War Crimes and Crimes against Humanity in the Rome Statute of the International Criminal Court

This Thesis is Submitted in Accordance with the Requirements of the University of Liverpool for the Degree of Doctor in Philosophy by

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CONTENTS

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ABSTRACT

Christine Byron: 'War Crimes and Crimes against Humanity in the Rome Statute of the International Criminal Court'

This thesis examines the offences of crimes against humanity and war crimes contained in Articles 7 and 8 of the Rome Statute of the International Criminal Court of 1998. It commences with a consideration of the origins of each offence in the conventional or customary source of the text in the Rome Statute, followed by a review of the development of the offences through, *inter alia*, national and international prosecutions.

Analysis of the development of the offences is heavily reliant upon the Decisions and Judgements of the International Criminal Tribunal for the Former Yugoslavia and to a lesser extent the International Criminal Tribunal for Rwanda. This jurisprudence represents the most extensive examination of war crimes and crimes against humanity since the Nuremberg and Tokyo Tribunals and will have an undeniable impact upon the approach to these offences taken by the ICC, despite the fact they are not formally binding upon the court. Interpretation of the definitions of crimes is also influenced by the work of human rights bodies. This reflects both the convergence between the fields of human rights and humanitarian law and the requirement under Article 21 of the Rome Statute that the law applied by the ICC is "consistent with internationally recognized human rights".

Finally the effect of the *travaux préparatoires* of the Rome Statute and the Elements of Crimes on the offences is assessed. The absence of recorded debates in the *travaux préparatoires* necessitates a reliance upon the unofficial reports of those who were present. However, the Elements of Crimes compensate for the lack of detail in the *travaux préparatoires* and are very important in aiding an understanding of the offences within the Rome Statute.

Whilst there are failings in the definitions of war crimes and crimes against humanity as, for example, in the lack of agreement on jurisdiction over weapons of mass destruction, nevertheless the Statute makes great advances in other areas, such as in addressing gender violence and so, on balance, it is a positive contribution to international humanitarian law. The definition and interpretation of crimes against humanity and war crimes is important, not only for future defendants before the ICC, but also for the effect these definitions will have on national laws and the implementation of humanitarian law world wide.

Total Word Count: 105,657

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Rowe, *The Gulf War*	P. Rowe ed., *The Gulf War 1990-91 in International and English Law*, (1993, Routledge, London)
RPE	Assembly of States Parties to the Rome Statute of the ICC, Official Records, First Session, ICC-ASP/1/3, 3-10 September 2002, pp.10-107
Rwanda Commission of Experts' Report	Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994), UN Doc.S/1994/1405, 9 December 1994
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Yugoslavia Commission of Experts' Report	Final Report of the Commission of Experts established pursuant to Security Council resolution 780 (1992), UN Doc.S/1994/674, 27 May 1994

Journals

AFLR	Air Force Law Review
AJIL	American Journal of International Law
Am.U.Int.LR	American University International Law Review
Am.UJ.Int'l.L&Pol'y	American University Journal of International Law and Policy
Am.ULR	American University Law Review
Ariz.J.Int'l&Comp.L	Arizona Journal of International and Comparative Law
Army Lawy.	The Army Lawyer
ASIL Proceedings	American Society of International Law Proceedings
Austrian JPIL	Austrian Journal of Public International Law
BCL Rev.	Boston College Law Review
BC Third World LJ	Boston College Third World Law Journal
Buff.Hum.Rts.LR	Buffalo Human Rights Law Review
BYIL	British Yearbook of International Law
BYU J.Pub.L	Brigham Young University Journal of Public Law
Calif.West.ILJ	California Western International Law Journal
Can.YBIL	Canadian Yearbook of International Law
Cas.W.Res.JIL	Case Western Reserve Journal of International Law
Catholic ULR	Catholic University Law Review
Chi-Kent LR	Chicago-Kent Law Review
Colum.Hum.Rts.L.Rev.	Columbia Human Rights Law Review
Colum.J.Transnat'l.Law	Columbia Journal of Transnational Law
Conn.JIL	Connecticut Journal of International Law
Cornell Int'l.LJ	Cornell International Law Journal
Crim.LF	Criminal Law Forum
Crim.LR	Criminal Law Review
DePaul LR	DePaul Law Review
Dick.J.Int'l.L	Dickinson Journal of International Law
Duke J.Comp.&Int'l.L	Duke Journal of Comparative and International Law
EJIL	European Journal of International Law
Emory Int'l.L.Rev.	Emory International Law Review
Fla.J.Int'l.L	Florida Journal of International Law
Fletcher F.World Aff.	Fletcher Forum of World Affairs
Fordham Int'l.LJ	Fordham International Law Journal
Geo.LJ	Georgetown Law Journal
Georgia J.Int.Comp.L	Georgia Journal of International and Comparative Law
Geo.Wash.JIL&Econ.	George Washington Journal of International Law and Economics
Germ.Yrbk.Int'l.L	German Yearbook of International Law
Hague Yrbk.Int'l.L	Hague Yearbook of International Law
Hamline LR	Hamline Law Review
Harv.HRJ	Harvard Human Rights Journal
Harv.ILJ	Harvard International Law Journal
Hastings Int.&Comp.LR	Hastings International and Comparative Law Review
Hof.LPS	Hofstra Law and Policy Symposium
Hous.LR	Houston Law Review
HR Brief	Human Rights Brief
HRLJ	Human Rights Law Journal

HRQ	Human Rights Quarterly
ICLQ	International and Comparative Law Quarterly
ILF	International Law Forum
ILQ	International Law Quarterly
Int.Com.JR	International Commission of Jurists Review
Int.Law.	International Lawyer
Int'l Enforcement L.Rep.	International Enforcement Law Reporter
Int.Rel.	International Relations
IRRC	International Review of the Red Cross
Israel Yrbk.Hum.Rts	Israel Yearbook on Human Rights
JACL	Journal of Armed Conflict Law
JCL	Journal of Criminal Law
JCSL	Journal of Conflict and Security Law
Jur.Rev.	Juridical Review
LJIL	Leiden Journal of International Law
Loy.LA Int.&Comp.LR	Loyola of Los Angeles International and Comparative Law Review
L&Pol.Int.Bus	Law and Policy in International Business
Mich.J.Gender&L	Michigan Journal of Gender and Law
Mich.J.Int'l.L	Michigan Journal of International Law
Mich.SU-Detroit Col.LJIL	Michigan State University - Detroit College of Law, Journal of International Law
Milit.LR	Military Law Review
MLR	Modern Law Review
Nav.LR	Naval Law Review
NCJIL & Com.Reg.	North Carolina Journal of International Law and Commercial Regulation
NILR	Netherlands International Law Review
NLJ	New Law Journal
NYIL	Netherlands Yearbook of International Law
NYL Sch.J Int'l&Comp.L	New York Law School Journal of International and Comparative Law
NYUJ Int.L&Pol.	New York University Journal of International Law and Politics
NYUR	New York University Review
Pace ILR	Pace International Law Review
Pac.Rim LPJ	Pacific Rim Law and Policy Journal
RADIC	African Journal of International and Comparative Law
RDI	Rivista Di Diritto Internazionale
Rec.des Cours	Recueil des Cours, Académie de Droit Internationale de la Haye (Neth.)
RECIEL	Review of European Community and International Environmental Law
Rev.Dr.Milit.	Revue de droit pénal militaire et de droit de la guerre
SAJHR	South African Journal on Human Rights
Scholar: St. Mary's LR.Min.Issues	The Scholar: St. Mary's Law Review on Minority Issues
St. John's JLC	Saint John's Journal of Legal Commentary
Suffolk Transnat'l.LR	Suffolk Transnational Law Review
Sy.J.Int.L	Syracuse Journal of International Law and Commerce

Texas Int'l.LJ	Texas International Law Journal
Thomas Jefferson LR	Thomas Jefferson Law Review
Transnat'l L&Contemp.Probs.	Transnational Law and Contemporary Problems
UC Davis J.Int'l.L&Pol'y	University College Davis Journal of International Law and Policy
U.Col.LR	University of Colorado Law Review
Va.Envtl.LJ	Virginia Environmental Law Journal
Va.JIL	Virginia Journal of International Law
Vand.J.Transnat'l.L	Vanderbilt Journal of Transnational Law
Yale HR&Dev.LJ	Yale Human Rights and Development Law Journal
Yale J.Int'l.L	Yale Journal of International Law
Yale LJ	Yale Law Journal
YIHL	Yearbook of International Humanitarian Law

Law Reports

AC	Appeal Cases (UK)
AD	Annual Digest and Reports of Public International Law Cases
All ER	All England Law Reports
CMR	Court Martial Reports (US)
EHRR	European Human Rights Reports
ICJ Rep.	International Court of Justice Reports
IHRR	International Human Rights Reports
ILM	International Legal Materials
ILR	International Law Reports
Iran-US CTR	Iran-US Claims Tribunal Reports
LRTWC	Law Reports Trials of War Criminals
RIAA	Reports of International Arbitral Awards
YB ECHR	Yearbook of the European Court of Human Rights

Miscellaneous

BIICL	British Institute of International and Comparative Law
CA	Court of Appeal
CCL No.10	Council Control Law No.10
Doc.	Document
ECHR	European Convention on Human Rights
EOC	Elements of Crimes
FCO	Foreign and Commonwealth Office
fn(s).	Footnote(s)
FRY	Federal Republic of Yugoslavia
GA	General Assembly
HL	House of Lords
HMSO	Her Majesty's Stationary Office
HRC	Human Rights Committee
IAComHR	Inter-American Commission of Human Rights
IACHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant of Civil and Political Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
IOM	International Organisation of Migration
LSE	London School of Economics
No.	Number
OAS	Organisation of American States
OAU	Organisation of African Unity
OPCW	Organisation for the Prohibition of Chemical Weapons
OR	Official Records
PLO	Palestine Liberation Organisation
POW	Prisoner of War
RPE	Rules of Procedure and Evidence
SC	Security Council
TRC	Truth and Reconciliation Commission of South Africa
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNCHS	United Nations Centre for Human Settlements
UNEP	United Nations Environment Programme
US	United States of America
WW1	World War One
WW2	World War Two

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INTRODUCTION

The purpose of this study is to analyse the definitions of the offences contained in Articles 7 and 8 of the Rome Statute, in order to anticipate the interpretation of crimes against humanity and war crimes which may be used by the ICC when it commences operation.

1.1 Background to the ICC

The origins of the ICC, established by the Rome Statute, are mainly rooted in the events of the Twentieth Century. Whilst attempts to create an international tribunal prior to WW2 failed dismally,[1] the horrific atrocities committed in that conflict led to the Nuremberg and Tokyo Tribunals to try German and Japanese war criminals.[2] Despite criticism of these tribunals for applying victor's justice and *ex post facto* law,[3] they revealed the potential of international criminal justice, when given political backing and sufficient resources.[4]

However, the momentum towards the formation of a permanent ICC, created in the wake of the International Military Tribunals, was soon lost in the deep freeze of the Cold War.[5] Nevertheless, towards the end of the Twentieth Century barriers impeding an ICC began to tumble one by one. First, the General Assembly managed to adopt a definition of aggression,[6] allowing the ILC to resume work on its Draft

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[1] See proposals for a 'High Court of International Justice', PCIJ Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee, 16 June to 24 July 1920, reprinted in B. Ferencz, *An International Criminal Court, A Step Toward World Peace - A Documentary History and Analysis*, Volume I, (1980, Oceana Publications Inc., New York), 193-224 and the adoption of a Convention for the Creation of an International Criminal Court to try those accused of terrorism, (never ratified) at the International Conference on the Repression of Terrorism, 1-16 November 1937, Geneva, reprinted in B. Ferencz, *ibid.*, 355-398.

[2] London Agreement and Nuremberg Charter, 8 August 1945.

[3] H. von Hebel, 'An International Criminal Court - A Historical Perspective', pp.13-38, in von Hebel *et al*, *Reflections on the ICC*, pp.20-22.

[4] M. Bassiouni, 'Establishing an International Criminal Court: Historical Survey', 149 Milit.LR (1995) 49-63, p.55.

[5] M. Bassiouni, 'From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court', 10 Harv.HRJ (1997) 11-62, p.53 and C. Tomuschat, 'A System of International Criminal Prosecution is Taking Shape', 50 Int.Com.JR (1993) 56-70, p.57.

[6] GA Res.3314 (XXIX), 14 December 1974.

Code of Crimes.[7] Secondly, with the end of the Cold War,[8] the General Assembly reacted favourably to the request of the Prime Minister of Trinidad and Tobago for consideration of an international court to deal with transnational drug offences, and so mandated the ILC to consider this under the umbrella of its work on the Draft Code of Crimes.[9]

The third factor was the instability of areas such as the Balkans and massive violations of human rights.[10] These atrocities, combined with the media coverage which bombarded the public with images of death and destruction, created a groundswell of public pressure that 'something' must be done.[11] The *Ad Hoc* international tribunals for Yugoslavia and Rwanda were born out of the post-Cold War cooperation of the Security Council and public pressure following media coverage of the conflicts.[12] Undoubtedly the existence and successful operation of the tribunals greatly increased support for the creation of an International Criminal Court.[13]

Influenced by these events, the ILC Draft Statute for an ICC envisaged jurisdiction over the crimes of genocide, aggression, serious violations of the laws and customs applicable in armed conflict and crimes against humanity, in addition to other exceptionally serious crimes of international concern contained in an Annex.[14] The crimes themselves were not further defined, as the Draft Statute addressed issues of procedure rather than substantive law issues.[15]

Acting on the advice of the Sixth Committee, the General Assembly established an *Ad Hoc* Committee to review "the major substantive and administrative issues arising out of the draft statute" and to consider arrangements for an international convention.[16] However, the *Ad Hoc* Committee Report in 1995

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[7] See the 1996 ILC Draft Code.
[8] See A. Cassese, 'On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law', 9 EJIL (1998) 2-17, p.7 and M. Leigh, 'Evaluating Present Options for an International Criminal Court', 149 Milit.LR (1995) 113-128, p.113.
[9] GA Res. 44/39, 4 December 1989.
[10] A. Cassese, n.8 *supra*, p.8.
[11] See J. Crawford, 'The ILC Adopts a Statute for an International Criminal Court', 89 AJIL (1995) 404-416, p.407.
[12] The ICTY and ICTR were created by SC Res.827, 25 May 1993 and 955, 8 November 1994, respectively.
[13] A. Bos, 'The International Criminal Court: Recent Developments', pp.39-46 in von Hebel *et al*, *Reflections on the ICC*, p.45.
[14] Article 20, ILC Draft ICC Statute.
[15] See B. Broomhall, 'Looking Forward to the Establishment of an International Criminal Court: Between State Consent and the Rule of Law', 8 Crim.LF (1997) 317-334, p.324.
[16] GA Res.49/53, 9 December 1994.

left many issues undecided.[17] In particular, whilst the Committee had expressed concern at the lack of definition of the crimes in the Draft Statute, it had not attempted to address this issue.[18]

The difficult task of defining the subject matter jurisdiction and working towards an acceptable statute for the Court fell to the Preparatory Committee, a body created by the General Assembly to finalise issues and work towards a diplomatic conference.[19] The Committee spent over two years debating and refining proposals for a workable ICC and moving towards an acceptable statute.[20] The UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court finally took place at the headquarters of the Food and Agricultural Organisation in Rome, from 15 June to 17 July 1998.[21] Despite "deep divides, a substantial volume of work and limited time",[22] the Rome Statute was eventually adopted on 17th July 1998.[23]

Articles 7 and 8 of the Rome Statute set out the eleven crimes against humanity and fifty war crimes. The Elements of Crimes, developed by the Preparatory Commission established under the Final Act of the Conference,[24] set out the Elements of war crimes and crimes against humanity in detail over 39 pages.[25] Nevertheless, there still remains a need for further analysis of these offences. First, the Rome Statute draws strongly upon international humanitarian law, but the interpretation of provisions drawn from this source can prove problematic, as they were primarily enacted with thoughts of the prevention of war crimes and gross

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[17] Report of the *Ad Hoc* Committee on the Establishment of an International Criminal Court, GA Official Records, 50th Session, Supplement No.22 (A/50/22) (hereinafter, '*Ad Hoc* Committee Report').
[18] *Ad Hoc* Committee Report, pp.11-12.
[19] GA Res.50/46, 11 December 1995.
[20] See C. Hall, 'The First Two Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court', 91 AJIL (1997) 177-187; *ibid.*, 'The Third and Forth Sessions of the UN Preparatory Committee...', 92 AJIL (1998) 124-133; *ibid.*, 'The Fifth Session of the UN Preparatory Committee...', 92 AJIL (1998) 331-339; *ibid.*, 'The Sixth Session of the UN Preparatory Committee...', 92 AJIL (1998) 548-556 and see the Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute and Draft Final Act, UN Doc.A/Conf.183/3/Add.1, 1998.
[21] GA Res.52/160, 15 December 1997.
[22] P. Kirsch, 'Introduction', pp.1-10, in von Hebel *et al*, *Reflections on the ICC*, p.2.
[23] 120 voted in favour, 21 abstained and 7 voted against this compromise package, see <http://www.un.org/icc/docs.htm>.
[24] Final Act, UN Doc. A/Conf.183/10, Annex 1, Resolution F.
[25] See C. Byron and D. Turns, 'The Preparatory Commission for the International Criminal Court', 50 ICLQ (2001) 420-435.

abuses of human rights, rather than as a basis for their prosecution.[26] Secondly, there is a vagueness inherent in customary international law, which is also often present in treaties owing to compromises during negotiations. The Rome Statute, itself a product of political compromises, is not immune from this.[27]

Therefore, an in-depth analysis of the crimes contained within Articles 7 and 8 is essential to forecast how the ICC will interpret these offences during the trial of an accused. Such analysis is particularly crucial in light of the Rome Statute's *de facto* codification of part of humanitarian law and the importance of effective national implementation of this law by States Parties to the ICC.[28] The definitions of crimes in the Rome Statute and EOC will not only be pertinent to cases before the ICC but, owing to the principle of complementarity, are likely to influence national trials of those who commit war crimes and crimes against humanity across the globe.[29]

1.2 Analysis of the Crimes

The law to be applied by the Judges when adjudicating cases before the ICC is given in Article 21 of the Rome Statute.[30] The primary source of law will be the Statute, the EOC and the RPE. Next, applicable treaties and the rules of international law may be applied where appropriate. Finally, in the absence of the above sources, general principles of law may be applied, and the Court may also apply principles and rules of law as interpreted in its previous decisions.[31] The interpretation of law pursuant to this Article must also be consistent with "internationally recognized human rights".

The analysis in this study of war crimes and crimes against humanity will not follow this order of applicable law sequentially. The participants at the ICC

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[26] W. Fenrick, 'International Humanitarian Law and Criminal Trials', 7 Transnat'l L&Contemp.Probs. (1997) 23-43, p.26.

[27] See L. Sadat, 'Custom, Codification and some Thoughts about the Relationship between the Two: Article 10 of the ICC Statute', 49 DePaul LR (2000) 909-923, p.910 and K. Ambos, 'General Principles of Criminal Law in the Rome Statute', 10 Crim.LF (1999) 1-32, p.1.

[28] See D. Turns, 'Prosecuting Violations of International Humanitarian Law: The Legal Position in the United Kingdom', 4 JACL (1999) 1-39; C. Kreß and F. Lattanzi eds., *The Rome Statute and Domestic Legal Orders, Volume 1: General Aspects and Constitutional Issues*, (2000, Editrice il Sirente Piccola Società Cooperativa a.r.l.) and discussion *infra*, para.6.1.

[29] Schabas, *An Introduction to the ICC*, p.19.

[30] See M. McAuliffe deGuzman, 'Article 21, Applicable Law', pp.435-446, in Triffterer, *Commentary on the Rome Statute*, p.436.

Diplomatic Conference in Rome, their forerunners in the Preparatory Committee and the delegates in the post-conference Preparatory Commission were not working in a vacuum. Rather, they were drawing from and, to a great extent, codifying existing conventional and customary law.[32]

This analysis will consist, first, of an examination of the original meaning of the text in the convention or customary source from which each offence in the Rome Statute was drawn. This will be undertaken by examining the wording and *travaux preparatoires* of conventional sources, and evidence of customary sources. All conventional sources will be analysed following Articles 31 and 32 of the Vienna Convention of the Law of Treaties of 1969. Whilst the Vienna Convention does not formally apply to treaties concluded prior to 1980,[33] nevertheless, it codified the customary international law approach to treaty interpretation in use throughout the Twentieth century. So this interpretation will also be applied, *inter alia*, to the 1949 Geneva Conventions and 1977 Additional Protocols.[34] Reference to interpretative declarations made to these conventions will also be considered inasmuch as they elucidate the customary international law interpretation of these crimes.[35]

Secondly, the development of these crimes through national and international prosecutions and work by UN bodies will be considered. The jurisprudence of the ICTY and ICTR and their contribution to the development of these crimes will be examined in some detail. Whilst the ICC will not be bound by the decisions of previous international tribunals, such decisions and those of national courts can shed light upon the treaties and customary law from which the offences in the Rome Statute are drawn. However, although some national decisions will be examined, this is not a comparative law study.[36]

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[31] Note that this is permissive.

[32] See P. Kirsch, n.22 *supra*, p.4; T. Meron, 'Crimes under the Jurisdiction of the International Criminal Court', pp.47-55, in von Hebel *et al*, *Reflections on the ICC*, p.48 and D. Robinson and H. von Hebel, 'War Crimes in Internal Conflicts: Article 8 of the ICC Statute', 2 YIHL (1999) 193-209, p.194, but see L. Sadat, n.27 *supra*, pp.915-916 and R. Clark, 'Methods of Warfare that Cause Unnecessary Suffering or are Inherently Indiscriminate: A Memorial Tribute to Howard Berman', 28 Calif.West.ILJ (1998) 379-389, pp.380-381.

[33] Article 4, 1969 Vienna Convention on the Law of Treaties.

[34] See C. Greenwood, 'Customary Law Status of the 1977 Geneva Protocols', pp.93-114, in Delisen and Tanja, *Humanitarian Law Challenges*, p.99.

[35] See discussion *infra*, para.6.2.

[36] For comments on the limited usefulness of national law decisions see, G. Mettraux, 'Crimes against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda', 43 Harv.ILJ (2002) 237-316, p.277 and P. Hwang, 'Defining Crimes against Humanity n the Rome Statute of the International Criminal Court', 22 Fordham Int'l.LJ (1998) 457-504, p.489.

Decisions of human rights bodies will also be drawn upon in order to expand the meaning of terms used in both humanitarian and human rights treaties. Human rights law is relevant not only because the non-derogable portions of human rights law remain applicable even in times of armed conflict, as the ICJ affirmed in the *Nuclear Weapons* Case,[37] but, in Meron's words, "the recognition as customary of norms rooted in international human rights instruments has affected the interpretation, and eventually the status, of the parallel norms in instruments of international humanitarian law".[38] Indeed, the relevance of human rights law to the definition of crimes before the ICC is confirmed by Article 21 on applicable law.

Finally, the wording of the relevant offences in the Rome Statute, and the EOC developed by the Preparatory Commission, will be examined. The analysis will take into account the fact that under Articles 9(1) and 51(5) the EOC and RPE are to assist the Court, but that the Statute should prevail in the case of a conflict.[39] Nevertheless, the EOC are an important interpretational aid, considered by some to represent customary international law.[40] They are especially useful, given the lack of detailed *travaux préparatoires* for the Rome Statute, as Official records of debates were not taken in order to facilitate compromises during delicate negotiations.[41]

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[37] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Rep. (1996) 226, para.25 and see the Inter-American Commission of Human Rights decisions in *Abella v United States* (1997), IAComHR Case 11.137, Report No.55/97, para.158 and *Coard et al v United States* (1999), IAComHR Case 10.951, Report No.109/99, para.39. See also D. Stephens, 'Human Rights and Armed Conflict - The Advisory Opinion of the International Court of Justice in the Nuclear Weapons Case', 4 Yale HR&Dev.LJ (2001) 1-24.

[38] T. Meron, 'The Humanization of Humanitarian Law', 94 AJIL (2000) 239-278, p.244.

[39] Article 51(5), Rome Statute states "[i]n the event of a conflict between the Statute and the Rules of Procedure and Evidence, the Statute shall prevail". Article 9(1), Rome Statute states that the EOC "shall assist the Court" and see para.1 of the General Introduction to the EOC, EOC, p.112. See also K. Dörmann, 'Contributions by the Ad Hoc Tribunals for the Former Yugoslavia and Rwanda to the Ongoing Work on Elements of Crimes in the Context of the ICC', 94 ASIL Proceedings (2000) 284-286, p.284; W. Rückert and G. Witschel, 'Genocide and Crimes against Humanity in the Elements of Crimes', pp. 59-93 in H. Fischer, C. Kreß, S. Lüder eds., *International and National Prosecution of Crimes under International Law, Current Developments*, (2001, Berlin Verlag, Berlin), p.61 and M. Politi, 'Elements of Crimes', pp. 443-473, in Cassese *et al*, *ICC Commentary*, p.447.

[40] C. Hall, 'The First Five Sessions of the UN Preparatory Commission for the International Criminal Court', 94 AJIL (2000) 773-789, p.788 notes that the US delegate considered that the EOC document "correctly reflects international law".

