose destruction may not have a severe enough impact on the victim as to constitute a crime against humanity, even if such a destruction is perpetrated on discriminatory grounds: an example is the burning of someone’s car (unless the car constitutes an indispensable and vital asset to the owner)”.<sup>370</sup>

However, this is not the last word on the matter of property violations. The Military Tribunal in the *Flick case*, after ruling that industrial property is not protected by the prohibition of persecution, distinguished industrial property from “dwellings, household furnishings, and food supplies”. Thus, it indicated that attacks on the latter forms of property may constitute crimes against humanity.<sup>371</sup> Accordingly, *Kupreskic* held that the “comprehensive destruction of homes and property” which “constitutes

<sup>365</sup> *Ibid.*, para. 210.

<sup>366</sup> *Prosecutor v. Tadic*, *supra* note 9, para. 704: “The Nürnberg Judgment considered the following acts, amongst others, in its finding of persecution: discriminatory laws limiting the offices and professions open to Jews; restrictions placed on their family life and their rights of citizenship; the creation of ghettos; the plunder of their property and the imposition of a collective fine” (footnote omitted).

<sup>367</sup> See the citation in *Prosecutor v. Tadic*, *supra* note 9, para. 705.

<sup>368</sup> *United States v. Flick*, *supra* note 17, p. 1214.

<sup>369</sup> *Prosecutor v. Tadic*, *supra* note 9, para. 707.

<sup>370</sup> *Prosecutor v. Kupreskic*, *supra* note 14, para. 631.

<sup>371</sup> *United States v. Flick*, *supra* note 17, p. 1214.

a destruction of the livelihood of a certain population” may be sufficient to meet the elements of persecution.<sup>372</sup> Similarly *Kordic* opined: “[W]hen the *cumulative effect* of such property destruction is the removal of civilians from their homes on discriminatory grounds, the ‘wanton and extensive destruction and/or plundering of Bosnian Muslim civilian dwellings, buildings, businesses, and civilian personal property and live-stock’ may constitute the crime of persecution”.<sup>373</sup> In contrast, the *Blaskic* Chamber was less precise:

In the context of the crime of persecution, the destruction of property must be construed to mean the destruction of towns, villages and other public or private property belonging to a given civilian population or extensive devastation not justified by military necessity and carried out unlawfully, wantonly and discriminatorily. In the same context, the plunder of property is defined as the unlawful, extensive and wanton appropriation of property belonging to a particular population, whether it be the property of private individuals or of state or “quasi-state” public collectives.<sup>374</sup>

However, this statement, despite a certain broadness, clearly contemplates very widespread violations of property and therefore may be considered to be in line with the holdings in *Tadic*, *Kupreskic* and *Kordic*.

The ICTY precedents are also supported by the consideration that there are two requirements which must be fulfilled in order to regard a certain conduct as persecution: it must be a human rights violation and must, alone or cumulatively, be of sufficient gravity. As to the first requirement, there is no doubt that, at present, the destruction of homes is a clear violation of international human rights law. The right to property has been acknowledged in major human rights instruments including the Universal Declaration of Human Rights.<sup>375</sup> Although the International Covenant on Civil and Political Rights does not enshrine the right to property, like most other human rights instruments<sup>376</sup> it protects the right of every individual not to be “subjected to arbitrary or unlawful interference with his [...]”

<sup>372</sup> *Prosecutor v. Kupreskic*, *supra* note 14, para. 631; also: *Prosecutor v. Tadic*, *supra* note 9, para. 707.

<sup>373</sup> *Prosecutor v. Kordic*, *supra* note 52, para. 205 (footnote omitted).

<sup>374</sup> *Prosecutor v. Blaskic*, *supra* note 68, para. 234.

<sup>375</sup> Universal Declaration of Human Rights, *supra* note 303; the right is also guaranteed, for example, in the following instruments: Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 149, art. 1; American Convention on Human Rights, 1144 U.N.T.S. 123, art. 21; African Charter on Human and Peoples’ Rights, 21 I.L.M. 58, art. 14; Arab Charter on Human Rights, art. 25.

<sup>376</sup> *E.g.*, Universal Declaration of Human Rights, *supra* note 303, art. 12; European Convention on Human Rights, *supra* note 149, art. 8(1); American Convention on Human Rights, *supra* note 375, art. 11(2); Arab Charter on Human Rights, *supra* note 375, art. 17.

home”.<sup>377</sup> Thus, at least the property which constitutes a person’s home is fully protected under human rights law.