[41] See R. Lee, 'Creating an International Criminal Court - of Procedures and Compromises', pp.141-152, in von Hebel *et al*, *Reflections on the ICC*, pp.145-146.

2

WAR CRIMES: GRAVE BREACHES

2.1 Background to War Crimes[1]

While the origins of the laws of war stretch back centuries,[2] the Nineteenth and Twentieth Centuries were the first to see multilateral conventions on the law of armed conflict,[3] and the Twentieth Century was the first to see significant prosecutions for breaches of this law.[4] Following the prosecution of a small number of Germans after the First World War by the Supreme Court of the Reich in Leipzig,[5] the aftermath of the Second World War saw the prosecution by the Allies of Axis citizens in the International Tribunals of Nuremberg and Tokyo, and the prosecution of countless more accused in national military tribunals throughout Europe.[6] In more recent years the *Ad Hoc* Tribunals for Yugoslavia and Rwanda, established by the Security Council resolutions under Chapter VII, have prosecuted persons accused of war crimes.[7]

Despite the significance of these prosecutions, and the proliferation of treaties on the law of armed conflict in the Twentieth Century, it is nevertheless true that

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[1] See generally L. Green, 'The Law of War in Historical Perspective', pp.38-78, in M. Schmitt ed., *The Law of Military Operations: Liber Amicorum Professor Jack Grunawalt*, 72 US Naval War College International Law Studies (1998, Naval War College, Rhode Island).

[2] Green, *Contemporary Law of Armed Conflict*, pp.20-33.

[3] Roberts and Guelff, *Documents*, pp.4-6 and C. Greenwood, 'Historical Development and Legal Basis', pp.1-38, in Fleck, *Handbook*, para.106.

[4] Notable exceptions include the 1474 trial of Peter von Hagenbach by the Hanseatic cities of Breisach, see G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals, Volume II, The Law of Armed Conflict*, (1968, Stevens and Sons, London), pp.462-466 and the trial of Captain Wurz of the Confederate Army for crimes committed in a Union prisoner of war camp, described by L. Laska and J. Smith, ''Hell and the Devil', Andersonville and the Trial of Captain Henry Wirz, C.S.A. 1865', 68 Milit.LR (1975) 77-132 - although the crimes in both cases could be characterised as crimes against humanity, rather than war crimes *per se*.

[5] See H. von Hebel, 'An International Criminal Court - A Historical Perspective', pp.13-38, in von Hebel, *et al*, *Reflections on the ICC*, pp.15-16.

[6] *Ibid.*, pp.19-22 and see the LRTWC series (1947-1949, HMSO, London).

[7] The ICTY and ICTR were created by SC Resolutions 827, 25 May 1993 and 955, 8 November 1994 respectively. See R. Clark and M. Sann eds., *The Prosecution of International Crimes: A Critical Study of the International Tribunal for the Former Yugoslavia*, (1996, Transaction, New Brunswick); J. Jones, *The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, (1998, Transnational, New York); V. Morris and M. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis*, (1995, Transnational, New York) and V. Morris and M. Scharf, *The International Criminal Tribunal for Rwanda*, (1997, Transnational, New York).

enforcement of the laws of armed conflict has "limped along behind the developmental pace of rules on warfare".[8] The ICC is a vital step forward in addressing this imbalance, as remedying the culture of impunity for war crimes cannot be achieved through the selective justice of *Ad Hoc* Tribunals alone.[9] It is therefore important that the Rome Statute's provisions on war crimes under Article 8 are clearly interpreted in order to promote deterrence of the crimes within, and to assist the prosecution and defence of those accused of breaches of the law.

2.2 Nexus with an Armed Conflict

For each of the crimes under Article 8 there must be a nexus between the crime itself and the armed conflict. The Elements of Crimes lay down that the conduct for each offence within Article 8 must take place "in the context of" and be "associated with an [international or non-international] armed conflict".[10] The necessity of this link was also recognised by the ICTY in the Appeal Chamber's Interlocutory Decision on Jurisdiction in the *Tadic* Case, where the Court explained "in the context of an armed conflict" as meaning "that the alleged crimes were *closely related* to the hostilities".[11]

The Trial Chamber in *Tadic*, suggested that this close relationship between the hostilities and the crime could be demonstrated by proving that "the crime was committed in the course of or as part of the hostilities in, or occupation of, an area controlled by one of the parties".[12] The Judgement further held that it was not necessary to show that "armed conflict was occurring at the exact time and place of the proscribed acts",[13] nor that it be "part of a policy or of a practice officially endorsed or tolerated by one of the parties to the conflict", nor even be "in the actual

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[8] R. Wolfrum, 'Enforcement of International Humanitarian Law', pp.517-550, in Fleck, *Handbook*, p.518.

[9] See G. Skillen, 'Enforcement of International Humanitarian Law', pp.205-216 in Durham and McCormack, *The Changing Face of Conflict*, pp.210-211 and G. Triggs, 'National Prosecutions of War Crimes and the Rule of Law', pp.175-191 in Durham and McCormack, *ibid.*, p.190.

[10] EOC, pp.125-144. For a discussion of the temporal and geographical extent of armed conflicts, see *infra*, para.4.2.

[11] *Tadic*, Interlocutory Appeal Decision, para.70, emphasis added.

[12] *Tadic*, Trial Judgement, para.573.

[13] *Ibid.*, and see also *Kordic and Cerkez*, Trial Judgement, para.27 and C. Rottensteiner, 'The Denial of Humanitarian Assistance as a Crime under International Law', 835 IRRC (1999) 555-582, p.561.

interest of a party to the conflict".[14] This approach was supported by the Judgements in *Celebici*, and *Blaskic*.[15]

The Women's Caucus for Gender Justice have strongly argued, particularly in respect of crimes of sexual violence, that the phrase "associated with an... armed conflict" in the EOC should be read widely enough, to include crimes committed in the aftermath of war or taking advantage of the situation of war.[16] This approach was taken in the *Foca* case, where the Trial Chamber stated that "[m]uslim civilians were killed, raped or otherwise abused as a direct result of the armed conflict and because the armed conflict apparently offered blanket impunity to the perpetrators".[17] It further held that "[t]he requirement that the act be closely related to the armed conflict is satisfied if, as in the present case, the crimes are committed *in the aftermath of the fighting*, and until the cessation of combat activities in a certain region, and are committed *in furtherance or take advantage of the situation created by the fighting*".[18] It is submitted that the ICC should adopt this fairly broad interpretation of the conflict nexus, which narrows a loophole that would otherwise undoubtedly be exploited by defendants, especially in respect of crimes of sexual violence which risk being defined as 'private' offences even when committed in the course of an armed conflict.[19]

The EOC for all offences in Article 8 require, in addition to a nexus between the armed conflict and the crime, that the perpetrator "was aware of factual circumstances that established the existence of an armed conflict".[20] In respect of this, the introduction to the Elements for Article 8 states that there is no requirement for a legal evaluation by the perpetrator as to either the existence of an armed conflict or whether it is international or non-international.[21] Therefore, it seems that the perpetrator must merely be sufficiently aware of the circumstances which objectively

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[14] *Tadic*, Trial Judgement, para.573.
[15] *Celebici*, Trial Judgement, paras.193-195 and *Blaskic*, Trial Judgement, paras.69-70. See *Furundzija*, Trial Judgement, para.65 for an example of where this nexus was found and *Kayishema and Ruzindana*, Trial Judgement, para.621 for an example of where it was not.
[16] Women's Caucus for Gender Justice, 'Recommendations and Commentary for the Elements Annex', Submitted to the 26 July-13 August 1999 Preparatory Commission for the International Criminal Court. Available at: <http://www.iccwomen.org/icc/>.
[17] *Foca*, Trial Judgement, para.568.
[18] *Ibid.*, emphasis added and see *Foca*, Appeal Judgement, paras.58-59.
[19] In the case of institutionalised sexual violence a nexus to the conflict would be undeniable, see C. Chinkin, 'Women's International Tribunal on Japanese Military Sexual Slavery', 95 AJIL (2001) 335-341, p.340.
[20] EOC, pp.125-144.
[21] *Ibid.*, p.125.

establish an armed conflict, to comprehend the context in which he commits his offence.[22] Indeed, if the prosecutor provides the proof that is required to create a relationship between the conduct of the perpetrator and the armed conflict, this mental element will generally be satisfied as an inevitable "by-product".[23]

2.3 *Mens Rea* for Offences in the Rome Statute

2.4 *Article 30 of the Rome Statute*

The mental element or *mens rea*, which is a necessary ingredient of war crimes and crimes against humanity, is explained in Article 30 of the Rome Statute. In order to be found liable for an offence, an accused must not only commit the *actus reus* of the offence, as described in the Statute, but according to Article 30 must commit the "material elements", or *actus reus* of the crime, with both "intent and knowledge". The default mental element applies "[u]nless otherwise provided"[24] and although Article 30 does not explain where else the *mens rea* may be provided, it is submitted that an alternative mental element could be found either in the Statute or the EOC.[25]

2.5 *"Intent" in Relation to Conduct*

Intent is defined in relation to conduct, where the *actus reus* of the offence forbids a certain behaviour,[26] when a person "means to engage in the conduct". This suggests, according to Piragoff, that the conduct "must be the result of a voluntary action on the part of an accused" and also connotes some element "of desire or willingness to do the action".[27] It is a basic principle of criminal law that the *actus*

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[22] See K. Dörmann, 'Contributions by the Ad Hoc Tribunals for the Former Yugoslavia and Rwanda to the Ongoing Work on Elements of Crimes in the Context of the ICC', 94 ASIL Proceedings (2000) 284-286, p.285.
[23] Lee, *ICC: Elements*, p.123.
[24] See EOC, 'General Introduction', p.112, para.2.
[25] See K. Dörmann, who also suggests that an alternative *mens rea* may be provided by customary international law, 'Preparatory Commission for the International Criminal Court: the Elements of War Crimes', 839 IRRC 771-795, p.776.
[26] For example the offence of 'declaring that no quarter will be given', under Article 8(2)(b)(xii).
[27] D. Piragoff, 'Article 30, Mental Element', pp.527-535 in Triffterer, *Commentary on the Rome Statute*, p.533.

reus of an offence be committed voluntarily,[28] and so this phrase must connote something more than mere voluntariness, such as deciding upon and initiating the conduct.[29]

It is uncertain whether the expression 'conduct' in Article 30 includes omissions in addition to actions. This uncertainty results from the fact that the Article on criminal liability for omissions, included in earlier drafts, was omitted from the final Statute.[30] Ambos suggests that this removal confirms that the offences in the Rome Statute may not be committed by omission, except in the case of command responsibility which is expressly allowed for in Article 28.[31] Piragoff, however, considers that there is still scope for the Court to decide whether a particular offence may be committed by omission and under which circumstances.[32] The latter opinion is persuasive, as the reasons for removal of the article in question are unclear.[33] Therefore, in deciding whether a particular offence may be committed by omission, the Court should consider the history and jurisprudence of the particular offence in international law and principles drawn from national legal systems.[34]

2.6 *"Intent" in Relation to a Consequence*

Intent is defined in relation to a consequence, where the *actus reus* of the offence forbids a particular result,[35] in two ways. First, when a person "means to cause that consequence". This would describe the situation where it was the accused's aim or objective to cause the result. Secondly, a person is taken to intend a consequence when he or she "is aware that it will occur in the ordinary course of events". This would describe the situation where the accused aimed to achieve

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[28] See W. Wilson, *Criminal Law Doctrine and Theory*, (1998, Longman, London), p.220.
[29] Taken from the dictionary definition of 'to will', in the *Concise Oxford Dictionary*.
[30] D. Piragoff, n.27 *supra*, p.532.
[31] K. Ambos, 'General Principles of Criminal Law in the Rome Statute', 10 Crim.LF (1999) 1-32, p.19.
[32] D. Piragoff, n.27 *supra*, p.532.
[33] *Ibid.* See Draft Article 28, Report of the Preparatory Committee on the Establishment of an International Criminal Court, 14 April 1998, A/CONF.183/2/Add.1, pp.54-55. The *travaux préparatoires* do not disclose the reasons for its exclusion from the final statute at the Rome Conference.
[34] For a discussion of criminal omissions in English and French law see P. Palmer, 'Attempt by Act or Omission: Causation and the Problem of the Hypothetical Nurse', 63 JCL (1999) 158-165, and A. Ashworth, 'Criminal Omissions and Public Duties: The French Experience', 10 Legal Studies (1990) 153-164.
[35] For example 'wilful killing', Article 8(2)(a)(i).

another result, but knew that the criminal result was a prerequisite or necessary side effect of the desired objective.[36]

With regard to this second type of intent, it is necessary to understand the expression "ordinary course of events". In English criminal law intention may only be inferred from an undesired but foreseen result when the forbidden consequence is foreseen by the accused as virtually certain to occur as a result of his or her actions.[37] Piragoff comments that this virtual certainty test is common to "most legal systems",[38] and suggests that foreseeing a consequence as a virtual certainty, or foreseeing a consequence as occurring in the ordinary course of events, amount to the same thing.[39]

However, the wording of the phase "will occur in the ordinary course of events" appears to allow of more uncertainty than the phrase "will occur as a virtual certainty". A hypothetical example of the possible difference can be shown in the offence of "enlisting children" under the age of fifteen. An army recruitment officer, who strongly desires to meet a high recruitment target for a popularly supported conflict, may recruit hundreds of individuals who stated that they were 15 and appeared to be *about* that age, without checking identity papers to confirm this. The recruitment officer could argue that it was not his objective to recruit under 15 year olds, simply to reach the recruitment target, and that he did not foresee under-age recruitment as virtually certain to result from his actions. However, it would be much more difficult for him to claim that he was unaware that in the ordinary course of events, some of the individuals recruited in such a fashion would be under-age.

2.7 *Knowledge*

Knowledge is defined by Article 30 as "awareness that a circumstance exists or a consequence will occur in the ordinary course of events". It is hard to see how the requirement of knowledge, when defined as being aware that "a consequence will occur in the ordinary course of events", adds to the notion of intent, when this is one

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[36] For a discussion of intention in English law see: A. Simester and W. Chan, 'Intention Thus Far', Crim.LR (1997) 704-719; A. Norrie, 'After *Woollin*', Crim.LR (1999) 532-544 and W. Wilson, 'Doctrinal Rationality after *Woollin*', 62 MLR (1999) 448-463.

[37] See the CA decision in *R v Nedrick* [1986] 3 All ER 1, pp.3-4 and the HL decision in *R v Woollin* [1998] 4 All ER 103, p.113.

[38] But see discussion of *dol éventuel* and *dol spécial* in C. Elliott, 'The French Law of Intent and its Influence on the Development of International Criminal Law', 11 Crim.LF (2000) 35-46, p.41.

of the definitions of *intent* in Article 30(2)(b). Ambos criticises this wording, stating that "article 30 ignores the difference between 'intent' and 'knowledge' and mixes up two different categories of conduct".[40]

However, "awareness that a circumstance exists", does add to the *mens rea* requirement, if the offence requires awareness of a particular circumstance in addition to the intention to act. For example in the case of wilful killing under Article 8(2)(a)(i) the accused must *intend* to kill a person, and have *knowledge* of both the factual circumstances establishing the protected status of the person and those establishing the existence of an armed conflict.

2.8 *General Mens Rea Issues*

The introduction to the Elements of Crimes make it clear that "intent and knowledge" do not have to be express, but may be "inferred from relevant facts and circumstances".[41] Additionally the introduction states that when the *mens rea* involves "elements involving value judgements" such as "inhumane" or "severe", it is not necessary, unless indicated, "that the perpetrator personally completed a particular value judgement".[42]

2.9 Article 8(1)

2.10 *The Chapeau to Article 8 - Jurisdiction in Respect of War Crimes*

The Court is to deal with war crimes, particularly when they are committed "as part of a plan or policy", or as part of a "large scale commission of such crimes". This *chapeau* was introduced at the third Preparatory Committee meeting,[43] in a proposal by the United States,[44] taking into account delegates' concerns that war crimes should be "limited to exceptionally serious violations of international

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[39] D. Piragoff, n.27 *supra*, pp.533-534.
[40] K. Ambos, n.31 *supra*, p.22.
[41] EOC, 'General Introduction', p.112, para.3.
[42] *Ibid.*, para.4.
[43] Decisions Taken by the Preparatory Committee at its Session Held From 11 to 21 February 1997, A/AC.249/1997/L.5, 1997, p.6.
[44] H. von Hebel and D. Robinson, 'Crimes within the Jurisdiction of the Court', pp.79-126, in Lee, *The Making of the Rome Statute*, p.107.

concern".[45] The threshold clause was intended to prevent the Court from "becoming overburdened by minor or isolated cases".[46]

Askin comments that the language of the chapeau "effectively prevents random acts, isolated crimes, or less serious offenses from coming within the jurisdiction of the Court".[47] However, the use of the word "particularly" demonstrates that the Court may nevertheless deal with isolated incidents if they are sufficiently grave, and indeed Fenrick comments that "plan, policy and scale are not elements or jurisdictional prerequisites, they are factors which should be taken into account by the Prosecutor".[48]

2.11 *Differentiation between International and Non-International Armed Conflicts under the Rome Statute*

Although the ICC will have jurisdiction over offences committed in both international conflicts, under Article 8(2)(a) and (b), and non-international armed conflicts, under Article 8(2)(c) and (e), the *travaux préparatoires* to the Rome Statute do not explain how the ICC should differentiate between the two situations. Common Article 2 of the 1949 Geneva Conventions gives an insight into the definition of an international armed conflict by stating that the Conventions should apply "to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them" and to "all cases of partial or total occupation", even if such occupation does not meet with armed resistance.

The ICTY has expanded upon this definition in the *Tadic* Appeal Judgement, which set out three situations which would constitute an international armed conflict.[49] First, a conflict is indisputably international if it takes place between two or more States.[50] Secondly, a conflict taking place on the territory of one State may

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[45] See the concerns expressed at the First Preparatory Committee Meeting, Summary of the Proceedings of the Preparatory Committee During the Period 25 March to 12 April 1996, A/AC.249/1, 1996, p.14.
[46] H. von Hebel and D. Robinson, n.44 *supra*, p.107.
[47] K. Askin, 'Crimes Within the Jurisdiction of the International Criminal Court', 10 Crim.LF (1999) 33-59, p.50.
[48] M. Cottier, W. Fenrick, P. Viseur Sellers and A. Zimmermann, 'Article 8, War Crimes', pp.173-262 in Triffterer, *Commentary on Rome Statute*, p.181, (hereinafter, Cottier *et al*, 'Article 8') and Lee, *ICC: Elements*, p.110.
[49] *Tadic*, Appeal Judgement, para.84.
[50] This may be a very low level affair, see Cottier *et al*, 'Article 8', p.182

be internationalised by the intervention of the military forces of a second State. Thirdly, a conflict taking place on the territory of one State between nationals of that State may be internationalised if "some of the participants in the internal armed conflict act on behalf of that other [second] State".[51]

The test to distinguish this third type of international armed conflict from a purely internal conflict has been analysed in depth in the jurisprudence of the ICTY.[52] The present approach taken by the Appeal Chamber of the ICTY is set out in the *Tadic* Appeal Judgement,[53] which held that the correct test for the internationalisation of a conflict owing to the influence of a foreign State over a military group in another State, is the same as the test of State responsibility of that State for violations of international law by the military group.[54] This had been the approach of the *Tadic* and *Aleksovski* Trial Chambers, who had based their reasoning on the Judgement of the ICJ in *Nicaragua*.[55] However, the *Tadic* Appeal Judgement did not find the reasoning of the ICJ on State responsibility in the *Nicaragua* case persuasive.[56]

The Majority in the *Tadic* Appeal propounded a test of control over rebels, which differentiated between private individuals and individuals making up an organised and hierarchically structured group such as a military unit.[57] They found that only in the case of private individuals would it be necessary to show that the State had "issued specific instructions concerning the commission of the breach",[58] whereas in order to attribute State responsibility for the actions of a military unit it would be sufficient to show that the group as a whole were under the "overall control" of the State.[59] Therefore, a conflict within one State between the

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[51] *Tadic*, Appeal Judgement, para.84.
[52] C. Byron, 'Armed Conflicts: International or Non-International?', 6 JCSL (2001), 63-90, pp.66-79.
[53] This has been followed by the *Aleksovski* and *Celebici* Appeal Judgements, paras.134 and 26 respectively and the *Blaskic* and *Kordic and Cerkez* Trial Judgements, paras.75 and 111 respectively.
[54] *Tadic*, Appeal Judgement, para.104.
[55] See *Tadic*, Trial Judgement, paras.585-588 and *Aleksovski*, Trial Judgement, Joint Opinion of the Majority, para.11.
[56] *Tadic*, Appeal Judgement, para.115. For a criticism of this approach see M. Sassòli and L. Olson, 'International Decisions: Prosecutor v Tadic (Judgement)', 94 AJIL (2000) 571-578, p.575.
[57] *Tadic*, Appeal Judgement, paras.118-121.
[58] *Ibid.*, para.118. To support this argument the cases of *United States Diplomatic and Consular Staff in Tehran* case, ICJ Rep. (1980) 3, and *Alfred W. Short v Islamic Republic of Iran*, Iran-US Claims Tribunal, 16 Iran-US CTR, 1987, 76, were cited in paras.132-135.
[59] *Tadic*, Appeal Judgement, para.120. To support this argument the cases of *United States v Mexico (Stephens Case)*, Mexico-US General Claims Commission, RIAA, Vol.IV 266; *Kenneth P. Yeager v Islamic Republic of Iran*, Iran-US Claims Tribunal, 17 Iran-US CTR, 1987, Vol IV, 92; *Loizidou v Turkey (Merits)*, ECHR, Judgement, 18 December 1996 (Merits), 26 Reports of Judgements and Decisions, 1996-VI, 2217 and the *Jogic* case, Oberlandesgericht, Düsseldorf, 26 September 1997, 2

government of that State and rebels is internationalised if a foreign State has "overall control" of those rebels, which means that the foreign State must have "*a role in organising, coordinating or planning the military actions* of the military group, in addition to financing, training and equipping or providing operational support to that group".[60]

Although this approach has now gained ascendancy in the ICTY, this does not necessarily mean that the ICC will adopt the same reasoning in the future, there being no principle of *stare decisis* in international law.[61] A possible alternative was suggested by Judge Shahabuddeen in his Separate Opinion in the *Tadic* Appeal Judgement, where he expressed the view that the *Nicaragua* Judgement was correctly decided.[62] He argued persuasively that in order to discover whether there is an international armed conflict, the question to be asked is not whether the foreign State has State responsibility for the actions of rebels in another State, but whether the foreign State has *used force* against the other State through the rebels.[63]

Judge Shahabuddeen suggested a flexible test of "effective control" to determine whether the foreign State had sufficient control over the rebel military to constitute a use of force against the other State.[64] In the case of *Tadic* he found that Yugoslavia was using force against Bosnia-Herzegovina through the Bosnian Serb army, the VRS, "even if such control did not rise to the level required to fix the FRY with state responsibility for any breaches of international humanitarian law committed by the VRS".[65] However, Judge Shahabuddeen noted in his Declaration

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StE 8/96, (Unpublished typescript, on file with the ICTY library, see *Tadic*, Appeal Judgement, para.129, and fns.154-156) were cited paras.125-129.

[60] *Tadic*, Appeal Judgement, para.137, original emphasis.

[61] Under Article 21 of the Rome Statute the Court will apply first the Statute, EOC and RPE, secondly applicable treaties and principles and rules of international law (including the established principles of the international law of armed conflict) and thirdly general principles of law derived from national laws of legal systems of the world. Nowhere are the decisions of other international tribunals mentioned except, perhaps, where they authoritatively expound the principles and rules of international law. See also M. Greenspan, *The Modern Law of Land Warfare*, (1959, University of California Press, Berkeley), p.7.

[62] *Tadic*, Appeal Judgement, Separate Opinion of Judge Shahabuddeen, para.5.

[63] *Ibid.*, para.17 and *Blaskic*, Trial Judgement, Declaration of Judge Shahabuddeen. See also T. Meron, 'Classification of Armed Conflict in the Former Yugoslavia: *Nicaragua's* Fallout', 92 AJIL (1998) 236-242, pp.236-237.

[64] *Tadic*, Appeal Judgement, Separate Opinion of Judge Shahabuddeen, para.19.

[65] *Ibid.* Judge Shahabuddeen comments that in *Nicaragua* the Court found that "the arming and training of the *contras* in the circumstances of the case amounted to a use of force" by the US against Nicaragua, but that the US were not liable for the breaches of humanitarian law committed by the *contras*, *ibid.*, paras.8-11, (see *Case Concerning Military and Paramilitary Activities in an Against Nicaragua (Merits)*, Judgement, Nicaragua v US, ICJ Rep. (1986) 14, especially paras.288 and 292).

in *Blaskic* that a conflict thus internationalised may also retain some internal aspects, and therefore may be mixed in status.[66]

A fourth type of internationalised conflict not contemplated by the *Tadic* Appeals Judgement, but relevant for the States Parties to API, is the situation described in Article 1(4) of the Protocol "where peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination".[67] The exercise of self-determination in such circumstances would turn what would otherwise be viewed as an internal conflict into an international one for the States Parties to API, provided that the rebel group had undertaken to apply the Geneva Conventions and Protocol.[68]

The type of armed conflict internationalised by API may pose problems for the ICC. The Rome Statute does not specifically incorporate API and so the ICC, when dealing with an individual alleged to have committed crimes in this situation, would be faced with two alternatives. The Court could make a finding of the nature of the conflict dependant upon whether or not the State involved had ratified API,[69] or it could consistently apply the same law to all States Parties to the Rome Statute irrespective of their participation in other international humanitarian law instruments. It is submitted that the latter approach would be preferable, but it would entail a decision upon whether the internationalisation of conflicts in such a situation constitutes customary international law.[70]

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[66] *Blaskic*, Trial Judgement, Declaration of Judge Shahabuddeen and see C. Greenwood, 'International Humanitarian Law and the *Tadic* Case', 7 EJIL (1996) 265-283, pp.271-273.

[67] H. Gasser, 'An Appeal for Ratification by the United States', 81 AJIL (1987) 912-925, pp.916-917; H. McCoubrey and N. White, *International Law and Armed Conflict*, (1992, Dartmouth, Aldershot), pp.197-199 and H. Wilson, *International Law and the Use of Force by National Liberation Movements*, (1988, Clarendon, Oxford), pp.162-180 suggest that Article 1(4) is very limited in scope. E. Kwakwa, *The International Law of Armed Conflict: Personal and Material Fields of Application*, (1992, Kluwer, Dordrecht), pp.49-66 and G. Abi-Saab, 'Wars of National Liberation in the Geneva Conventions and Protocols', 165 Rec.des Cours (1979) IV, 353-445, argue for a more liberal interpretation.

[68] Article 96(3), API. See G. Aldrich, 'Progressive Development of the Laws of War: A Reply to Criticisms of the 1977 Geneva Protocol I', 26 Va.JIL (1986) 693-720, pp.701-702 and Y. Dinstein, 'Interstate Armed Conflict and Wars of National Liberation: Commentator', 31 Am.ULR (1982) 849-853, pp.849-851.

[69] See M. Bothe, 'War Crimes', pp.379-426, in Cassese *et al*, *ICC Commentary*, p.391.

[70] C. Greenwood, 'Customary Law Status of the 1977 Geneva Protocols', pp.93-114 in Delissen and Tanja, *Humanitarian Law Challenges*, at pp.111-112, and the same author, 'Scope of Application of Humanitarian Law', pp.39-63, in Fleck, *Handbook*, para.202(4), suggests that Article 1(4) does not represent customary international law. This is supported by C. Murray, 'The 1977 Geneva Protocols and Conflict in Southern Africa', 33 ICLQ (1984) 462-470, p.465. However, of the 159 States Parties to API (September 2002), none have made a reservation or declaration with regard to Article 1(4) (See ICRC website at http://www.icrc.org/).

A final type of armed conflict which may be internationalised derives from the situation of a State which is fighting an internal conflict against a rebel movement, and invites a neighbouring State to send armed forces to assist in defeating the rebels.[71] This type of conflict does not immediately appear to come within the description given in Common Article 2 of the Geneva Conventions, not being "between" two contracting parties, and may not give rise to an occupation of territory by the neighbouring State's forces.

It is, however, arguable that such a conflict would be internationalised. First, the 'request' may not be genuine at all, and may be a mere device used by the neighbouring State to mask an invasion, or it maybe made by an individual not constitutionally capable of speaking for the State.[72] Secondly, it is strongly argued by some publicists that once a civil war is under way, there can be no valid request for external assistance in any case, as "there is no authority competent under international law to invite assistance from other states".[73] Finally, a purposive interpretation of the Geneva Conventions leads to the conclusion that the substantial intervention of foreign troops in an armed conflict would convert the conflict into an international one.

2.12 Article 8(2)(a)

2.13 *Persons or Property Protected under the Grave Breach Provisions of the Geneva Conventions*

The grave breach provisions of the Geneva Conventions, as reproduced in Article 8(2)(a) of the Rome Statute, apply only in international armed conflicts.[74] This, whilst not explicitly stated, was the clear intention of the drafters, who accepted that grave breaches of the Geneva Conventions should be included in the Statute of the ICC, prior to accepting the inclusion of jurisdiction over crimes in non-

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[71] See H. Gasser, 'International Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon', 31 Am.ULR (1982) 911-926.
[72] See D. Harris, *Cases and Materials on International Law*, (Fifth ed., 1998, Sweet and Maxwell, London), pp.890-894.
[73] M. Dixon, *Textbook on International Law*, (3rd ed., 1996, Blackstone, London), p.288 and see L. Doswald-Beck, 'The Legal Validity of Military Intervention by Invitation of the Government', 56 BYIL (1985) 189-252.
[74] C. Greenwood, n.66 *supra*, p.276.

international armed conflict.[75] Furthermore, this is also the clear meaning of the text as a whole, as is demonstrated by the expression "*[o]ther* serious violations of the laws and customs applicable in international armed conflict", used in Article 8(2)(b).[76] The Elements of Crimes confirm this interpretation, including in each element that the conduct "took place in the context of... an international armed conflict".[77]

Under Article 8(2)(a) an accused may be prosecuted for any of the listed grave breaches,[78] if they are carried out against "persons or property protected under the provisions of the relevant Geneva Convention". The four Geneva Conventions protect the wounded and sick of the armed forces in the field, the wounded, sick and shipwrecked of the armed forces at sea, prisoners of war and civilians,[79] and according to Baxter "are at their weakest in delineating the various categories of persons who benefit from the protection of each".[80] Under Article 8(2)(a) of the ICC, however, the alleged victims must be protected against that particular crime under the grave breach provision of the relevant Geneva Convention.

Those entitled to protection under the First and Second Geneva Convention are "the wounded and sick" or the "wounded, sick and shipwrecked at sea" belonging to the following categories: members of the armed forces, or militias or volunteer corps of the armed forces of a Party to the conflict; members of militias or other volunteer corps who fulfil the four conditions laid down, including obeying the laws and customs of war; members of regular armed forces professing allegiance to an authority not recognised by a Detaining Power; persons accompanying armed forces without being members thereof; members of crews of the merchant marine and civil aircraft who do not benefit by more favourable treatment under

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[75] Report of the *Ad Hoc* Committee on the Establishment of an International Criminal Court, GAOR Supplement No.22 (A/50/22) 1995, p.16.

[76] Emphasis added and see D. Sarooshi, 'The Statute of the International Criminal Court', 48 ICLQ (1999) 387-404, p.399.

[77] EOC, pp.125-130. See also K. Dörmann, 'The First and Second Sessions of the Preparatory Commission for the International Criminal Court', 2 YIHL (1999) 283-306, p.288.

[78] See J. Paust, 'The Preparatory Committee's "Definition of Crimes" - War Crimes', 8 Crim.LF (1997) 431-444, pp.437-438.

[79] Geneva Conventions I, II, III, and IV. For a brief description of persons protected under each Convention see T. Murphy, 'Sanctions and Enforcement of the Humanitarian Law of the Four Geneva Conventions of 1949 and Geneva Protocol I of 1977', 103 Milit.LR (1984) 3-77, pp.23-24.

[80] R. Baxter, 'So-Called 'Unprivileged Belligerency': Spies, Guerrillas and Saboteurs', 27 BYIL (1951) 323-345, pp.326-327.

international law and inhabitants of a non-occupied territory who spontaneously take up armed to resist invading forces.[81]

Those entitled to protection under the Third Geneva Convention are prisoners of war "who have fallen into the power of the enemy".[82] This expression is wider than the expression 'captured', and includes individuals who have become prisoners without fighting such as those who have surrendered.[83] Prisoners of war must either belong to one of the categories described above in relation to the first two Geneva Conventions, or belong or have belonged to the armed forces of an occupied territory if the Occupying Power finds it necessary to intern them, or belong to one of the categories above and be interned by neutral or non-belligerent Powers on their territory.[84]

Those entitled to protection under the Fourth Geneva Convention are persons, not protected by the first three Geneva Conventions,[85] "who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals".[86] Particular difficulty has been encountered by the ICTY in interpreting the extent of protection for civilians under this Convention. This is owing to the fact that the definition causes problems in the case of an armed conflict on the territory of a single State which is 'internationalised' owing to the fact that "some of the participants in the internal armed conflict act on behalf of that other [second] State".[87] In such a situation all the active participants may hold the same formal nationality.[88]

There are three ways that the ICC could tackle this problem. First, the definition could be read strictly, resulting in no protection under the grave breach provisions in Article 8(2)(a) for civilians in an 'internationalised' conflict where all

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[81] Article 13, Geneva Conventions I and II.
[82] Article 4, Geneva Convention III.
[83] Pictet, *Commentary: III Convention*, p.50 but see comments on defectors in the *British Military Manual*, para.126.
[84] Article 4, Geneva Convention III, and see Pictet, *Commentary: III Convention*, pp.44-72, and G. Draper, *The Red Cross Conventions*, (1958, Stevens and Sons, London), pp.52-54.
[85] According to the Commentary the result of this negative definition is that everyone is covered by one of the conventions "*there is no* intermediate status; nobody in enemy hands can be outside the law", original emphasis, Pictet, *Commentary: IV Convention*, p.51.
[86] Article 4, Geneva Convention IV, and see Pictet, *Commentary: IV Convention*, pp.45-51.
[87] *Tadic*, Appeal Judgement, para.84.
[88] See Article 12, Geneva Conventions I and II, and comments by T. Meron, 'On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument', 77 AJIL (1983) 589-606, p.595.

parties have the same nationality. This would be an undesirable outcome and arguably contrary to the object and purpose of the Conventions from which Article 8(2)(a) is drawn. Secondly, the expression 'in the hands of' could be interpreted more widely.[89] This was the approach of the ICTY in the Rule 61 Hearing of *Rajic*. The Trial Chamber held that the Bosnian Croats were under the control of Croatia, and therefore the Bosnian Muslims in Stupni Do, which the Bosnian Croats controlled, were protected persons under the Fourth Geneva Convention, as they were "constructively 'in the hands of' Croatia, a country of which they were not nationals".[90]

The shortcomings of this approach is that it offers somewhat one-sided protection. For example, if the rebels in State A are acting as agents for State B, then the civilians in areas controlled by the State A rebels will be protected by the Fourth Geneva Convention, as they will be constructively 'in the hands of' State B. However, if the State A government regains control over some State A rebel territory, then the State A rebels and supporters will not be constructively 'in the hands of' another State. This was essentially the *reductio ad absurdum* argument made by the Appeal Chamber in the Interlocutory Appeal on Jurisdiction in the *Tadic* Case.[91]

The third possible approach is more radical, but rectifies the shortcomings of the other methods. It involves a flexible reading of the expression 'nationals', and was applied by the ICTY in the *Tadic* Appeal Judgement when interpreting Article 4 of the Fourth Geneva Convention.[92] The Appeal Chamber extrapolated from the protection for stateless persons and refugees in Article 4,[93] that the legal bond of nationality was not crucial even in 1949, and could be overridden by "the lack of both allegiance to a State and diplomatic protection by this State".[94] They stated that "in modern inter-ethnic armed conflicts such as that in the former Yugoslavia, new States are often created during the conflict and *ethnicity rather than nationality may*

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[89] See Pictet, *Commentary: IV Convention*, p.47.
[90] *Rajic*, Rule 61 Review, para.37, supported in *Blaskic*, Trial Judgement, para.148-150.
[91] *Tadic*, Interlocutory Appeal Decision, para.76, but see G. Aldrich, 'Jurisdiction of the International Criminal Tribunal for the Former Yugoslavia', 90 AJIL (1996) 64-69, pp.66-67, and C. Greenwood, n.66 *supra*, pp.272-273.
[92] *Tadic*, Appeal Judgement, paras.163-169.
[93] See Article 70, Geneva Convention IV and J. Pictet ed., *Commentary: IV Convention*, pp.46 and 350.
[94] *Tadic*, Appeal Judgement, para.165.

become the grounds for allegiance".[95] Therefore, the Appeal Chamber concluded that the primary purpose of Article 4 "is to ensure the safeguards afforded by the Convention to those civilians who do not enjoy the diplomatic protection, and correlatively are not subject to the allegiance and control, of the State in whose hands they may find themselves".[96] This approach was supported by the Trial Chamber in the cases of *Blaskic* and *Kordic and Cerkez*, and again by the Appeals Chamber in the cases of *Aleksovski* and *Celebici*.[97]

This expansive interpretation of nationality for the purpose of determining protected person status under the Fourth Geneva Convention may be found persuasive by the ICC.[98] It is a solution which provides protection for both parties of a conflict on the territory of one State in the situation where it is internationalised, by the fact that some of the participants are acting on behalf of another State, and when most of the active participants hold the same formal nationality, or when the issue of the participant's nationalities is unclear owing to the creation of new States in the territory of a former State.[99]

The EOC for the offences within Article 8(2)(a) reflect the requirement of the *chapeau* that in each case the persons or property must have been protected under one or more of the Geneva Conventions of 1949.[100] However, the Elements impose an additional requirement that "[t]he perpetrator was aware of the factual circumstances that established that protected status",[101] although this does not appear to require a legal analysis on the part of the perpetrator.[102] A footnote to this Element states that "[w]ith respect to nationality, it is understood that the perpetrator needs only to know that the victim belonged to an adverse party to the conflict",[103] thus leaving open the way for the ICC to adopt a *Tadic* approach with respect to protected persons under the Fourth Geneva Convention.[104]

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[95] *Ibid.*, para.166, emphasis added. See also W. Fenrick, 'The Application of the Geneva Conventions by The International Criminal Tribunal for the Former Yugoslavia' 834 IRRC (1999) 317-329, p.329.
[96] *Tadic*, Appeal Judgement, para.168.
[97] *Blaskic*, Trial Judgement, para.127, *Kordic and Cerkez*, Trial Judgement, para.153, *Aleksovski*, Appeals Judgement, paras.151-152 and the *Celebici*, Appeal Judgement, para.84.
[98] See T. Meron, 'The Humanization of Humanitarian Law', 94 AJIL (2000) 239-278, p.257, and the same author, n.63 *supra*, p.239. See also K. Dörmann, n.22 *supra*, pp.285-286.
[99] For a criticism of this approach, see M. Sassòli and L. Olson, n.56 *supra*, p.576.
[100] EOC, pp.125-130.
[101] *Ibid.*
[102] Compare with requirement of awareness of circumstances establishing existence of an armed conflict, *supra*, para.2.2.
[103] EOC, p.125, fn.33.
[104] See Lee, *ICC: Elements*, p.117.

2.14 *(i) Wilful Killing*

2.15 **Origins**

Wilful killing is a grave breach under each of the Geneva Conventions and therefore the wounded and sick on land and at sea, the shipwrecked, prisoners of war and civilians are protected persons with respect to this offence. It is clear that the *actus reus* requires that the accused caused the death of another human being. However, the *mens rea* for this offence, described by the expression "wilful", is not explained by the commentary to the Conventions.[105] The French translation of this offence as 'l'homicide intentionnel' suggests that the killing must be done intentionally, not recklessly. However, this does not entirely clarify the issue, as, for example, under English law the *mens rea* for murder is intention to kill or cause really serious harm,[106] whereas under French law only an intention to kill will suffice.[107]

The Geneva Conventions were concluded in the wake of WW2, and the precedent to 'wilful killing' was the offence of 'murder' under Article 6(b) of the Nuremberg Charter. The Judgement of the IMT at Nuremberg discussed examples of murder, but did not expand on the *mens rea* required.[108] Equally many cases brought before national military tribunals under CCL No.10 did not overly concern themselves with the mental element of murder.[109] However, the Dutch Special Court of Cassation in the case of *In re Ahlbrecht* (No.2) considered on a policy basis that the mental element for murder in Article 6(b) should be construed in the broader Anglo-American sense, rather than the narrower continental sense.[110]

The issue of whether wilful killing can be committed by omission has not been examined in the post-WW2 trials, but the commentaries to the Geneva Conventions stress that this is entirely possible, "provided the omission was intended

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[105] Pictet, *Commentary: I Convention*, pp.371-372.
[106] *R v Moloney* [1985] AC 905, p.917.
[107] C. Elliott, n.38 *supra*, p.38.
[108] 22 Trial of German Major War Criminals, (1950, HMSO, London), (hereinafter: '*IMT Judgement*'), p.450.
[109] See *The Peleus Trial*, 1 LRTWC 1, p.20.
[110] *In re Ahlbrecht* (No.2), 16 AD 396, p.397.

to cause death".[111] An example of this would be "letting wounded persons die for want of the care which would have saved them, or by allowing protected persons to starve to death".[112] Therefore, a person "who gave instructions for the food rations of prisoners of war to be reduced to such a point that deficiency diseases causing death occurred would be held responsible".[113]

2.16 **Development**

The offence of 'wilful killing' has been discussed in depth in the *Celebici* case.[114] The Trial Chamber defined the *actus reus* of the offence as the "death of the victim as a result of the actions of the accused", holding that "the conduct of the accused must be a substantial cause of the death of the victim" and acknowledging that "omissions as well as concrete actions" can satisfy this element.[115] However, the mental element of 'wilful killing' was more contentious.[116] The Trial Chamber found it unhelpful to rely on the meaning of 'wilful' in national legal systems,[117] and instead considered the definition of 'wilful' in the commentary to Article 11 and 85 of API, which suggests that it includes the notions of intent and recklessness, but excludes mere negligence.[118]

After lengthy consideration the *Celebici* Trial Chamber concluded that the *mens rea* for murder or wilful killing under the Geneva Conventions was present "where there is demonstrated an intention on the part of the accused to kill, or inflict serious injury in reckless disregard of human life".[119] Therefore, according to *Celebici*, the accused must either intend to kill or intend to inflict serious injury and in the case of inflicting serious injury, the accused must also be acting recklessly in respect of the foreseen risk of death. A similarly worded approach has been followed in other ICTY Judgements to substantially the same effect.[120]

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[111] Pictet, *Commentary: II Convention*, p.267.
[112] Pictet, *Commentary: I Convention*, p.371.
[113] Pictet, *Commentary: III Convention*, pp.626-627.
[114] *Celebici*, Trial Judgement, paras.420-439.
[115] *Ibid.*, para.424. See R. Wolfrum, n.8 *supra*, p.12 and C. Rottensteiner, n.13 *supra*, p.563.
[116] *Celebici*, Trial Judgement, paras.426-430.
[117] *Ibid.*, para.431.
[118] *Ibid.*, para.431-432, and see Sandoz *et al*, *Commentary on the Additional Protocols*, pp.159 and 994.
[119] *Celebici*, Trial Judgement, para.439.
[120] See *Blaskic*, Trial Judgement, para.153; *Kordic and Cerkez*, Trial Judgement, para.229 and *Krstic*, Trial Judgement, para.485. The same approach was taken in respect of murder contrary to Common Article 3 in *Kvoca* et al, Trial Judgement, para.132 and *Krnojelac*, Trial Judgement, para.324, but see

2.17 **The Rome Statute**

Whilst there was agreement from an early stage that the Rome Statute should include grave breaches of the Geneva Conventions,[121] there is no amplification of the delegates' understanding of 'wilful killing' within the *travaux préparatoires*. The wording of Article 8(2)(a)(i) in both English and French, reflects exactly the wording of the Geneva Conventions grave breach provisions.[122] The EOC for this offence, in addition to those related to the nature of the conflict and protected status of the victim, simply require that the perpetrator must have killed one or more protected persons.[123]

Therefore, on a plain reading of the Statute and Elements, the *mens rea* of 'wilful killing' is still unclear. It is arguable that the 'default' *mens rea* of 'intent' and 'knowledge' in Article 30 applies,[124] but the expression 'wilful' could be interpreted as establishing a different standard of *mens rea* than that laid down in Article 30. Piragoff suggests that 'wilful' is synonymous with intent,[125] which would suggest that only an intention to cause death or an awareness that death will occur in the ordinary course of events as a result of the actions of the accused, will suffice for 'wilful killing'. However, Fenrick, maintains that the perpetrator of 'wilful killing' must act either intentionally or recklessly, in that they "intended to cause bodily harm and was aware that death was a possible consequence of his or her actions".[126]

This leaves the *mens rea* for 'wilful killing' before the ICC under some doubt. It is true that when an element of an offence is uncertain, it should be construed in favour of the defendant, in this case restricting the *mens rea* to intention to kill alone.[127] However, in light of the jurisprudence and academic comment discussed above, it is arguable that the *mens rea* for 'wilful killing' or 'murder' under international customary law includes intention to cause serious injury, reckless as to the probability of death.

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the narrower interpretation of *Jelisic*, Trial Judgement, para.35. See discussion of murder as a crime against humanity, *infra*, para.5.10.

[121] *Ad Hoc* Committee on the Establishment of an International Criminal Court, 3-13 April 1995, UN Doc.A/AC.244/2, para.32 and 34.

[122] Articles 50, 51, 130 and 147, Geneva Conventions I, II, III, and IV, respectively.

[123] EOC, p.125.

[124] See Lee, *ICC: Elements*, p.125.

[125] D. Piragoff, n.27 *supra*, p.531, fn.17.

[126] Cottier *et al*, 'Article 8', p.182.

Another unresolved issue is whether 'wilful killing' under the Rome Statute may be committed by omission. The history and jurisprudence of this offence suggest that it may be committed in this way. This issue is clarified by a footnote to the EOC regarding the word 'killed', which states that "[t]he term 'killed' is interchangeable with the term 'caused death'.[128] The use of this broader expression suggests that the ICC will accept that the offence of 'wilful killing' may be committed by omission.[129]

2.18 *(ii) Torture or Inhuman Treatment, Including Biological Experiments*

2.19 **Origins**

There are two distinct offences within this article, one of torture and one of inhuman treatment and the latter specifically includes biological experiments. These acts are criminalised by the grave breach provisions of all four Conventions, and therefore the wounded and sick on land and at sea, the shipwrecked, prisoners of war and civilians are protected persons with respect to these offences.

Torture is explained by the commentaries to the Third and Fourth Geneva Conventions, which state that it refers "especially to the infliction of suffering on a person in order to obtain from that person, or from another person, confessions or information"[130] and that it "is more than a mere assault on the physical or moral integrity of a person", because the pain is not as important as "the purpose behind its infliction".[131] Therefore the *actus reus* of torture under the Geneva Conventions would appear to be the infliction of pain on the victim. The *mens rea* would seem to be intentionally inflicting pain for the purpose of obtaining information or confessions.

The notion of inhuman treatment is to a certain extent defined negatively by the commentaries to the Geneva Conventions, as being treatment which is not 'humane'.[132] The commentaries therefore stress that this provision not only protects individuals from physical abuse, but because the Conventions serve to preserve

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[127] See Article 22(2), Rome Statute.
[128] EOC, p.125, fn.31.
[129] See *supra*, para.2.5.
[130] Pictet, *Commentary: III Convention*, p.627.
[131] Pictet, *Commentary: IV Convention*, p.598.

human dignity, this grave breach criminalises treatment which would bring individuals "down to the level of animals".[133] The expression "treatment" is confirmed as being "understood in its most general sense as applying to all aspects of life".[134]

Article 27 of Geneva Convention IV lays down the requirement that civilians be humanely treated. The same sentence states that they "shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity", and the following paragraph continues that women must be protected from "rape, enforced prostitution, or any form of indecent assault". It is therefore reasonable to argue that these are examples of actions incompatible with humane treatment,[135] and so would constitute the grave breach of inhuman treatment. The *actus reus* of inhuman treatment would appear to be quite wide and to a certain extent subjective, including such things as violence, humiliating public display and sexual abuse. The *mens rea* is unclear from the commentaries, but would certainly include intention to carry out acts such as those mentioned.[136]

The grave breach provisions of each of the Geneva Conventions give biological experiments as an example of inhuman treatment. This example was specifically included as a result of some of the horrific practices of the Nazis in WW2.[137] However, as the commentary states, the prohibition prevents protected persons from being used as "guinea-pigs",[138] but it does not "deny a doctor the possibility of using new methods of treatment justified by medical reasons and based only on concern to improve the state of health of the patient".[139] It should be noted that medical experiments may not even be carried out with consent as protected persons under the Geneva Conventions can not renounce their rights.[140]

2.20 **Development**

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[132] Pictet, *Commentary: II, III and IV Conventions*, pp.268, 627 and 598 respectively.
[133] *Ibid.*
[134] Pictet, *Commentary: III Convention*, p.140.
[135] Pictet, *Commentary: IV Convention*, p.204.
[136] It is unclear whether this offence was thought to be capable of commission by omission.
[137] See *Trial of Hoess*, 7 LRTWC 11, especially pp.14-16.
[138] Pictet, *Commentary: I, III and IV Conventions*, pp.139, 141 and 224 respectively.
[139] Pictet, *Commentary: II, III and IV Conventions*, pp.269, 627-628 and 598-599 respectively.
[140] Articles 7, 7, 7 and 8, Geneva Conventions I, II, III, and IV, respectively. This reverses the effect of *In re Brandt and Others*, 14 AD 296, which suggested that medical experiments could take place in war time, if certain stringent conditions were fulfilled.