As to the second requirement, it is necessary that such destruction of homes and property, which amounts to the destruction of the livelihood of a population, be of the same gravity as other crimes against humanity. Most crimes against humanity are extremely grave as they regard attacks on life or dignity. However, there are also crimes which are slightly less serious, like, for example, the crime of imprisonment, which requires only an unlawful deprivation of liberty, or other inhumane acts which may consist in severe beatings (cf. the examples given in *Kordic*). Compared to these crimes the destruction of a victim’s dwelling and livelihood seems to be at least of a similar seriousness. This is confirmed by a hypothetical example, however gruesome: If a victim has to choose between the burning of his or her house and a severe beating or a year of unlawful imprisonment it is not at all clear which alternative would be considered the lesser evil. Moreover, it must be taken into consideration that in many cultures a home is much more important than it is in western societies.

It may be added that the *Blaskic* Trial Chamber also covered the protection of religious and other buildings. It followed the ILC in holding that the “systematic destruction of monuments or buildings representative of a particular social, religious, cultural or other group”<sup>378</sup> may constitute persecution. Indeed, whereas such conduct probably lacks the necessary gravity if committed alone, it may contribute significantly to the overall cumulative effect of persecutory conduct if committed in connection with other acts, such as the burning of houses.

Another example for persecutory human rights violations is forcible transfer of persons from their home area. It is a human right to live, within the respective state, in the area of one’s own choosing. For example, article 13(1) of the Universal Declaration of Human Rights provides: “Everyone has the right to freedom of movement and residence within the borders of each State”. Article 12(1) of the International Covenant on Civil and Political Rights reads: “Everyone lawfully within the territory of a State shall, within that territory, have the [...] freedom to choose his residence”. Similar language is found in European, African, American and Arab human rights law.<sup>379</sup>

---

<sup>377</sup> International Covenant on Civil and Political Rights, *supra* note 62, art. 17(1).

<sup>378</sup> 1991 Draft Code, *supra* note 33, commentary to art. 18(9).

<sup>379</sup> Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2(1); African Charter on Human and Peoples’ Rights, *supra* note 371,



Also, the *ejusdem generis* maxim is satisfied by forcible transfer. As has been argued above, the requirements of the doctrine are met if important personal property is destroyed. Clearly, it does not matter for the victim whether his or her property is destroyed if he or she is removed from it by forcible transfer. Thus, forcible transfer is as grave or even graver than the destruction of homes and dwellings. In fact, deportation and forcible transfer in itself constitute a crime against humanity. Therefore, the qualification of forcible transfer as persecution remains irrelevant, unless the crime of deportation and forcible transfer is understood as having an unduly narrow scope (see above).

In conclusion, a campaign of destruction of homes (which may be accompanied by the destruction of religious buildings, schools, etc.), as occurred in East Timor, would be of sufficient gravity. The same applies for forcible transfer of persons from the area where they live. If such conduct is connected with an intentional (s. 18 of Reg. 15/2000) killing or even an intentional severe beating it can amount to the crime against humanity of persecution. It does not matter if the killing or beating remains an isolated event. Moreover, if the campaign is broad enough it may, in itself, constitute the context element.

Like all other crimes the persecutory act must also be committed with intent (s. 18 of Reg. 15/2000). However, a mental element with regard to the connection requirement is not required since it is a merely jurisdictional element. In addition to the general intent with regard to the persecutory act, the crime of persecution requires a special mental element, namely discriminatory intent.<sup>380</sup> The *Kordic* decision clearly and convincingly states that this mental element must be present in every single individual perpetrator. It is not sufficient that only the widespread or systematic attack, as such, be based on a discriminatory policy. The Trial Chamber argued that otherwise the distinction between persecution and other enumerated crimes against humanity would vanish and that “[s]uch an approach also would dilute the gravity of persecution as a crime against humanity”.<sup>381</sup>

---

art. 12(1); American Convention on Human Rights, *supra* note 375, art. 22(1); Arab Charter on Human Rights, *supra* note 375, art. 20.

<sup>380</sup> *Prosecution v. Kordic*, *supra* note 52, para. 217; *Prosecutor v. Blaskic* *supra* note 68, para. 235; *Prosecutor and Krnojelac*, *supra* note 97, para. 435.

<sup>381</sup> *Prosecutor v. Kordic*, *supra* note 52, para. 217; *Prosecutor v. Kvočka*, *supra* note 234, paras. 199–201, states that discriminatory intent may be inferred “from knowingly participating in a system or enterprise that discriminates on political, racial or religious grounds”. In our opinion, knowing participation may constitute (part of) the evidence necessary to prove discriminatory intent. This is not, however, *as such* sufficient to prove this specific

If, for example, a member of the persecuted group, during an attack on the group, burns a church with the sole intention to use the land to build a house, such conduct does not reach the gravity necessary for an international crime because it lacks discriminatory intent. A different case would be if the perpetrator uses the attack to disguise a killing. Such an act, regardless of whether it also amounts to persecution, would constitute the crime against humanity of murder, which is much graver in itself<sup>382</sup> and therefore can be committed without discriminatory intent.

The discriminatory intent required by articles 7(1)(h) and (2)(g) of the Rome Statute or sections 5.1(h) and 5.2(f) of Regulation 15/2000 must, in general, be interpreted in the same way. It should be noted, however, that these provisions are slightly broader than those of the Statutes of the *ad hoc* Tribunals. Under the Rome Statute and Regulation 15/2000 *any* ground “impermissible under international law” may constitute discriminatory intent, whereas the Statutes of the *ad hoc* Tribunals require that the persecutory act be committed on political, racial or<sup>383</sup> religious grounds.

Finally, the nature of the discriminatory intent must be understood as a prohibition to single out a victim on impermissible grounds. The decisive reason to choose a particular victim must have been the impermissible ground. In other words, if the perpetrator would have chosen a victim without the particular characteristic, there is no discriminatory intent. On the other hand, it does not matter if the perpetrator, in addition to the discriminatory intent also has, for example, the intent to steal.

Certain persecutory acts, on their own, are not sufficiently serious to amount to persecution, yet, through the cumulative effect together with other acts, may reach the necessary gravity. As the perpetrator can understand the gravity of such acts only if he or she knows about the other acts, the knowledge of these other acts is necessary for them to be culpable for a crime against humanity. As with the knowledge of the attack, the knowledge of details is not required.

---

intent. If, for example, there are reasons to assume that the perpetrator acted with the sole purpose of personally enriching herself, his or her knowing participation could not prove his or her discriminatory intent. This seems to have been acknowledged in para. 203 of the decision.

<sup>382</sup> *Prosecutor v. Blaskic*, *supra* note 68, para. 233, seems to argue that a lack of the gravity of the *actus reus* of persecution is compensated by the discriminatory intent: “The Trial Chamber finds [...] that the crime of ‘persecution’ encompasses [...] also acts which appear less serious, such as those targeting property, so long as the victimised persons were specially selected on grounds linked to their belonging to a particular community”.

<sup>383</sup> In article 3(h) of the ICTR Statute and article 5(h) the ICTY Statute an “and” was erroneously inserted; on this matter, see *Prosecutor v. Tadic*, *supra* note 9, para. 713.

### 7. *Other Inhumane Acts (s. 5.1(k))*

“Other inhumane acts” is the catch-all provision among the individual criminal acts. It has been held that such a provision is important as “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” or, as another decision put it, an exhaustive enumeration of the individual criminal acts “would merely create opportunities for evasion of the letter of the prohibition”.<sup>384</sup> Still, the *ad hoc* Tribunals have searched for a more specific and more practicable definition of “other inhumane acts”.<sup>385</sup>

To this end several decisions employ the *ejusdem generis* maxim which is also used to determine the scope of persecution. The doctrine has been applied by the *ad hoc* Tribunals mostly in such a way as to require that violations must be as grave as the other inhumane criminal acts.<sup>386</sup> This approach is criticised in *Kupreskic* as too general.<sup>387</sup> In addition to a sufficient gravity of the crime, which is also required by the *Kupreskic*,<sup>388</sup> the decision refers to international human rights instruments, including the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. Thus, it holds that inhuman or degrading treatment, forcible transfer of groups of civilians, enforced prostitution and enforced disappearance may constitute other inhumane acts.<sup>389</sup>

The Rome Statute and Regulation 15/2000 govern the scope of other inhumane acts in a more detailed way than the Statutes of the *ad hoc* Tribunals. According to article 7(1)(k) and section 5.1 other inhumane acts are “acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health”. The Elements of Crimes for article 7(1)(k) require that:

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

<sup>384</sup> *Prosecutor v. Kupreskic*, *supra* note 14, para. 563.