2.20.1 The Offence of Torture

The crime of torture has been developed in recent years by human rights law, particularly by the widely ratified Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. This Convention defines torture as:

"any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity".[141]

Therefore the main ingredients of the crime appear to be the infliction of severe pain, by an official or with official sanction, upon an individual for a particular purpose. This definition confirms that the offence must be carried out intentionally, that mental in addition to physical pain and suffering may amount to torture and extends the purposes which may lie behind the torture. It also restricts the possible perpetrators of torture to those connected with public officials or acting in a public capacity.

The ICTY has primarily considered the definition of torture in the cases of *Celebici*, *Furundzija* and *Foca*.[142] Both the *Celebici* and *Furundzija* Trial Chambers drew upon the definition of torture contained in the Torture Convention and held that it was "representative of customary international law".[143] This was supported by the *Furundzija* Appeal Chamber.[144] However, it is notable that the court in *Foca* emphasised the limited scope of the Torture Convention's definition of torture,[145] commenting that it was "meant to apply at an inter-state level and was, for that reason, directed at the *state's* obligations",[146] and therefore it could serve only "as an

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[141] Article 1, 1984 Torture Convention.
[142] *Celebici*, Trial Judgement, paras.441-496, *Furundzija*, Trial Judgement, paras.137-164 and *Foca* Trial Judgement, paras.468-497.
[143] *Celebici*, Trial Judgement, para.459 and *Furundzija*, Trial Judgement, para.160.
[144] *Furundzija*, Appeal Judgement, para.111.
[145] *Foca* Trial Judgement, para.473, upheld on appeal, *Foca*, Appeal Judgement, paras.147-148.
[146] *Foca*, Trial Judgement, para.482, emphasis added.

interpretational aid".[147] All three Judgements expanded upon the constituent elements of the crime of torture by drawing upon the jurisprudence of courts and monitoring bodies set up by treaties prohibiting torture.[148]

Severity of the pain and suffering necessary for torture

The *Celebici* Judgement referred first to the findings of the Human Rights Committee,[149] which considered that beating, electric shocks and mock executions amounted to torture in the case of *Muteba v Zaire*,[150] and that *plantones* and beatings combined with lack of food constituted torture, in the case of *Setelich v Uruguay*.[151] Secondly, the Chamber referred to the jurisprudence of the European Commission and Court of Human Rights.[152] In particular, the Court noted that the European Commission considered in the *Greek Case*,[153] that "the practice of administering severe beatings to all parts of the body, known as *falanga*", was held to constitute torture and ill-treatment.

The *Celebici* Trial Chamber used the *Ireland v United Kingdom Case*,[154] heard before the European Commission and Court of Human Rights, to illustrate "the inherent difficulties in determining a threshold level of severity beyond which inhuman treatment becomes torture".[155] In this case although the Commission found that the combination of "wall-standing, hooding, subjection to noise, sleep deprivation and food and drink deprivation" amounted to torture,[156] the Court held that these acts constituted inhuman and degrading treatment as they "did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood".[157] Finally, the *Celebici* Judgement approved of the non-exhaustive list of actions severe enough to amount to torture given by the Special

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[147] *Ibid.*

[148] The crime of torture is prohibited by Article 3, 1950 European Convention on Human Rights; Article 7, 1966 ICCPR; Article 5, 1969 American Convention on Human Rights and Article 1, 1984 Torture Convention.

[149] *Celebici*, Trial Judgement, para.461.

[150] *Muteba v Zaire* (124/1982), HRC Report, UNOR, GA 22nd Session, Supplement No.40, (1984) para.10.2.

[151] *Setelich v Uruguay* (63/1979), HRC Report, UNOR, GA 14th Session, para.16.2. Note that *platones* involves forcing prisoners to remain standing for very long periods of time.

[152] *Celebici*, Trial Judgement, paras.462-466.

[153] *The Greek Case*, 12 YB ECHR (1969) 1, p.504

[154] *Ireland v The United Kingdom*, Vol.23-I, Series B, Pleadings, Oral Arguments and Documents, (1976-1978), Report of Commission, 8 and Vol.25, Series A, Judgements and Decisions, (1978), Judgement of 18 January 1978, 5.

[155] *Celebici*, Trial Judgement, para.463.

[156] *Ireland Case*, Report of Commission, n.154 *supra*, pp.410-411.

Rapporteur Mr. Kooijmans in his 1986 report,[158] which included extraction of nails and teeth, electric shocks, suffocation, prolonged denial of food, total isolation and sensory deprivation and simulated executions.[159] The Trial Chamber in *Furundzija* added that the *actus reus* of torture could be carried out by omission[160] and this was supported by the *Foca* Judgement.[161]

Official sanction or involvement in torture

The *Celebici* Judgement held that "[i]n the context of international humanitarian law, this requirement must be interpreted to include officials of non-State parties to a conflict, in order for the prohibition to retain significance in situations of internal armed conflicts or international conflicts involving some non-State entities".[162] The Trial Chamber also emphasised that the requirement of official sanction or involvement was very broad, and would "extend to officials who take a passive attitude or turn a blind eye to torture".[163] Nevertheless, the *Celebici* Judgement did not question the requirement for official sanction and both the *Furundzija* Trial and Appeal Chambers included the requirement for such sanction in their elements of this offence.[164]

The *Foca* Judgement, however, held that unlike human rights law, international criminal law was concerned with the criminal responsibility of the individual and that "[w]ith or without the involvement of the state, the crime committed remains of the same nature and bears the same consequences"[165] and furthermore that "[t]he characteristic trait of the offence in this context is to be found in the nature of the act committed rather than in the status of the person who committed it".[166] Therefore, the Trial Chamber concluded that "the presence of a state official or of any other authority-wielding person in the torture process is not necessary for the offence to be regarded as torture under international humanitarian

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[157] *Ireland Case*, Judgement of 18 Jan 1978, n.154 *supra*, para.167.
[158] *Celebici*, Trial Judgement, para.467.
[159] See the more recent Interim Report on torture by the Special Rapporteur, Sir N. Rodley, UN Doc. E/CN.4/1999/61, January 1999, and R. Bailey, 'Why do States Violate the Law of War?: A Comparison of Iraqi Violations in Two Gulf Wars', 27 Sy.J.Int.L (2000) 103-129, p.117.
[160] *Furundzija*, Trial Judgement, para.162.
[161] *Foca*, Trial Judgement, para.483(i) and (ii).
[162] *Celebici*, Trial Judgement, para.473.
[163] *Ibid.*, para.474.
[164] *Furundzija*, Trial and Appeal Judgements, paras.162 and 111 respectively.
[165] *Foca*, Trial Judgement, para.493.
[166] *Ibid.*, para.495.

law".[167] This was upheld on appeal on the basis that "the public official requirement is not a requirement under customary international law in relation to the criminal responsibility of an individual for torture outside of the framework of the Torture Convention".[168]

The mental element of torture

The *Furundzija* and *Foca* Judgements held that the torture must be carried out intentionally.[169] Regarding the forbidden purpose behind the imposition of suffering, such as to obtain information, to punish the person or to intimidate him or her, the Trial Chamber in *Celebici* made it clear that the list given by Article 1 of the Torture Convention was not exhaustive.[170] This approach was supported by the Trial Chamber in *Furundzija* which held that the purposes of torture must additionally include "humiliating the victim".[171] However, the *Foca* and *Krnojelac* Trial Judgements doubted whether the expansion of purposes beyond those listed in the Torture Convention was recognised under customary international law.[172]

Importantly, the *Celebici* Judgement stated that "there is no requirement that the conduct must be *solely* perpetrated for a prohibited purpose", or even that the prohibited purpose must predominate, provided that it was "part of the motivation behind the conduct"[173] and this was supported by the *Foca* and *Krnojelac* Judgements.[174] The *Foca* Appeal Chamber, however, approached the crime of torture as one requiring proof of intention, rather than one in which motives are relevant.[175] Therefore, "even if the perpetrator's motivation is entirely sexual, it does not follow that the perpetrator does not have the intent to commit an act of torture... [if] such pain or suffering is a likely and logical consequence of his conduct".[176]

2.20.2 Rape or Sexual Violence as Torture[177]

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[167] *Ibid.*, para.496 and see *Kvoca et al*, Trial Judgement, para.139.
[168] *Foca*, Appeal Judgement, para.148.
[169] *Furundzija*, Trial Judgement, para.162 and *Foca*, Trial Judgement, para.483(i).
[170] *Celebici*, Trial Judgement, para.470.
[171] *Furundzija*, Trial Judgement, para.162 and see *Kvoca et al*, Trial Judgement, para.140.
[172] *Foca*, Trial Judgement, para.485 and *Krnojelac*, Trial Judgement, para.186.
[173] *Celebici*, Trial Judgement, para.470, emphasis added.
[174] *Foca*, Trial Judgement, para.486 and *Krnojelac*, Trial Judgement, para.184.
[175] *Foca*, Appeal Judgement, para.153.
[176] *Ibid.*
[177] For the definition of rape under international law see *infra*, paras.3.89.1 and 3.90.1.

The Yugoslavia Commission of Experts determined that rape and sexual assaults could amount to the grave breach of torture or inhuman treatment,[178] and this approach was supported by Gay McDougall, the Special Rapporteur on contemporary forms of slavery in her report on rape and sexual slavery in armed conflict.[179] A previous Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, Sir Nigel Rodley, has also referred to "gender-specific forms of torture" as an issue of special concern, and stated that this includes "rape, sexual abuse and harassment, virginity testing, forced abortion or forced miscarriage".[180]

The first international criminal tribunal to hold that rape could constitute torture, albeit in the context of crimes against humanity, was the ICTR in the case of *Akayesu*.[181] The Judgement stated that "[l]ike torture, rape is a violation of personal dignity and rape in fact constitutes torture when 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".[182] The ICTY in the case of *Celebici* later confirmed that rape could amount to the grave breach of torture,[183] and in *Furundzija* held that rape could constitute torture under Common Article 3 of the Geneva Conventions.[184]

The *Celebici* Trial Chamber considered the issue of rape as torture in some depth and held that in order to constitute torture, the crime of rape must meet each of the elements of the offence of torture.[185] The court examined cases of rape as torture from human rights jurisprudence[186] including the case of *Raquel Martín de Mejía v Peru*,[187] where the Inter-American Commission of Human Rights held that the act of rape causes sufficient physical suffering from the violence of the act itself to constitute torture, but also constitutes mental torture by causing "a psychological

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[178] Yugoslavia Commission of Experts Report, para.105.
[179] G. McDougall, 'Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-Like Practices During Armed Conflict', Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc.E/CN.4/Sub.2/1998/12, 22 June 1998, paras.53-55.
[180] N. Rodley, 'Interim Report on the Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment', Commission of Human Rights, UN Doc.A/55/290, 11 August 2000, para.5.
[181] *Akayesu*, Trial Judgement, para.597.
[182] *Ibid.*, and see *Nikolic*, Rule 61 Review, at para.33.
[183] *Celebici*, Trial Judgement, para.496.
[184] *Furundzija*, Trial Judgement, para.163.
[185] *Celebici*, Trial Judgement, para.480.
[186] *Ibid.*, para.480-489.
[187] *Raquel Martín de Mejía v Peru*, Inter-American Commission on Human Rights, Case No.10.970, Report No.5/96, 1 March 1996, reprinted in 4 IHRR (1997) 609.

trauma that results, on the one hand, from having been humiliated and victimized, and on the other, from suffering the condemnation of the members of their community if they report what has been done to them".[188]

After reviewing human rights jurisprudence, the *Celebici* Judgement held that "[r]ape causes severe pain and suffering, both physical and psychological".[189] Indeed, the *Foca* Appeal Chamber commented in respect of the suffering caused by rape that "[s]evere pain or suffering, as required by the definition of the crime of torture, can thus be said to be established once rape has been proved, since the act of rape necessarily implies such pain or suffering".[190] Further, the *Kvoca* Judgement held that in some circumstances the *threat* of rape and sexual violence could amount to torture.[191]

The *Celebici* Trial Chamber found that the offence of torture had been committed in respect of one of Delic's rape victims as "the violence suffered by Ms. Antic in the form of rape, was inflicted upon her by Delic because she is a woman... this represents a form of discrimination which constitutes a prohibited purpose for the offence of torture".[192] This suggests, rather progressively, that the prohibited purpose of torture will always be met in the case of rape. In any event, Askin stresses that "[i]t is paramount that when the requisite elements for torture are met, the international legal arena must formally prosecute sexual assault as torture", thus confirming that sexual assault often amounts to this offence.[193]

2.20.3 Inhuman Treatment[194]

The *Celebici* case is the only recent international criminal Judgement which considers the meaning of inhuman treatment as a grave breach in any depth.[195] The Trial Chamber stated that "humane treatment is the cornerstone of all four

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[188] *Ibid.*, p.632.
[189] *Celebici*, Trial Judgement, para.495.
[190] *Foca*, Appeal Judgement, para.151.
[191] *Kvoca et al*, Trial Judgement, para.561.
[192] *Celebici*, Trial Judgement, para.963 and see K. Askin, *War Crimes Against Women, Prosecution in International War Crimes Tribunals*, (1997, Martinus Nijhoff, The Hague), p.319.
[193] K. Askin, *ibid.*, pp.320-321.
[194] The development of the offence of biological experiments will not be covered as there have been no prosecutions of this offence in recent years.
[195] *Celebici*, Trial Judgement, paras.521-532, (considering Article 12 of Geneva Conventions I and II, Articles 13 and 20 of Geneva Convention III and Articles 27 and 32 of Geneva Convention IV and Common Article 3).

Conventions, and is defined in the negative in relation to a general, non-exhaustive catalogue of deplorable acts which are inconsistent with it, these constituting inhuman treatment".[196] The Tribunal reviewed human rights jurisprudence and,[197] amongst others, referred to the case of *A v United Kingdom* before the ECHR, which found that the minimum level of severity for inhuman treatment was relative, and depended upon "all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim".[198] However, the Judgement held the "most coherent framing of the concept"[199] to be the definition of inhuman treatment given by the European Commission in *Yagiz v Turkey*, which was treatment which "deliberately causes serious mental and physical suffering".[200]

The *Celebici* Judgement concluded that inhuman treatment "is an intentional act or omission... which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity" and thus is "treatment which does not conform with the fundamental principle of humanity... [h]ence, acts characterised in the Conventions and Commentaries as inhuman, or which are inconsistent with the principle of humanity, constitute examples of actions that can be characterised as inhuman treatment".[201] This finding was approved by the Trial Chamber in *Blaskic*,[202] which further held that the infliction of physical and mental violence upon detainees whilst forcing them to dig trenches in a life threatening situation at the front, amounted to inhuman treatment.[203]

2.21 **The Rome Statute**

The offences of torture and inhuman treatment before the ICC would appear to require the default *mens rea* of intention and knowledge under Article 30 of the Rome Statute. No alternative *mens rea* is suggested by the wording of Article 8(2)(a)(ii) or the EOC. It is unclear from the *travaux préparatoires* whether these

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[196] *Ibid.*, para.532.
[197] *Ibid.*, paras.534-541.
[198] *A v United Kingdom*, ECHR Judgement, 23 September 1998, 90 Reports of Judgements and Decisions, 1998-V, 2692.
[199] *Celebici*, Trial Judgement, para.538.
[200] *Yagiz v Turkey*, ECHR Judgement, 7 August 1996, 22 EHRR (1996) 573.
[201] *Celebici*, Trial Judgement, para.543.
[202] *Blaskic*, Trial Judgement, para.154, supported by the *Kordic and Cerkez*, Trial Judgement, para.256.

offences may be committed by omission, and whilst there is dicta to this effect in the Judgements of the ICTY, it is easier to comprehend the concept of inhuman treatment by omission than torture.

2.21.1 The Offence of Torture

The EOC state that the perpetrator must have "inflicted severe physical or mental pain or suffering upon one or more persons", and have done this "for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind".[204] Whilst this does not elucidate the level of pain necessary to constitute torture, it is likely that the ICC will take into consideration the jurisprudence of the ICTY and human rights bodies which have considered this issue.

The Elements require a specific purpose for the torture, although the expression 'such as' demonstrates that other similar purposes, such as humiliation of the victim proposed by the ICTY in *Furundzija*, could also amount to a prohibited purpose.[205] It is submitted that the ICC should follow the *Celebici* and *Foca* Judgements in holding that the prohibited purpose need not be the sole purpose of the accused.[206] Nevertheless, this requirement of a prohibited purpose requires an additional mental element, above the *mens rea* of intention to commit the act causing the pain and suffering.

It is notable that the requirement of official sanction has been dropped from the Elements. This omission was supported by the Women's Caucus for Gender Justice who argued that official involvement has never, in any case, been part of the offence of torture in armed conflict,[207] an approach taken recently by the ICTY Trial Chamber in the *Foca* case.[208] Dörmann states that this Element was omitted in order to ensure that acts of torture committed by irregular forces would not be excluded from the grave breach of torture.[209]

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[203] *Blaskic*, Trial Judgement, para.700.
[204] EOC, p.126.
[205] *Furundzija*, Trial Judgement, para.162 and see K. Dörmann, n.25 *supra*, p.786.
[206] *Celebici*, Trial Judgement, para.470 and *Foca* Trial Judgement, para.486.
[207] Women's Caucus for Gender Justice, 'Suggestions for the Elements', submitted to the 16-26 February 1999 Preparatory Commission for the International Criminal Court, available at <http://www.iccwomen.org/icc/>.
[208] *Foca*, Trial and Appeal Judgements, paras.496 and 148, respectively.
[209] K. Dörmann, n.77 *supra*, p.290

2.21.2 Inhuman Treatment

The EOC for inhuman treatment simply require that the accused has "inflicted severe physical or mental pain or suffering upon one or more persons".[210] This omits a "serious attack on human dignity", which the ICTY case of *Celebici* included in the offence of inhuman treatment.[211] Dörmann comments that this omission was controversial at the Preparatory Commission, but it was decided that such behaviour would instead constitute a crime under 8(2)(c)(ii) as an outrage upon personal dignity.[212] Nevertheless, if an attack on human dignity caused serious mental pain or suffering, an accused could still be prosecuted under this section.

2.21.3 Biological Experiments

The EOC list biological experiments as a separate crime. The accused must have subjected one or more persons to a particular biological experiment, which "seriously endangered the physical or mental health or integrity" of the victim.[213] Additionally, the experiment must have had no therapeutic intent, and be "neither justified by medical reasons nor carried out" in the victim's interest.[214] This offence is more difficult to prove than inhuman treatment, as for the latter, it is sufficient to inflict severe pain or suffering, but in the case of biological experiments, it must be shown that the health or integrity of the victim was actually seriously endangered. Presumably an experiment which caused severe pain, but did not actually endanger the victim in this way could be charged as inhuman treatment.

The *mens rea* for this offence requires that the accused had a "non-therapeutic intent" in conducting the experiment, and that the experiment was not justified by medical reasons, nor in the person's interest.[215] Therefore a well-intentioned incompetent doctor who carried out a procedure which was not objectively justified by medical reasons or in the patient's interests would not fulfil the *mens rea* of this offence, as he would have had a 'therapeutic' intent. This also

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[210] EOC, p.126.
[211] *Celebici*, Trial Judgement, para.543.
[212] K. Dörmann, n.25 *supra*, pp.786-787.
[213] EOC, p.127.
[214] *Ibid.*

means that an experiment aimed to assist the patient's recovery from an illness or disease, carried out in less than ideal circumstances owing to the armed conflict, would not constitute the offence of biological experiments.[216]

2.22 *(iii) Wilfully Causing Great Suffering, or Serious Injury to Body or Health*

2.23 **Origins**

This offence is prohibited in the grave breaches of all four Geneva Conventions, and so all those protected under those Conventions are protected persons for the purposes of this offence. The commentary to the Conventions states that wilfully causing great suffering includes "moral suffering" in addition to physical suffering.[217] Therefore the *actus reus* of this offence is causing great physical or mental suffering, or seriously injuring a person's body or health. The *mens rea* is contained in the expression 'wilfully', which is not defined or explained by the commentaries to the Geneva Conventions.[218] However, the commentaries do stress that there is no requirement that the accused have a prohibited purpose behind the infliction of suffering or serious injury, and indeed may commit the *actus reus* of the offence "out of pure sadism".[219]

2.24 **Development**

The only international criminal case to consider the meaning of this offence in detail is *Celebici* before the ICTY.[220] The Trial Chamber held that 'wilfully causing great suffering or serious injury to body or health', was one offence, the elements of which are framed in the alternative.[221] On the definition of 'great suffering' the Court concurred with the commentaries that this encompasses 'moral' or mental suffering.[222] However, the Judgement drew support for this interpretation

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[215] *Ibid.*
[216] See comments by M. Gunn and H. McCoubrey, 'Medical Ethics and the Laws of Armed Conflict', 3 JACL (1998) 133-161, p.140.
[217] Pictet, *Commentary: II, III and IV Conventions*, pp.269, 628 and 599 respectively.
[218] See *supra*, para.2.15.
[219] Pictet, *Commentary: III and IV Convention*, pp.628 and 599 respectively.
[220] *Celebici*, Trial Judgement, paras.506-511.
[221] *Ibid.*, para.506, supported by *Blaskic*, Trial Judgement, para.156.
[222] *Celebici*, Trial Judgement, para.509, supported by *Kordic and Cerkez*, Trial Judgement, para.244.

from the omission to qualify 'great suffering' by 'to body or health', which suggests that 'serious injury to body or health' can not include serious psychiatric injury.[223] The Judgement of *Blaskic*, on the other hand, stated clearly that this part of the offence consists of "causing great suffering or serious injury to body or health, *including mental health*".[224]

In order to interpret the expressions 'great' and 'serious' the *Celebici* Judgement applied the ordinary meaning of the words from the Oxford English Dictionary.[225] 'Great' was defined as "much above average in size, amount or intensity', and 'serious' defined as "not slight or negligible", and the Trial Chamber stated that it viewed "these quantitative expressions as providing for the basic requirement that a particular act of mistreatment results in a requisite level of serious suffering or injury".[226] Additionally the *Celebici*, *Blaskic* and *Kordic and Cerkez* Trial Chambers emphasised that this offence could be committed by omission.[227]

The *mens rea* of the offence is governed by the expression 'wilfully', which has already been discussed with respect to the offence of 'wilful killing'.[228] However, the *Celebici* Judgement stated that for this offence the act or omission must be "intentional, being an act which, judged objectively, is deliberate and not accidental".[229] This suggests nothing more that that the offence must be committed voluntarily, and does not really explain whether the accused must intend to cause great suffering or serious injury, when he carries out a deliberate act or omission, or whether he may be reckless as to causing such suffering or injury. The Trial Chamber in *Blaskic* does not really amplify the *mens rea*, and simply confirms that the act or omission must be done intentionally.[230]

2.24.1 Rape or Sexual Violence as Great Suffering or Serious Injury to Body or Health

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[223] *Celebici*, Trial Judgement, para.509.
[224] *Blaskic*, Trial Judgement, para.156.
[225] *Celebici*, Trial Judgement, para.510.
[226] *Ibid.*
[227] *Ibid.*, para.511 and *Blaskic*, Trial Judgement, para.156 and *Kordic and Cerkez*, Trial Judgement, para.245.
[228] *Supra*, para.2.16.
[229] *Celebici*, Trial Judgement, para.511.
[230] *Blaskic*, Trial Judgement, para.156.

The Yugoslavia Commission of Experts asserted that rape or sexual assault could amount to this offence.[231] Additionally, it has already been seen that rape and sexual violence can constitute the crime of torture and inhuman treatment, and the Judgement in *Celebici* acknowledged that "all acts constituting torture could also fall within the ambit" of the offence of wilfully causing great suffering or serious injury to body or health.[232] Indeed, Landzo, a defendant in *Celebici*, was found to have committed this offence in a case of sexual violence when he "placed a burning fuse-cord directly against... [the victim's] bare skin in the genital area, thereby inflicting serious pain and injury upon him".[233] This recognition that rape and sexual violence may constitute the grave breach of wilfully causing great suffering or serious injury to body or health has also been supported by many commentators.[234]

2.25 **The Rome Statute**

The EOC state that the perpetrator must have "caused great physical or mental pain or suffering to, or serious injury to body or health of" one or more persons.[235] This really does not elucidate the *actus reus* of this offence, and in particular does not clarify whether the serious injury to body or health can include mental health.[236] The ICTY jurisprudence is unhelpful on this issue, as the Judgements of *Blaskic* and *Celebici* appear to contradict each other,[237] but Fenrick asserts that "[d]amage to mental health is also prohibited by this provision".[238] This suggests that both causing great mental pain and causing serious injury to mental health would constitute this offence. Although rape and sexual violence are not explicitly mentioned in the Elements, von Hebel and Robinson report that most

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[231] Yugoslavia Commission of Experts Report, para.105.
[232] *Celebici*, Trial Judgement, para.511.
[233] *Ibid.*, paras.1039-1040.
[234] See T. Meron, 'Rape as a Crime under International Humanitarian Law', 87 AJIL (1993) 424-428, p.426; V. Morris and P. Scharf, n.7 *supra*, p.67 and C. Cleiren and M. Tijssen, 'Rape and Other Forms of Sexual Assault in the Armed Conflict in the Former Yugoslavia: Legal, Procedural and Evidentiary Issues', pp.257-292, in R. Clark and M. Sann eds., *The Prosecution of International Crimes: A Critical Study of the International Tribunal for the Former Yugoslavia*, (1996, Transaction, Brunswick), p.277.
[235] EOC, p.127.
[236] Lee, *ICC: Elements*, p.130, suggests that 'mental injury' is not included.
[237] *Supra*, para.2.24.
[238] Cottier *et al*, 'Article 8', p.183.