<sup>385</sup> “There is a concern that this category lacks precision and is too general to provide a safe yardstick for the work of the Tribunal and hence, that it is contrary to the principle of the “specificity” of criminal law. It is thus imperative to establish what is included within this category”. *Prosecutor v. Kupreskic*, *supra* note 14, para. 563.

<sup>386</sup> *Prosecutor v. Tadic*, *supra* note 9, para. 729; *Prosecutor v. Musema*, *supra* note 72, para. 232; *Prosecutor v. Kordic*, *supra* note 52, para. 269; *Prosecutor v. Bagilishema*, *supra* note 81, para. 92; *Prosecutor v. Kvočka*, *supra* note 234, para. 206.

<sup>387</sup> *Prosecutor v. Kupreskic*, *supra* note 14, para. 564.

<sup>388</sup> *Ibid.*, para. 566.

<sup>389</sup> *Ibid.*, para. 566.

2. Such act was of a character similar to any other act referred to in article 7, paragraph 1, of the Statute.<sup>390</sup>

A footnote clarifies: “It is understood that ‘character’ refers to the nature and gravity of the act”.<sup>391</sup> It is clear that the Preparatory Commission was of the opinion that the Rome Statute should be interpreted in such a way as to require acts of similar gravity. Moreover, it is also required that the acts must be similar in nature. As crimes against humanity protect human rights, acts similar in nature to the enumerated ones would be other violations of human rights (for example, the right not to be subjected to inhumane or degrading treatment (art. 7(1), International Covenant on Civil and Political Rights), such as beatings). This was also held in *Kupreskic*. Finally, the last requirement of other inhumane acts, as codified in the Rome Statute and Regulation 15/2000, is that the conduct in question must cause “great suffering, or serious injury to body or to mental or physical health”.

As to the possible forms of other inhumane acts – in addition to the examples given in *Kupreskic – Kordic* lists several cases: “Acts such as ‘mutilation and other types of severe bodily harm’, ‘beatings and other acts of violence’, and ‘serious physical and mental injury’ have been considered as constituting inhumane acts”.<sup>392</sup>

There are acts which under customary international law amount to torture but fulfil only either the control or the purpose requirement but not both. These acts do not meet the very restrictive torture definition of sections 5.2(d) and 7.1 of Regulation 15/2000. However, since they are of gravity similar to the rest of the enumerated inhumane acts, they must, under the *eiusdem generis* maxim, be regarded as other inhumane acts. This would be the case if severe pain or suffering were inflicted for prohibited purposes to a person not under control of the torturer or to a person under his or her control but without a specific purpose. Those crimes should be punished like torture, *i.e.*, more severe than the infliction of pain or suffering which is committed neither for specific purposes nor against a person under the control of the perpetrator.

---

<sup>390</sup> Elements of Crimes, *supra* note 79, Elements 1 and 2 of article 7(k).

<sup>391</sup> *Ibid.*, footnote 30 to Element 2 of article 7(k).

<sup>392</sup> *Prosecutor v. Kordic*, *supra* note 52, para. 270.

## ANNEX 1 – THE ELEMENTS OF CRIMES AGAINST HUMANITY

The following lists the elements of crimes against humanity under current international criminal law. Special forms of participation or indirect responsibility such as solicitation or attempt (cf. Sect. 14.3(b) and (f) of Reg. 15) are not considered.

### (I) *The Requirements of the Context Element*

#### (1) Widespread or systematic attack

Attack is the multiple commission of inhumane acts enumerated in Sect. 5.1. A single individual can commit multiple acts through a single conduct. A military attack is not required.

The attack must be either widespread or systematic but need not be both.

##### (a) systematic attack

A systematic attack is one carried out pursuant to a preconceived policy or plan. The number of victims required is smaller than for a widespread attack.

##### (b) widespread attack

A widespread attack is an attack which causes a large number of victims. The number of victims required is larger than for a systematic attack.

#### (2) Civilian population

The term population refers simply to a multiplicity of victims which is already required by the element of the “attack”.

A civilian is any individual who is not an active member of a hostile armed force, or a combatant who has laid down arms or has been rendered *hors de combat*. The victim’s formal status as a member of an armed force – hostile or not – bears no relevance.