States at the Rome Conference were of the view that the language covered sexual crimes in any case.[239]

The *mens rea* of this offence is not further explained by the EOC. The expression 'wilfully', by analogy to 'wilful killing', suggests that this offence has a specified *mens rea*, rather than the 'default' mental element of Article 30. It certainly includes committing the act or omission with the intention to cause such suffering or injury, but may also include carrying out an action or omission with reckless foresight that it *may* cause great suffering or serious injury.[240] Unfortunately the ambit of the mental element of this offence will remain unclear until ruled upon by the ICC.

2.26 *(iv) Extensive Destruction and Appropriation of Property, not Justified by Military Necessity and Carried Out Unlawfully and Wantonly*

2.27 **Origins**

Property is only protected against destruction and appropriation under the First, Second and Fourth Geneva Conventions. Therefore this provision essentially criminalises extensive destruction of civilian property and property associated with the sick, wounded and shipwrecked. The property protected under the Conventions from wanton destruction or appropriation is dependent upon the provisions in each Convention, which set out different types of protection for different types of property.

The property protected by the first two Geneva Conventions includes the buildings, materials and stores of fixed and mobile medical establishments, transports for sick and wounded, hospital ships, sick bays of warships, life boats and medical aircraft.[241] There are two types of property protected under the Fourth Convention. Protected property similar to that under the first two Conventions includes civilian hospitals, convoys of vehicles or hospital trains carrying sick and wounded civilians and aircraft employed in removal of sick and wounded

[239] H. von Hebel and D. Robinson, n.44 *supra*, pp.108-109. See also, J. Paust, 'Commentary on Parts 1 and 2 of the Zutphen Intersessional Draft', pp.27-42, in L. Sadat Wexler ed., *Observations on the Consolidated ICC Text Before the Final Session of the Preparatory Committee*, 13 *bis* Nouvelles Études Pénales (1998), p.29.
[240] See *supra*, para.2.17.

civilians.[242] The medical associated property described above would appear to be protected everywhere, extending "not only to the fighting zones and occupied territories, but also to the territories of the belligerents themselves".[243]

In addition, the Fourth Geneva Convention also protects certain categories of civilian property in occupied territory. The destruction of real or personal property belonging to individuals or the State is prohibited under Article 53 in occupied territory unless "rendered absolutely necessary by military operations".[244] Therefore, whilst the destruction of munitions factories in the adverse party's territory would be permissible, such destruction would be prohibited within occupied territory, unless, for example, a ground attack was imminent and the occupier needed a clear field of fire in order to protect his troops and retain the territory.[245] There are also limits on property which may be appropriated or requisitioned by an occupying power. Civilian hospitals and their stores are particularly protected, as are civilian foodstuffs and supplies, and may only be requisitioned subject to restrictive conditions.[246]

The wording of this grave breach establishes that an accused may only be prosecuted for this offence if the destruction or appropriation is both extensive and unlawful.[247] These terms are not defined by the commentary to the Conventions, but the ordinary meaning of the expression 'extensive', is "covering a large area" or "having a wide scope".[248] Therefore, whether the destruction or appropriation was extensive would have to be decided on an individual basis as a matter of fact and degree. The Articles referred to in the First, Second and Fourth Geneva Conventions both describe the protected property and lay down the limited circumstances in which the destruction or appropriation of such property may be done lawfully. If property protected by these Conventions is destroyed or appropriated in circumstances other than those laid down in the relevant Articles, then it would be done so 'unlawfully'.

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[241] Articles 33-36, Geneva Convention I and Articles 22-25, 27-28 and 38-39, Geneva Convention II.
[242] Articles 18-19 and 21-23, 1949 Geneva Convention IV.
[243] G. Schwarzenberger, n.4 *supra*, p.253.
[244] Article 53, 1949 Geneva Convention IV.
[245] Pictet, *Commentary: IV Convention*, p.601.
[246] Articles 55, 57 and 60, Geneva Convention IV.
[247] Articles 50, 51 and 147, Geneva Conventions I, II and IV respectively.
[248] *Concise Oxford Dictionary*.

Destruction or appropriation of property justified by military necessity does not amount to this offence.[249] One of the earliest legal formulations of military necessity was set out in the Lieber Code,[250] Article 14 of which stated that it "consists in the necessity of those measures which are indispensable for securing the ends of the war, *and which are lawful according to the modern law and usages of war*".[251] Green also stresses that a plea of military necessity "is not sufficient to evade compliance with the laws of war", as otherwise the law of armed conflict would be nothing more than a code to apply when convenient.[252]

Military necessity as a plea to destruction of property was raised in post WW2 cases, where the charge was 'wanton destruction of cities, towns, or villages, or devastation not justified by military necessity', under Article 6(b) of the Nuremberg Charter and Article 2(1)(b) of CCL No.10.[253] In the case of *von Manstein*, the accused was charged *inter alia* with wanton destruction and devastation of public and private buildings, in the course of a forced retreat from occupied territory in Russia.[254] The Judge Advocate emphasised that the accused is required to demonstrate military 'necessity' and not merely military 'advantage'.[255] However, he instructed the Tribunal to assess whether the devastation was justified "through the eyes of the accused... at the time when the events were actually occurring" and without hindsight.[256]

The *Hostages Trial* also considered the defence of military necessity to a charge of wanton destruction of private and public property.[257] The defendant had devastated public and private property pursuant to a 'scorched earth' policy in Finnmark, Norway, when retreating from the Russian attacks. The Judgement stated that military necessity in occupied territory generally "sanctions measures by an occupant necessary to protect the safety of his forces and to facilitate the success of

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[249] See generally N. Dunbar, 'The Significance of Military Necessity in the Law of War', 67 Jur.Rev. (1955) 201-212, H. McCoubrey, 'The Nature of the Modern Doctrine of Military Necessity', 30 Rev.Dr.Milit. (1991) 215-242 and Y. Dinstein, 'Military Necessity', pp.274-276, in R. Bernhardt ed., *Encyclopaedia Volume 3*.

[250] Articles 14-16, Lieber Code and B. Carnahan, 'Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity', 92 AJIL (1998) 213-231.

[251] *Ibid.*, emphasis added.

[252] Green, *Contemporary Law of Armed Conflict*, p.123; I. Detter, *The Law of War*, pp.393-398, and the summing up of the Judge Advocate in *In re von Manstein*, 16 AD (1949) 509, p.512.

[253] Article 6, Nuremberg Charter, and Article 2, CCL No.10.

[254] *In re von Manstein*, 16 AD (1949) 509.

[255] *Ibid.*, p.522.

[256] *Ibid.*, p.522. Von Manstein was found not guilty on this charge, but the *British Military Manual* cast doubt upon the last direction, para.616.

his operations".[258] The Court found the defendant not guilty on this count as "the conditions as they appeared to the defendant at the time were sufficient, upon which he could honestly conclude that urgent military necessity warranted the decision made" as a result of his fear of further Russian attacks.[259]

The *German High Command Trial* considered the case of von Leeb and other high ranking officers, who were accused, *inter alia*, of wanton destruction when retreating from Russian territory under attack and in danger of being cut off.[260] The Court held that in such circumstances a commander would need to make quick decisions and thus must be accorded "a great deal of latitude",[261] but appeared to accept the difference between 'military necessity' and 'military expediency', the latter being no defence.[262]

The *mens rea* required for this offence is governed by the expression 'wantonly'. The post WW2 cases discussed did not really consider the *mens rea* necessary for the analogous Charter crime of 'wanton destruction',[263] although it appears that for the most part the destruction alleged was carried out intentionally. A dictionary definition of 'wanton' as "capricious; random; arbitrary; motiveless",[264] suggests that specific motives are not an element of this offence, but does not really assist in explaining whether reckless destruction as opposed to intentional destruction would suffice for this offence.

2.28 **Development**

The case of *Blaskic* was the first ICTY Judgement to consider the elements of this offence, but it did so very briefly, and only with respect to destruction of property by an occupying power.[265] The Judgement simply stated that the occupying power may only destroy such property where it is made "absolutely necessary by military operations".[266] Furthermore, the Trial Chamber held that to constitute a

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[257] *The Hostages Trial*, 8 LRTWC 34.
[258] *Ibid.*, p.66.
[259] *Ibid.*, pp.68-69.
[260] *The German High Command Trial*, 12 LRTWC 1.
[261] *Ibid.*, p.125 and see M. McDougal and F. Feliciano, *The International Law of War, Transnational Coercion and World Public Order*, (1994, New Haven Press, New Haven), p.604.
[262] *The German High Command Trial*, 12 LRTWC 1, p.125.
[263] See E. Rosenblad, 'Area Bombing and International Law', 15 Rev.Dr.Milit. (1976) 53-104, p.79.
[264] *Concise Oxford Dictionary*.
[265] *Blaskic*, Trial Judgement, para.157.
[266] *Ibid.*

grave breach such destruction must be "extensive, unlawful and wanton"[267] and emphasised that "[t]he notion of 'extensive' is evaluated according to the facts of the case - a single act, such as the destruction of a hospital, may suffice to characterise an offence under this count".[268]

The Trial Chamber in *Kordic and Cerkez* discussed the elements of this offence in more depth.[269] It held that this crime is committed either where property protected under the Geneva Conventions is destroyed, whether or not in occupied territory, or where property is protected under the Geneva Conventions because of its location in occupied territory and the destruction occurs on a large scale and is not justified by military necessity. In each case the tribunal defined the *mens rea* of this offence as acting with "the intent to destroy the property in question or in reckless disregard of the likelihood of its destruction".[270] This shows that military necessity is not a defence to the destruction of property specifically protected by the Geneva Conventions such as hospitals and suggests that recklessness is a sufficient *mens rea* for this offence.

The possible criminality of the destruction carried out by Iraq during its occupation of and withdrawal from Kuwait in 1990 to 1991 has been discussed by a report of the US Department of Defence. The report contends that the actions of Iraq in setting fire to oil wells and releasing oil into the Persian Gulf constituted the grave breach of extensive destruction of property.[271] It emphasises that setting fire to oil wells "had no military purpose, but was simply punitive destruction at its worst".[272] This is because, had the Iraqi forces intended simply to obscure visibility they could have opened valves, as opposed to setting explosive charges on each well for maximum destruction.[273] Additionally the report comments that the Iraqi forces, when retreating from Kuwait, failed to set ablaze wells on their side of the border, whereas had there been military necessity for an obscurant they undoubtedly would have done so.[274] White and McCoubrey also comment that there was no justification

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[267] *Ibid.*
[268] *Ibid.*
[269] *Kordic and Cerkez*, Trial Judgement, paras.340-341.
[270] *Ibid.*, para.341.
[271] US Department of Defence Report, p.636.
[272] *Ibid.*, p.637.
[273] *Ibid.*
[274] *Ibid.*

of military necessity regarding the destruction to buildings carried out in Kuwait City prior to the Iraqi retreat.[275]

The evaluation of the Department of Defence report with respect to the Iraqi release of oil into the Persian Gulf is less convincing. The report simply states that "this aspect of Iraq's wanton destruction of Kuwaiti property had little effect on Coalition offensive combat operations".[276] However, the issue is not whether the actions of the accused were militarily effective, but whether the accused took such action because, at the time, he believed them to be a militarily necessity. Hampson suggests that Iraq could argue that "the oil spillages into the Gulf were intentional and designed to inhibit a feared amphibious landing".[277] Furthermore, she explains that "[t]he American forces were apparently deployed in such a way as to make that threat a real one".[278]

2.29 **The Rome Statute**

The EOC state that the accused must have destroyed or appropriated property, that such destruction or appropriation not be justified by military necessity, and finally that "[t]he destruction or appropriation was extensive and carried out wantonly".[279] 'Appropriation' is not defined in the Elements as the majority of delegates in the Preparatory Commission felt that this should be defined on a case-by-case basis.[280] However, the word order of the EOC confirms that both destruction and appropriation must be 'extensive' before the *actus reus* of this offence is committed.[281]

Fenrick, in the commentary to the Rome Statute, suggests that "[t]he expression 'and carried out unlawfully and wantonly' is surplusage",[282] and it is true that the expression 'unlawfully' is not repeated in the Elements. However the expression does serve as a reminder that if the stringent conditions of the Articles of

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[275] N. White and H. McCoubrey, 'International Law and the Use of Force in the Gulf', 10 Int.Rel. (1991) 347-373, pp.369-370.
[276] US Department of Defence Report, p.637.
[277] F. Hampson, 'Liability for War Crimes', pp.241-260, in P. Rowe ed., *The Gulf War 1990-91 in International and English Law*, (1993, Routledge, London), p.250.
[278] *Ibid.*
[279] EOC, p.127.
[280] Lee, *ICC: Elements*, p.133.
[281] *Ibid.*
[282] Cottier *et al*, 'Article 8', p.183.

the Geneva Conventions concerned with property are followed, then not all destruction and appropriation constitutes a crime under this section.[283]

The expression 'wantonly', however, is repeated in the Elements and although it is not explained, this repetition suggests that the word is not mere 'surplusage'. Piragoff suggests that the expression 'wantonly' connotes a different mental element than the default one provided for in Article 30.[284] Therefore, it seems likely that 'wantonly' is an expression of *mens rea*, rather than merely an indication that specific motives need not be proven for this offence. The question remains as to what standard of *mens rea* 'wantonly' imposes. Paust asserts that the *mens rea* imported by the expression 'wantonly' is 'recklessly'.[285] However, there is insufficient evidence to accept this as the definitive answer.

Dörmann explains that the expression 'not justified by military necessity' used in this section, does not provide a defence unless one has been laid down in the Geneva Conventions with regard to that type of property.[286] It must be borne in mind that "a rule of the law of armed conflict cannot be derogated from by invoking military necessity unless this possibility is explicitly provided for by the rule in question".[287] Dörmann gives the example of Article 18 of the Fourth Geneva Convention, which states that "[c]ivilian hospitals... may in no circumstances be the object of the attack".[288] The strict circumstances in which such a hospital may be attacked are laid down in Article 19, but do not include a defence of military necessity, and therefore an accused could not rely on such a defence if accused of attacking a civilian hospital.[289]

2.30 *(v) Compelling a Prisoner of War or Other Protected Person to Serve in the Forces of a Hostile Power*

2.31 **Origins**

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[283] *Supra*, para.2.27.
[284] D. Piragoff, n.27 *supra*, p.531.
[285] J. Paust, n.239 *supra*, pp.31-33.
[286] K. Dörmann, n.77 *supra*, pp.297-298.
[287] *Ibid.*, p.298.
[288] *Ibid,*, p.297.
[289] *Ibid.*

This offence is prohibited by the Third or Fourth Geneva Conventions, and therefore prisoners of war and civilians are protected from being compelled to serve in the forces of a hostile power. Even during the American Civil War the Lieber Code prohibited forcing "the subjects of the enemy into the service of the victorious government",[290] but did allow the army to use 'guides' and to obtain their service by force if necessary.[291] The Hague Regulations, whilst confirming that nationals of the hostile party could not be compelled to take part in operations of war against their own country, forbade the practice of forcing inhabitants of occupied territory to give information about their government's army or defence.[292] Furthermore, under the Geneva Conventions all compelled enlistment in the armed forces of the hostile power is prohibited, "whatever the theatre of operations and whoever the opposing forces might be".[293]

2.32 **Development**

To date the ICTY has not dealt with the grave breach of compelling protected persons to serve in the armed forces of a hostile power. Furthermore, despite "[p]ersistent evidence [which] emerged from Kuwait that attempts were being made to force Kuwaiti men of military age into service in the Iraqi forces" during the Gulf war,[294] there have been as yet no prosecutions at all for war crimes during that conflict.

2.33 **The Rome Statute**

The EOC state that the perpetrator must have "coerced one or more persons, by act or threat, to take part in military operations against that person's own country or forces or otherwise serve in the forces of a hostile power".[295] Therefore, to coerce a person by an act or a threat, presumably of physical violence or of another severely

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[290] Article 33, Lieber Code.
[291] Article 93, *ibid.*, p.15.
[292] Article 23 and 44, 1907 Hague Regulations and see *Trial of Rath and Schutz*, referred to in 15 LRTWC p.122. See also *infra*, paras.3.59-3.62.
[293] Pictet, *Commentary: IV Convention*, p.293. See also *Trial of Wagner*, 3 LRTWC 23, p.41.
[294] H. McCoubrey, 'Civilians in Occupied Territory', pp.205-223, in Rowe, *The Gulf War*, p.221 and A. DeSaussure, 'The Role of the Law of Armed Conflict during the Persian Gulf War: An Overview', 37 AFLR (1994) 41-68, p.54. See also US Department of Defence Report, p.618.
[295] EOC, p.128.

prejudicial act,[296] to serve in the forces of the hostile power is forbidden. Fenrick states that 'forces' should be interpreted as including "at a minimum, all entities encompassed by article 43 of the [API] which defines 'armed forces' as 'all organized armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates'".[297]

The coercion to take part in military operations against one's own country or forces, other than as part of the forces of the hostile power is also forbidden. Additionally, it is clear that coercion to serve in the forces of a hostile power against allied powers, resistance movements, or even such service not directly connected with the actual fighting is also prohibited.[298] In respect of the mental element of this offence, the default *mens rea* of intention and knowledge under Article 30 of the Rome Statute applies as no alternative *mens rea* is suggested by the EOC or Article 8(2)(a)(v). Therefore the accused would have to know that he was pressuring or coercing the victim and intend that the victim serve in forces hostile to him, or take part in military operations against his own country or forces.

2.34 *(vi) Wilfully Depriving a Prisoner of War or Other Protected Person of the Rights of Fair and Regular Trial*

2.35 **Origins**

This offence is prohibited by the Third and Fourth Geneva Conventions and therefore it is an offence to deprive prisoners of war or civilians of fair and regular trial. The right to a fair and regular trial was also asserted during the post-WW2 war crimes trials.[299] In particular, *The Justice Trial* considered the character of the trials under the *Nacht und Nebel* degree.[300] It found that they "did not approach even a semblance of a fair trial or justice", citing the fact that the defendants were held incommunicado, were in many cases "denied the right to introduce evidence, to be

[296] A threat short of violence, such as threatening to take a person's children away to be adopted by another couple, would presumably be a sufficient threat to constitute coercion.
[297] Cottier *et al*, 'Article 8', p.183.
[298] Pictet, *Commentary: IV Convention*, p.293.
[299] See G. Draper, n.84 *supra*, pp.71-72.
[300] *The Justice Trial*, 6 LRTWC 1, p.97. (The *Nacht und Nebel* Degree translates as the Night and Fog Degree. Under this persons who were suspected of committing offences against the German forces in occupied territories were taken secretly to Germany for trial and punishment, *IMT Judgement*, p.453.)

confronted by witnesses against them, or to present witnesses on their own behalf".[301] They were not given counsel of their choice and occasionally denied the aid of counsel. Frequently no indictment was served and "the accused learned only a few moments before the trial of the nature of the alleged crime for which he was to be tried".[302]

Whilst the elements of a fair trial can be deduced from this negative phrasing, the Judge Advocate in the *Trial of Ohashi* set out the fundamental principles of justice necessary for a "fair and reasonable" trial.[303] He stated that, first the tribunal must be "comprised of one or more men who will endeavour to judge the accused fairly upon the evidence... endeavouring to discard any preconceived belief in the guilt of the accused or any prejudice against him".[304] Secondly the accused must know the exact nature of the charge and the evidence against him and "should have full opportunity to give his own version of the case and produce evidence to support it".[305] Finally, the court should satisfy itself that the accused is guilty before awarding punishment and should not award a punishment which "outrages the sentiments of humanity".[306] However, in *The Trial of Latza*, the Supreme Court of Norway emphasised that the denial of one right alone may not amount to the denial of a fair trial, and it should be considered whether a sufficient number of these rights have been breached seriously enough to constitute an unfair trial.[307]

The commentaries to the Third and Fourth Geneva Conventions discuss the requirement of a fair and regular trial.[308] Together they include the right to notification of charges, to have defence counsel, to have time to prepare a case, to bring witnesses, to have an interpreter and to appeal.[309] The commentary to the Fourth Geneva Convention confirms that the safeguard of a fair and regular trial applies "to all accused persons, even those who are charged with having contravened the Geneva Conventions themselves".[310]

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[301] *Ibid.*
[302] *Ibid.*
[303] *Trial of Ohashi and Others*, 5 LRTWC 25, p.30.
[304] *Ibid.*
[305] *Ibid.*
[306] *Ibid.*
[307] *Trial of Latza and Two Others*, 14 LRTWC 49, p.85.
[308] Pictet, *Commentary: III and IV Conventions*, pp.412, 484-495 and pp.352-359 respectively.
[309] *Ibid.* See Articles 84-88,99,103, and 105-106, Geneva Convention III and Articles 70-73, Geneva Convention IV.
[310] Pictet, *Commentary: IV Convention*, p.354 and see Article 85 of Geneva Convention III.

2.36 **Development**

There have been no recent prosecutions of this offence before international criminal tribunals.

2.37 **The Rome Statute**

The Elements of denying a fair trial require that the perpetrator "deprived one or more persons of a fair and regular trial by denying judicial guarantees as defined, in particular, in the Third and Fourth Geneva Conventions of 1949".[311] Therefore, the prosecution must prove that the denial of the judicial guarantee or guarantees was sufficient to deprive the victim of a fair and regular trial. It is likely that the ICC will look at the trial procedure in totality when deciding whether the denial of guarantees was sufficient to amount to depriving the individual of a fair and regular trial.[312] Whilst the judicial guarantees in the Geneva Conventions have been discussed above,[313] the expression "in particular" leaves the door open for the ICC to find that other judicial guarantees are essential for a fair and regular trial and Dörmann comments that a denial of the presumption of innocence at the victim's trial may also constitute this offence.[314]

The mental element accompanying the deprivation of a fair and regular trial is described as 'wilfully' in Article 8(2)(a)(vi), but is not further elucidated in the EOC. By analogy with 'wilful killing', this expression denotes a specific *mens rea* for this offence, which may include recklessly as well as intentionally carrying out an action or omission which results in depriving an individual of a fair and regular trial.[315]

2.38 *(vii) Unlawful Deportation or Transfer or Unlawful Confinement*

2.39 **Origins**

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[311] EOC, p.128.
[312] See *Trial of Latza and Two Others*, 14 LRTWC 49, p.85.
[313] *Supra*, para.2.35.
[314] K. Dörmann, n.25 *supra*, p.789. See also Cottier *et al*, 'Article 8', p.184 and Lee, *ICC: Elements*, pp.134-135.

Under Geneva Convention IV civilians are protected against the grave breach of unlawful deportation or transfer or unlawful confinement.[316] Whilst the prohibitions on deportation or transfer, restrict the actions of an occupying power,[317] the offence of unlawful confinement can be committed either by an occupying power or by a party to the conflict in respect of alien civilians on its territory.[318]

2.39.1 Unlawful Deportation or Transfer

Article 49 of the Fourth Geneva Convention forbids both individual and mass forcible transfers of the civilian population by the occupying power and forbids deportations to any other country, including that of the occupying power, regardless of motive. The expressions 'transfer' and 'deportation' are not defined by the commentary to the Conventions, but presumably "a transfer is a relocation within the occupied territory and a deportation is a relocation outside the occupied territory".[319]

The prohibition is limited to *forcible* transfers of the civilian population, as individuals belonging to ethnic or political minorities "might have suffered discrimination or persecution on that account and might therefore [voluntarily] wish to leave the country".[320] However, the wording of Article 49 suggests that whilst only forcible transfers are prohibited, all deportations are forbidden. Nevertheless, it is arguable that voluntary deportations would not be considered 'unlawful' and would therefore not constitute a grave breach of the Geneva Conventions.[321]

In certain strictly limited situations, Article 49 provides for lawful transfers and deportations if either the security of the population, or "imperative military reasons so demand". The commentary emphasises that an evacuation under these conditions "is a provisional measure... often taken in the interests of the protected persons themselves" and gives the example of the population an area, which is suffering intense bombing, being removed for their own safety and security.[322] According to Yingling and Ginnane an area could be evacuated for imperative

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[315] See discussion *supra*, paras.2.16-2.17.
[316] Article 147, Geneva Convention IV.
[317] For the definition of an occupying power see *infra*, para.3.32.
[318] Articles, 49, 78 and 42, respectively, Geneva Convention IV.
[319] J. Henckaerts, *Mass Expulsion in Modern International Law and Practice*, (1995, Martinus Nijhoff, Dordrecht), p.144.
[320] Pictet, *Commentary: IV Convention*, p.279. However, if the discrimination is aimed at 'encouraging' the group to leave the country, it may still constitute forcible transfer.
[321] J. Henckaerts, n.319 *supra*, pp.144-5.

military reasons if illegal combatant activities were rife.[323] Such evacuations would be lawful, possibly even if carried out using reasonable force, but they may not displace the population outside the bounds of the occupied territory unless it is physically impossible to avoid and the population must be evacuated under humane conditions and returned to their homes as soon as feasible.[324]

Interpretation of this provision is also reliant upon jurisprudence from post WW2 cases. Although deportations were not specifically prohibited by the 1907 Hague Regulations, it is thought that this omission was simply due to "the fact that deportation of civilians was no longer practised... at the beginning of the Twentieth Century".[325] However, Article 6(b) of the Nuremberg Charter recognised the war crime of "deportation to slave labor or for any other purpose of civilian population of or in occupied territory".[326] The Nuremberg Judgement recounts that at least 5,000,000 workers were deported to Germany by such methods as "withdrawing the ration cards of laborers... or by discharging them from their jobs and denying them unemployment benefit or an opportunity to work elsewhere".[327]

2.39.2 Unlawful Confinement

The Fourth Geneva Convention discusses two types of 'confinement' of civilians. The first type is the internment or placing in assigned residence of civilian aliens in the territory of one of the parties to the conflict and the second is the internment or placing in assigned residence of civilians in occupied territory by the occupying power.[328] The grave breach of unlawful confinement is committed if the internment or assigned residence of civilians in either of these situations is not in accordance with the restrictions laid down within the relevant articles of the Fourth Geneva Convention. The commentary to the Geneva Conventions defines assigned residence as moving persons from their domicile and forcing them to live "in a locality which is generally out of the way and where supervision is more easily

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[322] Pictet, *Commentary IV Convention*, p.280.
[323] R. Yingling and R. Ginnane, 'The Geneva Conventions of 1949', 46 AJIL (1952) 393-427, p.419.
[324] Pictet, *Commentary: IV Convention*, p.280. See the *British Military Manual*, para.560.
[325] T. Meron, *War Crimes Law Comes of Age*, (1998, Clarendon, Oxford), p.143.
[326] Article 6(c), Nuremberg Charter also recognised deportation as a crime against humanity.
[327] *IMT Judgement*, p.461 and see *Trial of Milch*, 7 LRTWC 27, p.46 and *In re Lippert*, 17 ILR (1950) 432, p.433.
[328] Articles 41-43 and 78, Geneva Convention IV.

exercised".[329] Internment is defined as "a form of assigned residence", but a more severe one "as it generally implies an obligation to live in a camp with other internees".[330]

According to Article 42 of the Fourth Geneva Convention, aliens in the territory of a party to the conflict may be interned "only if the security of the Detaining Power makes it absolutely necessary", whereas under Article 78 only "imperative reasons of security" will suffice to confine civilians in occupied territory. The commentary stresses with regard to both articles that the belligerent must have "serious and legitimate reason[s]" to confine enemy alien civilians in its territory and may not take collective action against particular classes of people.[331] The State must "have good reason to think that the person concerned, by his activities, knowledge or qualifications, represents a real threat to its present or future security".[332] Articles 43 and 78 lay down procedural rules connected with any confinement, giving individuals the right to have their cases reconsidered by a court or administrative board as soon as possible and setting down a procedure for the automatic biannual reconsideration of confinements.

2.40 **Development**

2.40.1 Unlawful Deportation or Transfer

This offence has been discussed recently with respect to the actions of Iraq against Kuwaiti citizens during the Gulf conflict in 1990 and the actions of Israel against the Palestinians from the occupied territories in 1992. During the Gulf conflict Iraq allegedly deported large numbers of Kuwaiti citizens from Kuwait to Iraq.[333] The Security Council condemned the "forced departure of Kuwaitis" and stated that Iraq was attempting to "alter the demographic composition of the population of Kuwait".[334] Such actions would clearly amount to the grave breach of unlawful deportation.

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[329] Pictet, *Commentary: IV Convention*, p.256.
[330] *Ibid.*
[331] *Ibid.*, p.258 and p.367.
[332] *Ibid.*
[333] J. Henckaerts, n.319 *supra*, pp.158-162.
[334] SC Res.674, 29 October 1990 and SC Res.677, 28 November 1990.

In 1992 Israel deported 415 Palestinians, who were allegedly members of Hamas and Islamic Jihad, from the West Bank and the Gaza Strip into no man's land between Israeli controlled territory and Lebanon.[335] According to Machover and Cragg, Israel argued that Article 49 only prohibits mass deportations and that the Palestinians were not in fact truly deported, but only 'temporarily removed' for a period up to two years.[336] However, it is clear on the face of Article 49 that it is not so restricted and as neither the Convention nor the commentary make any mention of a minimum length of time necessary to constitute a deportation, it would seem that even the shortest expulsion from the occupied area could amount to this offence.[337] Had the Palestinians on an individual basis represented a real threat to Israeli security they should have interned them in accordance with the procedures laid down in Article 78.

The only recent judicial decision on the offence of unlawful transfer of protected persons was in the ICTY case of *Nikolic*. The original indictment in 1994 accused Nikolic of a grave breach of the Geneva Convention by participating in the unlawful transfer of civilians from Susica Camp to Batkovic Camp.[338] The Trial Chamber in the Rule 61 Hearing commented that this set of facts could also have been characterised as deportation and charged as a crime against humanity.[339] This leaves the difference between transfer and deportation somewhat confused, given that both the camps were situated in Bosnia, and in any case omits the consideration that deportation could also have been charged as a war crime. In the event the indictment was amended in 1999 and omitted any reference to unlawful transfer or deportation.[340]

2.40.2 Unlawful Confinement

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[335] See D. Machover and S. Cragg, 'The Deportation of Palestinians', 143 (6583) NLJ (1993) 59-60 and C. Foster, 'Jerusalem, Geneva and the Hills of Lebanon', 143 (6589) NLJ, (1993) 282 and 297-298. Israel contests the applicability of the Geneva Conventions, but this is not accepted by most academics or the Security Council, see J. Henckaerts, n.319 *supra*, pp.166-169 and SC Res.799, 18 December 1992, para.2.
[336] D. Machover and S. Cragg, n.335 *supra*, p.60.
[337] *Ibid.*
[338] Indictment of *Nikolic*, 4 November 1994, para.22.1.
[339] *Nikolic*, Rule 61 Review, para.23.
[340] First Amended Indictment, 12 February 1999.

The ICTY has primarily considered the crime of unlawful confinement as a crime against humanity.[341] However, the grave breach of unlawful confinement was considered in the Rule 61 Hearing of *Nikolic* which held that internment in the Susica camp was unlawful, as the establishment of the camp "was aimed at detaining a defenceless civilian population which was not organised into a resistance movement".[342] In *Celebici* the Trial Chamber emphasised that "[t]he fact that an individual is male and of military age should not necessarily be considered as justifying the application of [internment]" and stated that an "initially lawful internment clearly becomes unlawful if the detaining party does not respect the basic procedural rights of the detained persons".[343] This approach was upheld by the Appeal Judgement in *Celebici*,[344] which emphasised that "there is no such blanket power to detain the entire civilian population of a party to the conflict... but... there must be an assessment that each civilian taken into detention poses a *particular risk* to the security of the State".[345]

2.41 **The Rome Statute**

The EOC for both unlawful deportation or transfer and unlawful confinement are brief. The former merely states that the perpetrator "deported or transferred one or more persons to another State or to another location",[346] whereas the latter states that the perpetrator "confined or continued to confine one or more persons to a certain location".[347] This has the effect of confirming the findings of the ICTY in *Celebici* when it stated that a lawful confinement could become unlawful if the correct procedures such as appeal and review were not carried out.[348] In respect of the mental element of this offence, the default *mens rea* of intention and knowledge under Article 30 of the Rome Statute applies as no alternative *mens rea* is suggested in the EOC or in Article 8(2)(a)(vii). Therefore the perpetrator would have to intend

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[341] See *infra*, paras.5.24-5.25.
[342] *Nikolic*, Rule 61 Review, para.20.
[343] *Celebici*, Trial Judgement, paras.577 and 583 and see F. Hampson, 'The Geneva Conventions and the Detention of Civilians and Alleged Prisoners of War', Public Law (1991) 507-522.
[344] *Celebici*, Appeal Judgement, para.322 and 327 and see *Kordic and Cerkez*, Trial Judgement, para.289 and 291.
[345] *Celebici*, Appeal Judgement, para.327, original emphasis.
[346] EOC, p.129.
[347] *Ibid.*
[348] *Celebici*, Trial Judgement, para.583, and see Lee, *ICC: Elements*, pp.137-138.

to deport, transfer or confine the victims and to know of the factual circumstances which made this act unlawful.[349]

2.42 *(vii) Taking of Hostages*

2.43 **Origins**

The Fourth Geneva Convention prohibits the taking of hostages and so civilians are protected persons in respect of this grave breach. Prior to the conclusion of the 1949 Geneva Conventions it had been accepted practice to take hostages "as a means of securing legitimate warfare".[350] Whilst the offence of "killing of hostages" was prosecuted as a war crime before post WW2 tribunals,[351] no offence was committed at that time by *taking* hostages, and there was even debate over whether hostages could be killed legitimately in certain circumstances.[352]

The commentary to the Fourth Geneva Convention gave a definition of hostages as "nationals of a belligerent State who of their own free will or through compulsion are in the hands of the enemy and are answerable with their freedom or their life for the execution of his orders and the security of his armed forces".[353] Examples of hostage-taking include taking prominent persons from a district in order to prevent attacks on occupation troops, or taking hostages from a district after such attacks so that the attackers will be given up and "the practice of taking so-called accompanying hostages [which] consists of placing inhabitants of occupied territory on board lorry convoys or trains in order to prevent attacks by their compatriots".[354] The commentary explained that hostage taking would be accompanied by "the threat either to prolong the hostage's detention or to put him to death".[355]

2.44 **Development**

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[349] For example the perpetrator may be aware that the civilians he intends to confine pose no security risk, but would not have to know that such a confinement was illegal.
[350] *British Military Manual*, para.650. See also Articles 54 and 55, Lieber Code 1863.
[351] Article 6(b), Nuremberg Charter, *IMT Judgement*, p.454, *The Hostages Trial*, 8 LRTWC 34, *The German High Command Trial*, 12 LRTWC 1 and *Trial of Rauter*, 14 LRTWC 89.
[352] See M. Greenspan, n.61 *supra*, pp.414-417; G. Schwarzenberger, n.4 *supra*, pp.237-241 and Lord Wright, 'The Killing of Hostages as a War Crime', 25 BYIL (1948) 296-310.
[353] Pictet, *Commentary: IV Geneva Convention*, p.229.
[354] *Ibid.*, p.230.

The offence of taking civilians as hostages was considered in the case of *Blaskic*.[356] The Trial Chamber stated that the elements of taking of hostages as a grave breach was similar to that of taking of hostages as a breach of Common Article 3 of the Geneva Conventions, and held that "[t]he Prosecution must establish that, at the time of the supposed detention, the allegedly censurable act was perpetrated in order to obtain a concession or gain an advantage".[357] Blaskic was found guilty of taking of hostages both as a grave breach and as a breach of Common Article 3, for detaining civilians and other persons *hors de combat* at the Vitez cultural centre in order "to compel the ABiH [Muslim army of Bosnia-Herzegovina] to halt its advance".[358]

2.45 **The Rome Statute**

The Elements of taking hostages under Article 8(2)(a)(viii) consist of three specific parts. The perpetrator must have "seized, detained or otherwise held hostage one or more persons" and "threatened to kill, injure or continue to detain such person or persons".[359] In addition he or she must intend "to compel a State, an international organization, a natural or legal person or a group of persons to act or refrain from acting as an explicit or implicit condition for the safety or the release of such person or persons".[360]

These Elements are based, with some alterations, on the definition of hostage-taking under Article 1 of the 1979 International Convention Against the Taking of Hostages.[361] The Element of taking the hostage is broader than that of the Hostage Convention by use of the all-inclusive expression "or otherwise held hostage". Fenrick comments that the offence of hostage-taking may be committed irrespective of whether the initial detention was lawful or unlawful and that the threat issued by the hostage taker to kill, injure or continue to detain, may be implicit or explicit.[362] Although on the face of it the second Element "threatened to kill..." appears to

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[355] *Ibid.*, p.600.
[356] *Blaskic*, Trial Judgement, paras.158 and 187.
[357] *Ibid.*, para.158, followed in *Kordic and Cerkez*, Trial Judgement, para.313.
[358] *Blaskic*, Trial Judgement, para.708 and 'Disposition'. See also the detention of Hizbullah hostages in Lebanon by Israeli forces discussed in Green, *Contemporary Law of Armed Conflict*, pp.214-215.
[359] EOC, p.129.
[360] *Ibid.*
[361] K. Dörmann, n.77 *supra*, p.298.
[362] Cottier *et al*, 'Article 8', p.185.

require an explicit threat, it is submitted that it should be interpreted in a broad sense and include an implicit threat, or an unacceptable loophole in this offence would be created.

The mental element of this offence requires that the hostage taker *intend* to compel one of the listed entities to "act or refrain from acting" as an explicit or implicit condition for the "safety or release" of the hostages.[363] Dörmann comments that the expression 'safety' was inserted into this Element in addition to the word 'release' in the Hostages Convention, as a result of WW2 experience.[364] Therefore, it appears that the accused must intend to take the victim into captivity, or extend previously lawful captivity and then threaten to kill, injure or continue to detain that person. Furthermore, the accused must intend to compel specified entities to modify their behaviour in return for the safety or release of the hostages.

[363] EOC, p.129.
[364] K. Dörmann, n.77 *supra*, p.298.

3

WAR CRIMES: OTHER OFFENCES IN INTERNATIONAL ARMED CONFLICTS

3.1 Article 8(2)(b) of the Rome Statute

3.2 *The Chapeau to Article 8(2)(b), Other Serious Violations of the Laws and Customs Applicable in International Armed Conflict, within the Established Framework of International Law, namely, any of the Following Acts:*

The chapeau explains that the offences under Article 8(2)(b) must be committed in an international armed conflict,[1] but the meaning of "serious violations" is unclear. The ICTY Trial Chamber in the case of *Celebici* stated that in order to be considered as a serious violation of international humanitarian law, an offence must "be one which constitutes a breach of a rule protecting important values" and "also be one which involves grave consequences for the victim".[2] Fenrick suggests that "[a]ll of the acts listed in article 8 para. 2 (b) may be regarded as meeting an appropriate level of seriousness",[3] an interpretation which is supported by the phrase "namely, any of the following acts" in the chapeau, prior to the enunciation of the various offences.

The phrase "within the established framework of international law" has been described as "unnecessary and confusing" by Paust.[4] However, despite the uncertainty surrounding this expression, Fenrick's explanation that it "is merely intended to confirm that the listed acts are serious violations bearing in mind the existing framework of international law" seems a likely explanation.[5] A notable absence from the chapeau of this Article is any reference to protected persons. This suggests that, contrary to the grave breach offences, protected person status under the

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[1] See *supra*, para.2.11.
[2] *Celebici*, Trial Judgement, para.1154.
[3] M. Cottier, W. Fenrick, P. Viseur Sellers and A. Zimmermann, 'Article 8, War Crimes', pp.173-288 in Triffterer, *Commentary on the Rome Statute*, p.185 (hereinafter Cottier *et al*, 'Article 8')
[4] J. Paust, 'Commentary on Parts 1 and 2 of the Zutphen Intersessional Draft', pp.27-42, in L. Sadat Wexler ed., *Observations on the Consolidated ICC Text Before the Final Session of the Preparatory Committee*, 13 *bis* Nouvelles Études Pénales (1998), p.29.

Geneva Conventions is not a requirement for the victims of Article 8(2)(b), and indeed the EOC to this section make no reference to protected person status.[6]

3.3 *(i) Intentionally Directing Attacks Against the Civilian Population as such or Against Individual Civilians not Taking Direct Part in Hostilities*

3.4 **Origins**

The prohibition of attacks upon civilians has been recognised as far back as the Lieber Code.[7] However, during WW2 the practice of 'carpet bombing', which lead to the deaths of hundreds of thousands of civilians brought this proscription into question.[8] The modern prohibition against attacks upon civilians is contained within Article 51(2) of API and states, in similar language to Article 8(2)(b)(i), that "[t]he civilian population as such, as well as individual civilians, shall not be the object of attack".[9] API defines 'civilians' negatively, by excluding those defined as combatants in the Geneva Convention and Protocols.[10] The Bothe *et al* commentary emphasises that the definition of civilians also includes individuals linked to the armed forces without being members thereof, such as civilians accompanying, serving and transporting the military or employed in munitions work, as well as civilians who have previously taken part in hostilities without combatant status.[11]

API defines the 'civilian population' as comprising all those who are civilians. However, it confirms that "[t]he presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character".[12] The ICRC commentary to API suggests that

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[5] Cottier *et al*, 'Article 8', pp.185-186.
[6] See Schabas, *An Introduction to the ICC*, p.47.
[7] Article 22, Lieber Code.
[8] The Hague Regulations did not expressly prohibit attacks against civilians and Article 22 of the 1923 Hague Rules of Aerial Warfare was not legally binding. On 30 September 1938, the League of Nations GA adopted a resolution acknowledging that "[t]he intentional bombing of civilian populations is illegal", but this did not prevent indiscriminate bombing during the Second World War, see Schindler and Toman, *Laws of Armed Conflicts Documents*, pp.221-222.
[9] See also Article 85(3), API.
[10] Article 50(1), API, excludes those persons referred to in Article 4(a)(1), (2), (3) and (6) of Geneva Convention III and those persons referred to in Article 43 of API. On combatant status see generally M. Clarke, T. Glynn and A. Rogers, 'Combatant and Prisoner of War Status', pp.107-135, in M. Meyer ed., *Armed Conflict and the New Law: Aspects of the 1977 Geneva Protocols and the 1981 Weapons Convention*, (1989, BIICL, London).
[11] Bothe *et al*, *New Rules*, pp.293-294 and see Rogers, *Law on the Battlefield*, pp.8-9.
[12] Article 50(3), API.

such intermingling of combatants with civilians as soldiers on leave visiting families would not alter the civilian nature of a population.[13] The expression "civilian population as such" "implies that there can be no assurance that attacks against combatants and other military objectives will not result in civilian casualties".[14]

Article 51(3) of API provides that civilians are only protected "unless and for such time as they take a direct part in hostilities". The expression "direct part in hostilities" is defined by the Bothe *et al* and the ICRC commentaries as participation in combatant activities,[15] although Bothe *et al* propose that this expression is broader than 'attacks' and includes preparation for and return from combat.[16] Both commentaries agree, however, that civilians participating in the war effort, such as workers in defence plants, do not lose their protected status.[17] Finally, the expression 'attacks' has also been defined by API in Article 49(1) as "acts of violence against the adversary, whether in offence or in defence". The ICRC commentary explains that this definition essentially equates the word 'attack' with 'combat action'.[18]

3.5 **Development**

The definition of 'attacks' in API has been the subject of much discussion. Whilst conceding that the definition of 'attacks' as 'acts of violence' is broad enough to cover the actions of individual soldiers, Fenrick argues that in the context of Articles 51 and 57 "it would normally be inappropriate and impractical to classify an operation below divisional or equivalent level as an 'attack'" because of the planning process envisaged.[19] Support for this approach can be found in the Swiss reservation to Article 57(2), which states that this Article only creates obligations for commanders at the battalion or group level and above to ensure that civilian objects are not attacked.[20]

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[13] Sandoz, *et al*, *Commentary on the Additional Protocols*, p.612.
[14] Bothe *et al*, *New Rules*, p.300 and see H. Blix, 'Area Bombardment: Rules and Reasons', 49 BYIL (1978) 31-69, p.42. See discussion *infra*, paras.3.15-3.18.
[15] Bothe *et al*, *New Rules*, p.303 and Sandoz *et al*, *Commentary on the Additional Protocols*, p.619.
[16] Bothe *et al*, *New Rules*, p.303.
[17] *Ibid.*, and Sandoz *et al*, *Commentary on the Additional Protocols*, p.619. Although see Spaight's arguments that such people are 'quasi-combatants', J. Spaight, 'Legitimate Objectives in Air Warfare', 21 BYIL (1944) 158-164, p.162.
[18] Sandoz *et al*, *Commentary on the Additional Protocols*, p.603 and see S. Oeter, 'Methods and Means of Combat', pp.105-207, in Fleck, *Handbook*, para.441(3).
[19] W. Fenrick, 'The Rule of Proportionality and Protocol 1 in Conventional Warfare', 98 Milit.LR (1982) 91-127, p.102.
[20] See Switzerland's reservation to API, available from the ICRC website: <http://www.icrc.org/>.

However, this interpretation has been disputed by Rogers who contends, more in line with the API commentaries, that "[t]he definition of attack is wide enough to include a whole range of attacks, from that of a single soldier opening fire with his rifle to that of an army group's major offensive".[21] He proposes that the UK's interpretative declaration to API, that those responsible for deciding upon or executing attacks must be judged in light of the information available to them at that time, takes account of the knowledge and situation of the accused in respect of the standard required of him.[22] This approach has the benefit of accepting that individual soldiers must rely upon the military intelligence and analysis of those who designate a particular target, whilst holding them responsible if they become aware upon approach that the target is in fact civilian and nevertheless proceed to attack.

The ICTY, in *Blaskic*, considered attacks upon civilians in the village of Ahmici.[23] The Trial Chamber stated that in order to constitute an offence the attack must have caused deaths or serious bodily injury, not have been justified by military necessity and have been conducted intentionally in the knowledge that the target was civilian.[24] A similar definition was also given in the *Kordic and Cerkez* case.[25] The proposition that death or serious injury of civilians must result from the incident appears to have been based on Article 85 of API, which confines the grave breach of attacking civilians to situations where death or serious injury has been caused. The defence of military necessity, read into this offence by the tribunal, is questionable. The relevant articles of API do not suggest that there is any defence of military necessity in respect of the killing of civilians.[26] Indeed, under API even reprisal attacks against civilians are prohibited.[27]

3.6 **The Rome Statute**

The definition of the offence of attacking civilians in the Rome Statute follows closely the definitions of attacking civilians as a grave breach in API and as

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[21] Rogers, *Law on the Battlefield*, p.24 and see Bothe *et al*, *New Rules*, p.288.
[22] Rogers, *Law on the Battlefield*, p.25. UK reservations and understandings in relation to API, available from the ICRC website: <http://www.icrc.org/>.
[23] *Blaskic*, Trial Judgement, paras.180 and 414-417.
[24] *Ibid.*, para.180.
[25] *Kordic and Cerkez*, Trial Judgement, para.328.
[26] Although civilians may be killed or injured as an incidental result of an attack upon a legitimate military object, see *infra*, paras.3.15-3.18.

an offence in the ILC's Draft Code of Crimes.[28] The EOC, other than those related to the nature of the conflict, require that the perpetrator "directed an attack", that the "object of the attack was a civilian population as such or individual civilians not taking direct part in hostilities" and that the perpetrator intended such persons to be the object of the attack.[29]

The Element of 'directing an attack' is somewhat unclear. This is due, in part, to debate over the meaning of 'attack' in API, but also because of the choice of the phrase 'directing attacks' in Article 8(2)(b)(i), (ii), (iii), (ix) and (xxiv), as opposed to 'launching an attack' in Article 8(2)(b)(iv) and 'attacking' in article 8(2)(b)(v) of the Rome Statute. These terms are not defined in the Statute and the EOC do not assist in an understanding of them. In light of the discussion above, the ICC may well interpret attack broadly as including any combat action either by an individual combatant or by a formation or group of combatants. Fenrick suggests that the use of the expression 'launching' rather than 'directing' when referring to attacks where proportionality is a relevant issue, implies that such decisions are usually made at a higher level and involve a formal planning process.[30] This would support the argument that the offence of 'directing attacks' at civilians in the Rome Statute envisages attacks committed by a single combatant acting alone.

The object of the attack must be civilians or the civilian population, clearly defined by API and its commentaries.[31] In particular, it must be noted that the presence of combatants does not necessarily transform a civilian population into a legitimate objective. When the level of combatants within a civilian population has increased to the point where they could be considered a military objective, the legitimacy of the attack would depend upon the question of proportionality dealt with under Article 8(2)(b)(iv).[32]

The EOC confirm that it is not an offence to attack civilians who are taking a "direct part in hostilities".[33] This proviso was inserted during the fifth Preparatory

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[27] Article 51(6), API, and see G. Aldrich, 'New Life for the Laws of War', 75 AJIL (1981) 764-783, pp.781-782.
[28] Article 85(3), API and Article 20(b)(i), 1996 ILC Draft Code.
[29] EOC, p.130.
[30] Cottier *et al*, 'Article 8', p.197.
[31] See *supra*, para.3.4.
[32] See *infra*, paras.3.14-3.18.
[33] EOC, p.130.

Committee prior to the Rome Conference,[34] but its scope is still uncertain. Whilst participation in combat activities would clearly deprive civilians of the protection of this section and working in a munitions factory would clearly not,[35] what of civilian engineers working to mend tanks near the front line? In the 'grey' areas between direct participation and indirect participation in hostilities, the ICC will have to take each case on its merits.