A civilian population is a multiplicity of civilians. The character of a predominantly civilian population is not altered by the presence of certain non-civilians in their midst.

#### (3) Policy

##### (a) the entity behind the policy (state or organization)

The entity behind the policy must be the state or organisation which exercises the highest *de facto* authority in a given territory and can – within limits – control all other bearers of power and all individuals.

##### (b) the content of the policy

The content of the policy must be to commit a multiplicity of inhumane acts against a civilian population.

##### (c) the form of adoption of the policy

An implicit *de facto* policy is sufficient. It need not be adopted formally nor need it be declared expressly or stated clearly and precisely.

##### (d) the implementation of the policy

A systematic attack requires active conduct from the side of the entity behind the policy. The active identification of possible victims, providing guidance to the perpetrators is sufficient.

The policy regarding a widespread attack can be implemented by deliberate non-interference. However, the entity in question must be under a legal obligation to interfere and must be able to do so.

- (4) The link between the attack and the individual criminal act  
An individual criminal act is objectively part of the attack if its dangerousness is elevated by the attack. *I.e.*, if it would be less dangerous for the particular victim, had the attack not existed.
- (5) Knowledge of the attack  
Knowledge of the attack is awareness of the risk that there an attack exists and that the perpetrator's conduct objectively forms part of it, *i.e.*, the perpetrator must be aware of the risk that certain circumstances of the attack render conduct more dangerous than if the attack would not exist or that her conduct creates the atmosphere for other crimes. The knowledge of (further) details of the attack is not required.

## (II) *The Individual Inhumane Acts*

The following elements comprise only the objective or material elements of the respective inhumane act, unless a particular mental element is required. The general requirements of the mental element with regard to the inhumane acts are dealt with below (III).

- (1) Murder (Sect. 5.1. (a))  
The perpetrator must cause the victim's life to end.
- (2) Deportation or forcible transfer of population (Sect. 5.1. (d))
- (a) Deportation or transfer  
The perpetrator must transfer one or more persons from his or her chosen area of residence. It is not necessary to transfer the person(s) across a national border.
  - (b) Forcible  
The perpetrator must apply force, threat of force or coercion to cause the transfer.
  - (c) Legality of the transfer  
The transfer must be unjustifiable under international law.
- (3) Imprisonment or other severe deprivation of liberty (Sect. 5.1. (e))
- (a) Deprivation of liberty  
The perpetrator must restrict the victims liberty of physical movement.
  - (b) Severity  
The deprivation of liberty must be severe either with regard to its duration or with regard to the conditions of detention or both. Imprisonment measured at least in weeks or a single night under inhumane conditions is sufficient.
  - (c) Illegality of the deprivation of liberty  
The deprivation of liberty must be illegal under **international** law.
- (4) Torture (Sect. 5.1. (f))
- (a) Infliction of physical or mental pain or suffering  
Torture requires the infliction of physical or mental pain or suffering which is at least as severe as would be required for other inhumane acts
  - (b) Control  
The victim must be in the custody or under the control of the perpetrator, she must be in a situation from which she cannot escape.
  - (c) Purpose  
The perpetrator must pursue a certain purpose. These purposes include but are not limited to:

- obtaining information or a confession,
  - punishing, humiliating, intimidating or coercing the victim or a third person,
  - discriminating, on any ground, against the victim or a third person.
- (d) No legal sanction  
The pain or suffering may not be the consequence of a lawful sanction. However, the sanction must be compatible with general human rights law.
- (5) Persecution (Sect. 5.1. (h))
- (a) Human rights violation  
The persecutory act consists in a human rights violation.
  - (b) Severity  
The human rights violation must be severe. The severity threshold may be reached either by a very serious single act or by a multiplicity of acts through their cumulative effect.  
If the persecutory act reaches the necessary gravity only when seen cumulatively with other conduct, the perpetrator must be aware of this other conduct.
  - (c) Connection requirement  
In connection with the persecutory conduct an enumerated inhumane act (not a multiplicity of acts), a war crime or genocide must be committed.  
The connection between the act or crime and the persecutory conduct exists if the goal of the persecution is supported by the act or crime or if the persecution supports the commission of the act or crime. A causal link is not required.
  - (d) Discriminatory intent  
The perpetrator must choose the victim on grounds impermissible under international law.
- (6) Other inhumane acts (Sect. 5.1. (k))
- (a) Human rights violation  
The crime of other inhumane acts consists in a violation of human rights (*e.g.*, beatings which come under the purview of article 7 of the ICCPR).
  - (b) Suffering, or injury to body or to mental or physical health  
The result of the human rights violation must be suffering or injury to body or to mental or physical health.
  - (c) Severity  
The suffering or injury to body or to mental or physical health must be similar in gravity with other forms of enumerated inhumane acts.

### (III) *The Mental Element Required for the Individual Acts*

- (a) With regard to conduct  
The person must mean to engage in the conduct.
- (b) With regard to consequences  
The person must mean to bring the consequence about *or* be aware that it would occur in the ordinary course of events.
- (c) With regard to circumstances  
The person must be aware that the required circumstances exist.

ANNEX 2 – SYNOPSIS OF SECTION 5 OF REGULATION  
15/2000 AND ARTICLE 7 OF THE ROME STATUTE

Section 5, of Regulation 15/2000	Art. 7, Rome Statute
<p>5.1 For the purposes of <i>the present regulation</i>, “crimes against humanity” means any of the following acts when committed as part of a widespread or systematic attack <i>and</i> directed against any civilian population, with knowledge of the attack:</p> <ul style="list-style-type: none"> <li>(a) Murder;</li> <li>(b) Extermination;</li> <li>(c) Enslavement;</li> <li>(d) Deportation or forcible transfer of population;</li> <li>(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;</li> <li>(f) Torture;</li> <li>(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity;</li> <li>(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in s. 5.3 of <i>the present regulation</i>, or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the <i>panels</i>.</li> <li>(i) Enforced disappearance of persons;</li> <li>(j) The crime of apartheid;</li> <li>(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.</li> </ul> <p>5.2 For the purposes of s. 5.1 of <i>the present regulation</i>: [– omitted –]</p>	<p>Art. 7(1). For the purpose of <i>this Statute</i>, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:</p> <ul style="list-style-type: none"> <li>(a) Murder;</li> <li>(b) Extermination;</li> <li>(c) Enslavement;</li> <li>(d) Deportation or forcible transfer of population;</li> <li>(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;</li> <li>(f) Torture;</li> <li>(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity;</li> <li>(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in <i>paragraph 3</i>, or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the <i>Court</i>;</li> <li>(i) Enforced disappearance of persons;</li> <li>(j) The crime of apartheid;</li> <li>(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.</li> </ul> <p>(2) For the purpose of <i>paragraph 1</i>: (a) “Attack directed against any civilian population” means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack;</p>



## Section 5, of Regulation 15/2000

## Art. 7, Rome Statute

(a) "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;

(b) "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;

(c) "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;

(d) "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;

(e) "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;

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

(g) "The crime of apartheid" means inhumane acts of a character similar to those referred to in s. 5.1, committed in the context of an institutionalised regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

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

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

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

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

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

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

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

Section 5, of Regulation 15/2000	Art. 7, Rome Statute
<p>(h) “Enforced disappearance of persons” means the arrest, detention or abduction of persons by, or with the authorisation, support or acquiescence of, a State or a political organisation, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.</p> <p>5.3 For the purpose of the <i>present regulation</i>, the term “gender” refers to the two sexes, male and female, within the context of society. The term “gender” does not indicate any meaning different from the above.</p>	<p>(i) “Enforced disappearance of persons” means the arrest, detention or abduction of persons by, or with the authorisation, support or acquiescence of, a State or a political organisation, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.</p> <p>(3) For the purpose of <i>this Statute</i>, it is understood that the term “gender” refers to the two sexes, male and female, within the context of society. The term “gender” does not indicate any meaning different from the above.</p>

## Synopsis of section 7.1 of Regulation 15/2000 and article 1(1) of the Torture Convention

section 7.1, Regulation 15/2000	art. 1, of the Torture Convention
<p>For the purposes of the present regulation, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from <i>him/her</i> or a third person information or a confession, punishing <i>him/her</i> for an act <i>he/she</i> or a third person has committed or is suspected of having committed, or humiliating, intimidating or coercing <i>him/her</i> or a third person, or for any reason based on discrimination of any kind.</p> <p>[<i>omission</i>].</p> <p>It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.</p>	<p>For the purposes of <i>this Convention</i>, the term “<i>torture</i>” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, <i>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</i>. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.</p>