Importantly, the EOC do not include a result Element for this offence, so it need not be proven that civilians were actually killed or injured because of the attack. Dörmann comments that this was a controversial issue in the Preparatory Commission, as the API grave breach provision on attacks against civilians or the civilian population requires that death or serious injury to body or health result from the attack.[36] The consensus of the Preparatory Commission, however, was that the result requirement had been consciously left out of this Article in the Rome Statute and therefore the EOC should not reintroduce this limitation.[37]

The *mens rea* of this offence is set out in the Element requiring that the perpetrator "intended" the civilians to be the object of the attack. It appears that recklessness as to civilian injury would not suffice.[38] Therefore, although the Iraqi use of scuds against Israeli and Saudi cities during the Gulf conflict were indiscriminate, as they were not capable of being targeted at specific military objects,[39] they would not have breached this Article of the Rome Statute unless it could it be proven that an accused Iraqi had *intended* to make civilians the object of the attack as opposed to simply being reckless.[40] The argument that the accused must have foreseen that such an attack would amount to an attack against civilians, or that the requisite intention could be inferred from his failure to take precautionary measures (such as more precisely targeted weapons) in the attack is not a watertight

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[34] Preparatory Committee on the Establishment of an ICC, A/AC.249/1997/L.9/Rev.1, 18 December 1997, p.3.

[35] Although a munitions factory itself would be a legitimate military target, and thus the civilian workers could be considered as collateral damage in such an attack provided that the rule on proportionality under Article 82b(iv) was not breached.

[36] Article 85(3), API and K. Dörmann, 'Preparatory Commission for the International Criminal Court: The Elements of War Crimes, Part II: Other Serious Violations of the Laws and Customs Applicable in International and Non-International Armed Conflicts', 842 IRRC (2001) 461-487, pp.466-467.

[37] K. Dörmann, *ibid.*, p.467.

[38] Fenrick argues that recklessness is sufficient, but this was prior to the conclusion of the EOC, Cottier *et al*, 'Article 8', p.186.

[39] Such attacks would breach Article 51(4) of API, although Iraq is not a party to API, see M. Schmitt, 'Future War and the Principle of Discrimination', 28 Israel Yrbk.Hum.Rts (1998) 51-90, p.55 and Rogers, *Law on the Battlefield*, p.20.

argument.[41] This appears to leave an unfortunate loophole in the Rome Statute, which defendants will no doubt attempt to exploit.

3.7 *(ii) Intentionally Directing Attacks Against Civilian Objects, that is, Objects which are not Military Objectives*

3.8 **Origins**

Whilst specific civilian objects have been protected by international conventions since the Hague Regulations,[42] the first treaty to set out the absolute prohibition that "[c]ivilian objects shall not be the object of attack or of reprisals" was Article 52 of API, the basis of this Article in the Rome Statute.[43] API defines civilian objects negatively, as "objects which are not military objectives". However, it is restricted to dealing with attacks against civilian objects *per se* and not collateral damage or "unintentional or unavoidable but necessary destruction of civilian objects incidental to military operations such as destruction to delay pursuit, [or] clearing fields of fire".[44]

When analysing this offence, because of the negative definition of 'civilian objects', the real question becomes: what are military objectives?[45] API defines military objectives as "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage".[46] Bothe *et al* comment that this definition provides a "two-pronged test".[47] The objects, must both "make an effective contribution to military action" and their neutralisation "in the circumstances ruling at the time" must offer a "definite military advantage".[48]

With respect to the first part of this test, the ICRC commentary suggests that objects which by 'nature' make an effective contribution to military action are "all

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[40] The Rome Statute does not include jurisdiction over indiscriminate attacks *per se*.
[41] See comments of K. Dörmann, n.36 *supra*, p.469. The use of such weapons could also be considered under the rule of proportionality of Article 8(2)(b)(iv), see *infra*, paras.3.15-3.18.
[42] See Article 27, 1907 Hague Regulations.
[43] See A. Randelzhofer, 'Civilian Objects', pp.93-96, in Bernhardt, *Encyclopaedia Volume 3*, p.94.
[44] Bothe *et al*, *New Rules*, p.321.
[45] See F. von der Heydte, 'Military Objectives', pp.276-279, in Bernhardt, *Encyclopaedia Volume 3*.
[46] Article 52, API.
[47] Bothe *et al*, *New Rules*, p.323.

objects directly used by the armed forces", such as weapons, equipment, fortifications, staff headquarters and communications centres.[49] 'Location' refers to objects such as a construction or a site that it is strategically important to seize, withhold from enemy possession or force the enemy to retreat from.[50] Indeed, the UK's understanding to Article 52 of API confirms that "a specific area of land may be a military objective if, because of its *location*... its total or partial destruction... offers definite military advantage".[51] Finally the commentary states that "[t]he criterion of *purpose* is concerned with the intended future use of an object, while that of *use* is concerned with its present function".[52] However, the Bothe *et al* commentary to API emphasises that the object's 'nature, location, purpose or use', need not have a direct connection with combat operations in order to constitute an effective contribution to military action.[53]

With respect to the second part of the test, the terms 'total or partial destruction' and 'capture' are relatively clear. 'Neutralisation' is explained by the Bothe *et al* commentary as denying a location or object to the enemy without necessarily destroying it, perhaps by a temporary bombardment or by setting landmines.[54] The definite military advantage from this destruction, capture or neutralisation, must be offered 'in the circumstances ruling at the time' and "not at some hypothetical future time",[55] and this phrase also emphasises that "objects which may have been military objectives yesterday, may no longer be such today and vice versa".[56]

The expression 'military advantage' "involves a variety of considerations, including the security of the attacking force",[57] and must be judged "in the context of the military advantage anticipated from the specific military operation of which the attack is a part considered as a whole, and not only from isolated or particular parts

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[48] *Ibid.*
[49] Sandoz *et al*, *Commentary on the Additional Protocols*, p.636.
[50] *Ibid.*
[51] UK reservations and understandings to API, emphasis added, available at the ICRC website: <http://www.icrc.org/>. Canada, Germany, Italy, New Zealand and the Netherlands made similarly worded understandings also available at the ICRC website, *ibid.*
[52] Sandoz *et al*, *Commentary on the Additional Protocols*, p.636, original emphasis.
[53] Bothe *et al*, *New Rules*, p.324.
[54] *Ibid.*, p.325. Neutralisation by landmines would be restricted for parties to the 1997 Ottawa Convention or the 1980 Convention on Conventional Weapons and its 1980 Protocol II or 1996 Amended Protocol II.
[55] Bothe *et al*, *New Rules*, pp.323-324.
[56] *Ibid.*, pp.326.

of that operation".[58] The military advantage must be definite, that is, "a concrete and perceptible military advantage rather than a hypothetical and speculative one",[59] although it need not be related to "the advantage anticipated by the attacker from the destruction, capture or neutralization of the object" as would be the case in a diversionary attack.[60]

3.9 **Development**

The Iraq-Kuwait Gulf conflict and the NATO air campaign against the Federal Republic of Yugoslavia (FRY), have raised interesting issues in respect of the prohibition against attacking civilian targets. In particular, the air bombardment of Iraq during the Gulf conflict raised the difficult issue of dual use objects, that is, objects which are contributing to the military campaign as well as supporting ordinary civilian life. As Schachter comments "the hostilities revealed how difficult it can be to make a sharp separation between the military targets and civilian objects, especially in an industrial society where their commingling is widespread".[61]

On this issue the US Department of Defence Report simply stated that "[w]hen objects are used concurrently for civilian and military purposes, they are liable to attack if there is a military advantage to be gained in their attack".[62] Greenwood sums up that "there is no intermediate category of 'dual use' objects: either something is a military object or it is not".[63] This harsh approach reflects the basic problem of modern conflicts, where many of the necessities of civilian life, such as power and communication lines, are also being used to support the military machine. However, with regard to dual use bombardment during the Kosovo crisis,

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[57] See the understandings to API on this issue made by Australia and New Zealand, available at the ICRC website: <http://www.icrc.org/>.

[58] Bothe *et al*, *New Rules*, pp.324-325 and the understandings to API of the UK, Australia, Belgium, Canada, Germany, Italy, New Zealand, the Netherlands and Spain, available at the ICRC website: <http://www.icrc.org/>.

[59] Bothe *et al*, *New Rules*, pp.325-326.

[60] *Ibid.*, p.325. Although API does not provide a list of military objectives, for examples see Draft Article 24 of the 1923 Hague Rules of Aerial Warfare and Article 8 of the 1954 Hague Convention.

[61] O. Schachter, 'United Nations Law in the Gulf Conflict', 85 AJIL (1991) 452-473, p.466. In this respect see discussion of the targeting of the national power grid of Iraq, in Rogers, *Law on the Battlefield*, p.45 and A. DeSaussure, 'The Role of the Law of Armed Conflict during the Persian Gulf War: An Overview', 37 AFLR (1994) 41-68, pp. 62-63.

[62] US Department of Defence Report, p.623.

[63] C. Greenwood, 'Customary International Law and the First Geneva Protocol of 1977 in the Gulf Conflict', pp.63-88, in Rowe, The *Gulf War*, p.73. However, attack against dual use objects is subject to the laws of proportionality, see *infra*, paras.3.15-3.18.

Rowe emphasised the limiting effect of the words *effective* contribution to military action and *definite* military advantage in respect of dual use objects.[64] The fact that an object is of some use to the military is not alone sufficient to justify its being targeted as a military objective.[65]

Another controversial issue, raised by the Gulf conflict and NATO's bombardment of FRY, was the targeting of communications. The US Department of Defence report stated that "microwave towers for everyday, peacetime civilian communications can constitute a vital part of a military command and control system".[66] Indeed, Oeter observes that "[i]n the case of modern densely interlinked infrastructures of telecommunication, it may be doubted whether any 'unimportant' installation still exists".[67] Furthermore, he contends that the Gulf conflict demonstrated that "an attacker nowadays must probably destroy a network of telecommunication *in toto* (or at least its central connection points) in order to paralyse the command and control structures of the enemy armed force, which in themselves clearly constitute a legitimate military objective".[68]

NATO's bombardment of FRY during the Kosovo crisis led to an assessment by the Office of the Prosecutor (OTP) at the ICTY of possible breaches of international humanitarian law.[69] The OTP then issued a report on the bombing campaign which included reasoning for the decision not to open a full criminal investigation.[70] The report examined the API definition of a military objective and found that this definition is "generally accepted as part of customary law".[71] Whilst most of NATO's bombardment was against "military facilities, fielded forces, heavy

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[64] P. Rowe, 'Kosovo 1999: The Air Campaign - Have the Provisions of Additional Protocol I Withstood the Test?', 837 IRRC (2000) 147-164, pp.151-152.
[65] *Ibid.* However, the US definition of military advantage is wider than the definition in Article 52(2), API, see US Department of Defence Report, p.623.
[66] US Department of Defence Report, p.623.
[67] S. Oeter, n.18 *supra*, p.161.
[68] *Ibid.*
[69] On the NATO action see generally Lord Robertson, 'Kosovo: An Account of the Crisis', 7 October 1999, available at: <http://www.fas.org/man/dod-101/ops/docs99/account/> and D. Kritsiotis, 'The Kosovo Crisis and NATO's Application of Armed Force Against the Federal Republic of Yugoslavia', 49 ICLQ (2000) 330-359.
[70] See N. Ronzitti, 'Is the Non Liquet of the Final Report by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia Acceptable?', 840 IRRC (2000) 1017-1028.
[71] OTP Report, para.42.

weapons and military vehicles and formations",[72] great controversy arose after the NATO bombardment of a state-owned television and radio station in Belgrade.

The OTP report found that whether the media could be a legitimate target was debatable,[73] but importantly confirmed that "civilian morale as such" is not a legitimate military objective[74] and that "merely disseminating propaganda to generate support for the war effort" would not convert the media into a military objective.[75] However, the report contended that "if the media is used to incite crimes, as in Rwanda, it can become a legitimate military objective".[76] This latter statement, however, was criticised as somewhat dubious by Cottier, who asserted that "the prevention or repression of international crimes may often not present a definite military advantage".[77] In the event, NATO never claimed that the radio and television centre were being used to incite crimes, but primarily supported its targeting as "part of a more general attack aimed at disrupting the FRY Command, Control and Communications network".[78]

Whilst the OTP report accepted that the targeting of the station on a propaganda basis was an incidental, albeit complementary, aim to the legitimate targeting of the station on that basis, it also claimed that "[i]f the media is the nerve system that keeps a war-monger in power and thus perpetuates the war effort, it may fall within the definition of a legitimate military objective".[79] However, although the media of dictatorial regimes are often used as part of the control mechanism to sustain the ruling party in power, during a conflict, practically all media display bias in supporting their country. Therefore, the OTP approach could risk opening the way to the bombardment of the media during conflicts as a matter of course. Additionally, as the OTP acknowledged, "[w]hilst stopping such propaganda may

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[72] Lord Robertson, 'Kosovo One Year On, Achievement and Challenge', 13 April 2000, available at: <http://www.nato.int/kosovo/repo2000/index.htm>.
[73] OTP Report, para.47.
[74] *Ibid.*, para.55. This is supported by G. Aldrich, 'Yugoslavia's Television Studios as Military Objectives', 1 ILF (1999) 149-150, p.150, but see comments by O. Medenica, 'Protocol 1 and Operation Allied Force: Did NATO Abide by Principles of Proportionality', 23 Loy.LA Int.&Comp.LR (2001) 329-426, p.423.
[75] OTP Report, para.47.
[76] *Ibid.*, para.55.
[77] M. Cottier, 'Did NATO forces Commit War Crimes During the Kosovo Conflict? Reflections on the Prosecutor's Report of 13 June 2000', pp.505-537, in H. Fischer, C. Kreß and S. Lüder eds., *International and National Prosecution of Crimes under International Law, Current Developments*, (2001, Berlin Verlag , Berlin), pp.521-522.
[78] OTP Report, para.75.
[79] *Ibid.*, para.76 and see W. Fenrick, 'Targeting and Proportionality during the NATO Bombing Campaign against Yugoslavia', 12 EJIL (2001) 489-502, p.497.

serve to demoralize the Yugoslav population and undermine the government's political support, it is unlikely that either of these purposes would offer the 'concrete and direct' military advantage necessary to make them a legitimate military objective".[80]

Another important issue raised by the prohibition against attacking civilian objects is whether those involved in conflicts at sea are also bound by the rule in API to only attack military objectives. Article 49 of API states that the provisions of that section apply to any warfare which may affect objects on land. This suggests that ship to ship warfare would not be bound by the prohibition against attacking civilian objects, but Heintschel von Heinegg argues that the basic rule of distinction between civilian objects and military objectives is customary in character and thus binding in naval warfare.[81] This proposition is supported by the San Remo Manual on International Law Applicable to Armed Conflicts at Sea, which, whilst not legally binding, was prepared by experts as a restatement of international humanitarian law at sea.[82]

An important question is whether a country's economic and financial system could amount to military objectives. Fleck suggests that whether economic objectives could be viewed as constituting military objectives would be influenced by the "means available and by existing options for successful operations".[83] Schmitt also warns that "[d]isparity also provides an incentive for 'have nots' to define the concept of military objective broadly... [s]ince economic facilities undergird the 'haves' superiority, they will seem particularly lucrative targets".[84] Rogers, however, argues that the general financial system of a country or particular exports upon which a country greatly relied, could not constitute a legitimate military objective as they could not be described as making "an *effective* contribution to *military* action".[85] This would seem correct, as if the expression 'military action'

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[80] OTP Report, para.76 and see G. Aldrich, n.74 *supra*, p.150.
[81] W. Heintschel von Heinegg, 'The Law of Armed Conflicts at Sea', pp.405-483, in Fleck, *Handbook*, p.420.
[82] See Articles 39-41, 1994 San Remo Manual.
[83] D. Fleck, 'Strategic Bombing and the Definition of Military Objectives', 27 Israel Yrbk.Hum.Rts (1997) 41-64, p.52.
[84] M. Schmitt, n.39 *supra*, p.65.
[85] Rogers, *Law on the Battlefield*, pp.40-41, original emphasis. See also H. Robertson, 'The Principle of the Military Objective in the Law of Armed Conflict', pp.197-223 in M. Schmitt ed., *The Law of Military Operations: Liber Amicorum Professor Jack Grunawalt*, 72 US Naval War College International Law Studies (1998, Naval War College Press, Rhode Island), pp.209-211.

was interpreted so broadly as to cover any type of contribution to the war effort, then the principle of distinction would become totally illusory.

The ICTY has only considered attacks upon civilian property in the cases of *Blaskic* and *Kordic and Cerkez*.[86] The Judgements in both cases demand that there be intentional targeting of civilian property which is not justified by military necessity[87] and the Trial Chamber in *Kordic and Cerkez* adds that the attack must result in "extensive damage to civilian objects".[88] The restriction of this offence to damage to civilian objects not justified by military necessity is in line with the commentary to Article 52 of API.[89] However, the requirement that the destruction of civilian property be extensive,[90] appears to confuse the offence of attacking civilian objects under Article 52 of API with the grave breach of extensive destruction and appropriation of property. Evidence of extensive destruction of civilian objects would, of course, support a finding that the defendant intended to make such objects the target of his attack.[91]

3.10 **The Rome Statute**

The EOC in respect of attacking civilian objects are very similar to those of attacking the civilian population.[92] First, the perpetrator must have "directed an attack". This Element has been discussed in respect of attacking the civilian population and should be defined similarly for this offence, as combat action by one or more combatants.[93] Secondly the target of the attack must have been civilian objects, "that is, objects which are not military objectives". Although the Rome Statute and Elements do not refer directly to Article 52 of API and its definition of military objectives it is likely that the ICC will apply this definition as customary law.[94] Finally it must be shown that the perpetrator "intended such civilian objects to

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[86] *Blaskic*, Trial Judgement, para.180 and *Kordic and Cerkez*, Trial Judgement, para.328.
[87] *Ibid.*
[88] *Kordic and Cerkez*, Trial Judgement, para.328.
[89] Bothe *et al*, *New Rules*, p.321.
[90] *Kordic and Cerkez*, Trial Judgement, para.328.
[91] Although very minor damage would not be sufficiently 'serious' for prosecution before the ICC, see Article 17(1)(d), Rome Statute, on admissibility.
[92] EOC, p.130.
[93] *Supra*, para.3.6.
[94] See discussion *supra*, para.3.9. This is supported by para.5 of the French understanding to the Rome Statute, which defines military objective using a very similar formula to API.

be the object of the attack", as opposed to being reckless thereto.[95] As with Article 8(2)(b)(i), the EOC do not require a result for this offence and therefore if a weapon is directed at a civilian object, yet fails to hit its target, the offence of intentionally directing attacks against civilian objects would still be committed.[96]

Some objects, such as military vehicles and weapons, are clearly military objectives, and others, such as schools and hospitals (when being used for those purposes) are clearly not. API in Article 52(3) imposes a presumption that "in cases of doubt whether an object which is normally dedicated to civilian purposes... is being used to make an effective contribution to military action, it shall be presumed not to be so used". Whilst this presumption is not mentioned in the Rome Statute or Elements, it would be open to the ICC to hold that this presumption represented customary law.[97] However, the real legal difficulty for the ICC will probably arise in drawing the line between military objectives and civilian objects in the grey areas of dual use objects. Here it must be remembered that not every object which contributes to the war effort is immediately a legitimate military objective, that contribution must be *effective* and destruction must produce a *definite* military advantage.[98] Additionally, even if an object constitutes a military objective under this test, action against it must still be considered under the test of proportionality of Article 8(2)(b)(iv).[99]

3.11 *(iii) Intentionally Directing Attacks Against Personnel, Installations, Material, Units or Vehicles Involved in a Humanitarian Assistance or Peacekeeping Mission in Accordance with the Charter of the United Nations, as Long as they are Entitled to the Protection Given to Civilians or Civilian Objects under the International Law of Armed Conflict*

3.12 **Origins**

The origins of the prohibition against attacking persons involved in humanitarian assistance or peacekeeping missions has its roots in the 1994

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[95] See discussion *supra*, para.3.6.
[96] K. Dörmann, n.36 *supra*, p.467.
[97] See Cottier *et al*, 'Article 8', p.187.
[98] See P. Rowe, n.64 *supra*, pp.151-152.
[99] *Infra*, paras.3.15-3.18.

Convention on the Safety of United Nations and Associated Personnel. This convention obliges States to criminalise crimes of murder, kidnapping or other attack upon UN and Associated Personnel, or attacks against their official premises, private accommodation or means of transportation.[100]

3.13 **Development**

There have yet to be any prosecutions under the UN convention, which only entered into force in January 1999. However, the offence was contained in similar wording in Article 19 of the ILC's Draft Code of Crimes and the ILC's commentary states that "[a]ttacks against United Nations and associated personnel constitute violent crimes of exceptionally serious gravity which have serious consequences not only for the victims, but also for the international community... [as] they are committed against persons who represent the international community and risk their lives to protect its fundamental interest in maintaining the international peace and security of mankind".[101]

The Statute for the Special Court for Sierra Leone in Article 4(b) includes an offence identical to Article 8(2)(b)(iii) of the Rome Statute. Whilst this Court is only now commencing operation and has not yet issued a Judgement on this offence, the commentary to this offence acknowledges that "[a]ttacks against peacekeeping personnel, to the extent that they are entitled to protection recognized under international law to civilians in armed conflict, do not represent a new crime", but explains that persons with a humanitarian or peacekeeping mission were felt to deserve special protection.[102] Notwithstanding this, the commentary emphasises that "[t]he specification of the crime of attacks against peacekeepers, however, does not imply a more serious crime than attacks against civilians in similar circumstances and should not entail, therefore, a heavier penalty".[103]

3.14 **The Rome Statute**

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[100] There was support for inclusion of this Convention in the Rome Statute at the Preparatory Committee, but it was not at that time in force, M. Arsanjani, 'The Rome Statute of the International Criminal Court', 93 AJIL (1999) 22-43, p.29.

[101] 1996 ILC Commentary, available at: <http://un.org/law/ilc/texts/dccomfra.htm>.

[102] Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, 4 October 2000, S/2000/915, p.4. See also C. Greenwood, 'International Humanitarian Law and United Nations Military Operations', 1 YIHL (1998) 3-34, pp.30-31.

In addition to the requirements relating to the international status of the conflict, the EOC lay down five points that must be proven for this offence.[104] The perpetrator must have directed an attack, the object of the attack must have been "personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations" and the perpetrator must have intended that these be the object of the attack.[105] The personnel and associated objects must have been "entitled to that protection given to civilians or civilian objects under the international law of armed conflict" and the perpetrator must be "aware of the factual circumstances that established that protection".[106] Once again, there is no requirement in the Elements for a particular result to occur, so provided that humanitarian or peacekeeping personnel or objects are attacked there is no need to show that such personnel or objects have actually been killed, injured or destroyed.[107]

The Element of directing an attack has been discussed in respect of attacking the civilian population and civilian objects and so should be defined similarly as combat action by one or more combatants.[108] In respect of the object of the attack, the difficulty lies in ascertaining how the ICC will interpret the words "humanitarian assistance", "peacekeeping mission" and "in accordance with the Charter of the United Nations". This expression suggests that such missions must be in accordance with the purposes of the UN and not contrary to any articles of the UN Charter. The purposes of the UN are laid down in Article 1 of the Charter, and include the maintenance of international peace and security, peaceful settlement of international disputes, and co-operation in solving international problems of an economic, social, cultural or humanitarian character. The Charter prohibits under Article 2(4) the threat or use of force against the territorial integrity or political independence of any State, and under Article 2(7) intervention in matters within the domestic jurisdiction of a State.

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[103] Report of the Secretary-General, n.102 *supra*, p.4.
[104] EOC, p.131.
[105] *Ibid.*
[106] *Ibid.*
[107] K. Dörmann, n.36 *supra*, p.467.
[108] See discussion *supra*, para.3.6.

Although "[t]here is no generally accepted definition of what constitutes a 'humanitarian assistance mission'",[109] assistance to a State of a humanitarian nature would appear, in principle, to be in accordance with the purposes of the UN Charter. In order to avoid breaching Article 2 of the Charter such assistance must have the consent of the State involved. Cottier suggests that 'humanitarian assistance' in connection with an armed conflict would primarily consist of "relief assistance, that is, assistance to prevent or alleviate human suffering of victims of armed conflicts and other individuals with immediate and basic needs" and that their personnel may include "administrative staff, coordinators and logistic experts, doctors, nurses and other specialists and relief workers".[110]

Assistance by the Red Cross, an independent humanitarian organisation,[111] or by UN agencies would clearly come under the heading of humanitarian assistance. The aid should be given impartially to all in need.[112] Cottier casts doubt as to whether humanitarian action by a State would also constitute humanitarian assistance for the purposes of this offence,[113] but it is submitted that Article 8(2)(b)(iii) does not rule out such assistance if given with consent of the State involved and on an impartial and neutral basis.

The expression 'peacekeeping mission' has primarily been used with respect to UN operations. The former Secretary-General of the UN, Boutros-Ghali, defined peacekeeping as "the deployment of a United Nations presence in the field, hitherto with the consent of all the parties concerned, normally involving United Nations military and/or police personnel and frequently civilians as well".[114] Peacekeepers carry out tasks such as "monitoring and enforcement of cease-fires, observation of frontier lines, interposition between belligerents, election-monitoring, protection and delivery of humanitarian aid, and the maintenance of government and public order".[115] Indeed, Boutros-Ghali commented that the personnel involved in

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[109] Cottier *et al*, 'Article 8', p.189.
[110] *Ibid.*, pp.189-190.
[111] Article 1, 1998 ICRC Statute (revised).
[112] See Article 4(1), 1998 ICRC Statute (revised).
[113] Cottier *et al*, 'Article 8', p.191.
[114] Report of the Secretary-General, 'An Agenda for Peace: Preventative Diplomacy, Peacemaking and Peace-Keeping', UN Doc.A/47/277-S/24111, 17 June 1992, para.20.
[115] A. Roberts and B. Kingsbury, 'Introduction: The UN's Roles in International Society since 1945', pp.1-62, in B. Kingsbury and A. Roberts, *United Nations, Divided World: the United Nations Roles in International Relations*, (2nd ed., 1993, Oxford University Press, Oxford), p.32. For other peacekeeping activities see M. Shaw, *International Law*, (4th ed., 1997, Cambridge University Press, Cambridge), p.853.

peacekeeping could include "civilian police officers, human rights monitors, electoral officials, refugee and humanitarian aid specialists".[116]

The three basic principles of peacekeeping were laid down by Boutros-Ghali as "consent of the parties, impartiality and the non-use of force except in self-defence"[117] and these were referred to as "bedrock principles" by the recent Brahimi Report on UN Peace Operations.[118] The legality of such operations within the UN system was confirmed by the ICJ in the *Certain Expenses of the United Nations Case*, which confirmed that the peacekeeping forces in the Middle East and the Congo, which had been established with the consent of the States involved, were "undertaken to fulfil a prime purpose of the United Nations, that is, to promote and to maintain a peaceful settlement of the situation".[119]

The Elements do not clarify whether peacekeeping missions protected by Article 8(2)(b)(iii) are only those under the UN banner or include regional peacekeeping operations. Cottier comments that "regional organizations such as the OSCE, EU or ECOWAS have been establishing or authorizing peacekeeping and observer missions"[120] and Miyet, the UN Under-Secretary-General for Peacekeeping Operations has spoken of the work of regional peacekeeping NATO forces in Bosnia.[121] Therefore, it would appear that such peacekeeping forces would be protected by Article 8(2)(b)(iii) of the Rome Statute, provided that they abide by the UN standard of consent, impartiality and non-use of force.

The EOC state that the persons and objects protected under this article must be "entitled to that protection given to civilians or civilian objects under the international law of armed conflict".[122] As a result from a technical viewpoint this provision is superfluous,[123] given that those on humanitarian assistance or peacekeeping missions would in any case be protected under Article 8(2)(b)(i) and (ii). However, von Hebel and Robinson stress this Article's "symbolic importance as

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[116] Report of the Secretary-General, n.114 *supra*, para.52.
[117] Report of the Secretary-General, 'Supplement to an Agenda for Peace', UN Doc.A/50/60-S/1995/1, 3 January 1995, para.33.
[118] Report of the Panel on United Nations Peace Operations, Brahimi Report, UN Doc.A/55/305-S/2000/809, 21 August 2000, para.48.
[119] *Certain Expenses of the United Nations Case*, Advisory Opinion, ICJ Rep. (1962) 151, pp.24-25.
[120] Cottier *et al*, 'Article 8', p.192.
[121] B. Miyet, Under-Secretary-General for Peacekeeping Operations, Press Conference, United Nations Headquarters, 29 May 1998, available at:
<http://www.un.org/Depts/dpko/dpko/50web/50years.htm>.
[122] EOC, p.131.
[123] H. von Hebel and D. Robinson, 'Crimes within the Jurisdiction of the Court', pp.79-126, in Lee, *The Making of the Rome Statute*, p.110.

a clear signal by the world community that it attaches great importance to the work and protection of such personnel and considers attacks against them as a serious crime of international concern".[124]

The limitation of protection to civilians and civilian objects raises the question of whether those giving humanitarian assistance and peacekeepers remain protected if they carry or use weapons for self-defence. Cottier suggests plausibly that such persons should be entitled to self-defence to the same extent as protected persons are so entitled without losing their status under the Geneva Conventions.[125] An example of this is found in Article 22 of the First Geneva Convention, which states that medical units shall not be deprived of their protection because the personnel of the unit are armed and use the arms in their own defence.[126] However, it is more doubtful whether an expanded notion of self-defence, which includes defence of the mission objectives in addition to defence the peacekeepers themselves, would allow such personnel to retain the protection of this article.[127]

The mental element for this offence is an intention to make the humanitarian or peacekeeping personnel or their material objects of the attack, and awareness of the factual circumstances that established their protection under the international law of armed conflict. It therefore would seem that the perpetrator must intentionally, rather than recklessly, attack the relevant personnel or objects and additionally he must be aware of the factual circumstances establishing the civilian nature of the personnel and their material.

3.15 *(iv) Intentionally Launching an Attack in the Knowledge that such Attack will Cause Incidental Loss of Life or Injury to Civilians or Damage to Civilian Objects or Widespread, Long-Term and Severe Damage to the Natural Environment which would be Clearly Excessive in Relation to the Concrete and Direct Overall Military Advantage Anticipated*

3.16 **Origins**

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[124] *Ibid.*
[125] Cottier *et al*, 'Article 8', p.193 and 195.
[126] See also Article 35, Geneva Convention II and Article 13, API.
[127] See Cottier *et al*, 'Article 8', p.195.

Although the rule of proportionality in the use of force has been acknowledged at least since the Caroline case of 1837,[128] the modern rule of proportionality within international humanitarian law is contained in Article 85(3)(b) of API, "launching an indiscriminate attack... in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects".[129] Article 57(2)(a)(iii) of API explains that any collateral damage must not be "excessive in relation to the concrete and direct military advantage anticipated". In addition, the prohibition against excessive damage to the environment is contained in Articles 35(3) and 55(1) of API, the former stating that "[i]t is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment".

Declarations made upon ratification of API have made it clear that the decision on proportionality must be made on the basis of an assessment of the information "from all sources which is reasonably available to them at the relevant time".[130] It is clear that the decision of a commander or other person to attack a particular object with a particular weapon may not be judged with hindsight. In this respect, McCoubrey comments that the proportionality decision must "clearly be undertaken in good faith in the light of the possibly limited information available".[131]

Dinstein comments that when postulating collateral casualties planners must take into account several ways in which civilians could be hit.[132] First, they may be inside the target, for example workers in a munitions factory, secondly they may "live, work or even pass by near a military target" and thirdly a bomb can fall short of its target or a missile may go off course.[133] Fenrick also adds the risk of collateral casualties resulting from the actions of the responding defence forces but suggests that such possible casualties should not be taken into account in the proportionality

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[128] See D. Harris, *Cases and Materials on International Law*, (5th ed., 1998, Sweet & Maxwell, London), pp.894-896.

[129] On state practice on proportionality between these two dates see W. Fenrick, n.19 *supra*, pp.124-125 and for proportionality in naval warfare, E. Roucounas, 'Some Issues Relating to War Crimes in Air and Sea Warfare', pp.275-292, in Y. Dinstein and M. Tabory eds., *War Crimes in International Law*, (1996 Kluwer, The Hague), pp.288-289.

[130] UK's declaration para.(c), in respect of API, available from the ICRC website: <http://www.icrc.org/>. Similar declarations were made by Australia, Austria, Belgium, Canada, Germany, Ireland, Italy, New Zealand, Spain and the Netherlands.

[131] H. McCoubrey, *International Humanitarian Law, The Regulation of Armed Conflicts*, (1990, Dartmouth, Aldershot), p.116.

[132] Y. Dinstein, 'The Laws of Air, Missile and Nuclear Warfare', 27 Israel.Yrbk.Hum.Rts (1997) 1-16, p.6.

[133] *Ibid.*

balance.[134] In addition, there are suggestions that collateral casualties amongst civilians working for the armed forces would carry less weight in the proportionality balance than such casualties amongst 'innocent' civilians.[135]

A common declaration on the issue of proportionality in API is that "the military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack".[136] Doswald-Beck suggests that this approach is acceptable "if seen within the context of a given tactical operation".[137] She gives the example of an operation's necessitating the destruction of six military objectives, one of which would involve more casualties than the others, but within the context of the operation is an essential objective: "[t]he yardstick, in this example, would be the number of casualties overall in relation to the value of the operation as a whole".[138] However, as Fenrick warns, "[i]f military benefit is assessed on too broad a basis.... then it may well be extremely difficult to apply the proportionality equation until the war has ended".[139]

The proportionality equation is based on the premise that collateral damage must not be *excessive* compared to the military advantage expected. Factors which must be weighed in this balance include "the military importance of the target or objective, the density of the civilian population in the target area, the likely incidental effects of the attack, including the possible release of hazardous substances, the types of weapon available to attack the target and their accuracy... and the timing of the attack".[140] Schmitt comments upon the difficulty of applying this equation as, although jurisprudential balancing tests should compare like values, "proportionality

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[134] W. Fenrick, 'Attacking the Enemy Civilian as a Punishable Offence', 7 Duke J.Comp.&Int'l.L (1997) 539-559, p.547.

[135] Bothe *et al*, *New Rules*, p.295 and S. Oeter, n.18 *supra*, para.445(3).

[136] UK's declaration para.(i), in respect of API, available from the ICRC website: <http://www.icrc.org/>. Similar declarations were made by Australia, Belgium, Canada, Germany, Italy, New Zealand, Spain and the Netherlands. See S. Oeter, n.18 *supra*, para.444.

[137] L. Doswald-Beck, 'The Value of the 1977 Geneva Protocols for the Protection of Civilians', pp.137-172, in M. Meyer ed., *Armed Conflict and the New Law: Aspects of the 1977 Geneva Protocols and the 1981 Weapons Convention*, (1989, BIICL, London), pp.156-157.

[138] *Ibid.*

[139] W. Fenrick, n.19 *supra*, p.107 and see J. Gardam, 'Proportionality and Force in International Law', 87 AJIL (1993) 391-413, p.407.

[140] Rogers, *Law on the Battlefield*, p.19. With respect to accuracy of weapons available, see S. Belt, 'Misiles over Kosovo: Emergence, Lex Lata, of a Customary Norm Requiring the Use of Precision Guided Munitions in Urban Areas', 47 Nav.LR (2000) 115-175, p.150 and D. Infeld, 'Precision-Guided Munitions Demonstrated their Pinpoint Accuracy in Desert Storm; But is a Country Obligated to Use Precision Technology to Minimize Collateral Civilian Injury and Damage', 26 Geo.Wash.JIL&Econ. (1992) 109-141, pp.130-131.

calculations are heterogeneous, for dissimilar value genre - military and humanitarian - are being weighed against each other".[141] Fenrick's solution is that "the determination of relative values must be that of the 'reasonable military commander'".[142] However, as Schmitt points out, such a value judgement would be affected by the social or cultural background of the commander and whether his side was currently winning or losing the conflict.[143]

The ICRC commentary to API explains that the expression "concrete and direct military advantage" shows that "the advantage concerned should be substantial and relatively close".[144] On this point New Zealand and Australia entered declarations upon ratification of API that this expression "means a bona fide expectation that the attack will make a relevant and proportional contribution to the objective of the military attack involved".[145] The ICRC commentary explains that a "concrete and direct" military advantage imposes stricter conditions upon the attacker than the "definite" military advantage required by Article 52(2) of API in its definition of military objectives.[146]

The meaning of "widespread, long-term and severe damage to the natural environment" has also been the subject of much debate.[147] Within the *travaux préparatoires* to API, the expression 'long-term' was explained in terms of decades, with WW1 battlefield damage to France being treated as outside that range.[148] Whilst the expression used in API is similar to that used in the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification

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[141] M. Schmitt, n.39 *supra*, p.59.
[142] W. Fenrick, n.134 *supra*, p.546.
[143] M. Schmitt, 'The Principle of Discrimination in 21st Century Warfare', 2 Yale HR&Dev.LJ (1999) 143-182, pp.152 and 157 and see M. Bothe, 'The Protection of the Civilian Population and NATO Bombing on Yugoslavia: Comments on a Report to the Prosecutor of the ICTY', 12 EJIL (2001) 531-535, p.535.
[144] Sandoz *et al*, *Commentary on the Additional Protocols*, p.684.
[145] New Zealand's declaration in respect of API, para.3, available from the ICRC website: <http://www.icrc.org/>. A similar declaration was made by Australia.
[146] Sandoz *et al*, *Commentary on the Additional Protocols*, p.685.
[147] See generally B. Baker, 'Legal Protection for the Environment in Times of Armed Conflict', 33 Va.JIL (1993) 351-383; A. Bouvier, 'Protection of the Natural Environment in Time of Armed Conflict', 285 IRRC (1991) 567-578; G. Plant ed., *Environmental Protection and the Law of War*, (1992, Belhaven Press, London) and M. Schmitt, 'Green War: An Assessment of the Environmental Law of International Armed Conflict', 22 Yale J.Int'l.L(1997) 1-109.
[148] *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict*, (1974-1977), Geneva, (hereinafter: 'OR 1977 Diplomatic Conference') Vol.XV, pp.268-269, CDDH/215/Rev.1, para.27. See also Henckaerts' criticism of the expression 'long-term', J. Henckaerts, 'Towards Better Protection for the Environment in Armed Conflict: Recent Developments in International Humanitarian Law', 9 RECIEL (2000) 13-19, p.16.

Techniques, it is clear from the *travaux préparatoires* that States did not accept that the words had the same meaning in the two treaties.[149]

Leibler suggests that 'widespread' would encompass "at least an entire region of several hundred square kilometres" and that 'severe' could be interpreted as "causing death, ill-health or loss of sustenance to thousands of people, at present or in the future".[150] Rogers interprets 'widespread' similarly and suggests that 'severe' would entail "prejudicing the continued survival of the civilian population or involving the risk of major health problems".[151] This appears to give a great deal of leeway to those fighting in a conflict. Indeed, Bothe *et al* comment that Articles 35(3) and 55 of API "will not impose any significant limitation on combatants waging conventional warfare"[152] and Leibler suggests of his analysis that "any broader interpretation could not be said to reflect international consensus".[153]

3.17 **Development**

The offence of disproportionate collateral damage and damage to the environment has been developed by debate and discussion following the Iraq-Kuwait and Kosovo[154] conflicts and by Judgements of the ICTY. In particular, after the Gulf conflict the question arose in respect of whether the proportionality equation should take into account longer term collateral damage. Greenwood comments that previously the tendency had been to apply the proportionality principle by "comparing the immediate military advantage resulting from an attack with the immediate civilian losses".[155] However, during the Gulf conflict there were many more civilian deaths from the longer term results of the destruction of the power

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[149] OR 1977 Diplomatic Conference, Vol.VI, p.100, CDDH/SR.39, paras.49 and 53, and pp.208-209, CDDH/SR.42, paras.21 and 25-27.
[150] A. Leibler, 'Deliberate Wartime Environmental Damage: New Challenges for International Law', 23 Calif.West.ILJ (1992) 67-137, p.111.
[151] Rogers, *Law on the Battlefield*, pp.115-116.
[152] Bothe *et al*, *New Rules*, p.348 and see M. Bothe, 'The Protection of the Environment in Times of Armed Conflict', 34 Germ.Yrbk.Int'l.L (1991) 54-62, pp.56-57.
[153] A. Leibler, n.150 *supra*, p.111.
[154] See the UNEP/UNCHS Report, 'The Kosovo Conflict - Consequences for the Environment and Human Settlements', (1999), available at: <http://www.grida.no/inf/news/news99/finalreport.pdf>, especially p.10.
[155] C. Greenwood, 'A Critique of the Additional Protocols to the Geneva Conventions of 1949', pp.3-20, in Durham and McCormack, *The Changing Face of Conflict*, p.13.

grids, "as hospitals, sewerage plants, water purification facilities and the like ceased to be able to operate", than there were during the actual attacks themselves.[156]

Greenwood argues that these longer term effects must be taken into account when calculating the proportionality equation, but concedes that such side effects may be difficult to predict and may be due to a combination of factors, such as the priority given to military over civilian needs by the opposing power.[157] Nevertheless, whilst the lessons of the Gulf show that the proportionality equation should not be restricted to the immediate effects of an attack,[158] it is clear that commanders and those planning an attack do not operate with hindsight and can only be expected to take into account the potential side effects which would be apparent at that time.

The ICTY discussed the proportionality requirement in the *Blaskic* Judgement, which considered the possible breach of this rule by the defendant during an attack against some villages in central Bosnia.[159] The Trial Chamber held that "[b]y advocating the vigorous use of heavy weapons to seize villages inhabited mainly by civilians, General Blaskic gave orders which had consequences out of all proportion to military necessity and knew that many civilians would inevitably be killed and their homes destroyed".[160] This confirms that by using inappropriate and indiscriminate weapons for the target selected, the proportionality rule may be breached.[161] It also demonstrates that the proportionality rule may be breached through excessive damage to civilian objects as well as by wounding or killing civilians.[162]

The Trial Chamber in the *Kupreskic* Judgement also considered the issue of proportionality and suggested that whereas a single attack falling in the grey area of legitimacy regarding proportionality may not contravene API *per se*, in the case of repeated attacks, almost all of which fall within this grey area, "it might be warranted

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[156] *Ibid.*, p.12 and R. Normand and C. af Jochnick, 'The Legitimation of Violence: A Critical Analysis of the Gulf War', 35 Harv.ILJ (1994) 387-416, pp.400-401 and 404-405.
[157] C. Greenwood, n.155 *supra*, p.13 and C. Greenwood, n.63 *supra*, p.79.
[158] J. Crawford, 'The Law of Noncombatant Immunity and the Targeting of National Electrical Power Systems', 21 Fletcher F.World Aff. (1997) 101-115, p.114
[159] *Blaskic*, Trial Judgement, paras.650-651.
[160] *Ibid.*, para.651.
[161] Voon argues that flying at a high altitude when carrying out aerial bombardment could prevent compliance with the proportionality rule, T. Voon, 'Pointing the Finger: Civilian Casualties of NATO Bombing in the Kosovo Conflict', 16 Am.U.Int.LR (2001) 1083-1113, pp.1104-1105.
[162] See P. Benvenuti, 'The ICTY Prosecutor and the Review of the NATO Bombing Campaign against the Federal Republic of Yugoslavia', 12 EJIL (2001) 503-529, pp.508-509.

to conclude that the cumulative effect of such acts entails that they may not be in keeping with international law".[163] This appears to suggest that a number of attacks, legitimate in themselves, may breach the proportionality requirement when considered together, but it is difficult to see how a number of legal actions could add up to an illegal action. However, the OTP report on the NATO bombing acknowledged that this "progressive statement of the applicable law" was somewhat ambiguous and proposed an understanding of the formulation as referring to "an *overall* assessment of the totality of civilian victims as against the goals of the military campaign.[164]

The OTP report also considered the prohibition on excessive environmental damage and concluded that Articles 35(3) and 55 of API "have a very high threshold of application" and are widely believed to cover only "very significant damage".[165] This opinion of the restricted nature of these articles is shared by many commentators on the environmental damage caused by Iraq during the Gulf conflict.[166] In February 1991 Iraq sabotaged hundreds of Kuwaiti oil wells, setting many on fire which caused huge emissions of noxious gases and deposited soot over half of Kuwait, damaging agriculture and causing risks to the health of the local population.[167] Although Iraq was not a party to API, Rogers speculated as to whether Iraq's actions would have breached the 'widespread, long-term and severe' tests and suggested that the 'long-term' test may not have been satisfied.[168]

3.18 **The Rome Statute**

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[163] *Kupreskic*, Trial Judgement, para.526.
[164] OTP Report, para.52, original emphasis.
[165] *Ibid.*, para.15. This interpretation is challenged by T. Marauhn in 'Environmental Damage in Times of Armed Conflict - Not "Really" a Matter of Criminal Responsibility', 840 IRRC (2000) 1029-1036, para.3.
[166] L. Green, 'The Environment and the Law of Conventional Warfare', 29 Can.YBIL (1991) 222-237, pp.233-234 and Rogers, *Law on the Battlefield*, p124. See generally, C. York, 'International Law and the Collateral Effects of War on the Environment: The Persian Gulf', 7 SAJHR (1991) 269-290 and R. Falk, 'The Environmental Law of War: An Introduction', pp.78-95, in G. Plant ed., *Environmental Protection and the Law of War*, (1992, Belhaven Press, London).
[167] Rogers, *Law on the Battlefield*, p.121.
[168] *Ibid.*, p.124 and see J. Sills, J. Glenn, E. Florescu and T. Gordon 'Environmental Crimes in Military Actions and the International Criminal Court (ICC) - United Nations Perspectives', (April 2001, Army Environmental Policy Institute, AEPI-IFP-0502A), p.22, although Sharp disagrees, P. Sharp, 'Prospects for Environmental Liability in the International Criminal Court', 18 Va.Envtl.LJ (1999) 217-243, p.242.

The EOC, in addition to those related to the nature of the conflict, require that the perpetrator "launched an attack".[169] The attack must have been such to cause "incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated".[170] The perpetrator must have known that this incidental death, injury or damage would occur and that it would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.[171]

The first Element, that the perpetrator 'launched an attack', differs from the EOC for Article 8(2)(b)(i), (ii) and (iii) which use the expression 'directed an attack' and rather follows the wording of the grave breach of excessive loss of civilian life in Article 85(3)(b) of API.[172] Fenrick proposes that this evidences an understanding on behalf of those drafting the Rome Statute that offences involving proportionality are usually made at a higher level and involve a planning process.[173] This is a reasonable approach as, for example, the selection of targets, type of weapons and timing of an attack would be made by commanders and planners who would have access to information about the likely effects upon civilians. However, it is also feasible that an individual soldier may have to make a proportionality assessment in the field. For example a soldier may have been ordered to destroy a series of strategically important bridges, but he would surely breach Article 8(2)(b)(iv) if he chose to open fire upon one of them at the time a large convoy of refugees was crossing.[174] Equally he would not be expected to desist from firing upon each target because a single car or person was crossing the bridge at the time.[175]

The EOC for this offence follow the wording of Article 8(2)(b)(iv) closely, and whilst 'death or injury to civilians or damage to civilian objects' is quite clear,[176] the Elements do not expand upon the meaning of 'widespread, long-term and severe

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[169] EOC, pp.131-132.
[170] *Ibid.*
[171] *Ibid.*
[172] See *supra*, para.3.6.
[173] Cottier *et al*, 'Article 8', p.197.
[174] Alternatively it could be found that this evidenced an intention to kill the civilians and the soldier could be charged under Article 8(2)(b)(i).
[175] See the controversy surrounding the NATO pilot who attacked a bridge when a civilian train was crossing it, OTP Report, para.58-62, although this was primarily discussed in the context of whether the pilot intentionally attacked the civilians.
[176] For the meaning of 'civilians' and 'civilian objects' see *supra*, paras.3.4 and 3.8.

damage to the natural environment'. First, it is clear from the construction of this offence that the proportionality equation applies to the environmental damage as well as to the collateral damage to civilians.[177] Secondly, the environmental criteria are cumulative as in API and, given that there is no suggestion to the contrary, should be given a similar meaning. Finally, although France declared upon ratification of the Rome Statute that Article 8(2)(b) neither regulates nor prohibits the possible use of nuclear weapons,[178] it is clear that nuclear weapons must be used, as must conventional weapons, in accordance with the rule of proportionality.[179]

The EOC require that the collateral damage be 'clearly excessive in relation to the concrete and direct overall military advantage anticipated' and according to the OTP report the expression 'clearly' "ensures that criminal responsibility would be entailed only in cases where the excessiveness of the incidental damage was obvious".[180] This approach is supported by academic commentary, which confirms that, as the Rome Statute was not intended to be used to prosecute "mere errors of judgement by commanders in the field", only serious criminal conduct will contravene this article.[181] A footnote to the EOC explains that the expression 'concrete and direct overall military advantage' "refers to a military advantage that is foreseeable by the perpetrator at the relevant time".[182] This ensures that the accused will be judged in the light of the information available to him at the time of the decision to attack.[183]

The mental element of this offence is that the perpetrator knew the attack would cause collateral damage which would be clearly excessive in relation to military advantage anticipated.[184] Therefore, the prosecution must prove that the

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[177] H. von Hebel and D. Robinson, n.123 *supra*, pp.111-112. For a definition of "the natural environment" see G. Plant, 'Environmental Damage and the Laws of War: Points Addressed to Military Lawyers', pp.159-174, in H. Fox and M. Meyer ed., *Armed Conflict and the New Law, Volume II, Effecting Compliance*, (1993, BIICL, London), pp.169-170.

[178] See France's interpretative declaration to the Rome Statute para.2, available from the ICRC website: <http://www.icrc.org/>.

[179] See Ireland's understanding of Article 55, API, available from the ICRC website: <http://www.icrc.org/> and J. Burroughs, of the Lawyers' Committee on Nuclear Policy, 'The French "Interpretative Declaration" Regarding Nuclear Weapons', available at: <http://www.lcnp.org/global/french/htm>. See also *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Rep. (1996) 226, paras.31 and 33.

[180] OTP report, para.21 and Lee, *ICC: Elements*, p.148.

[181] H. von Hebel and D. Robinson, n.123 *supra*, p.111 and A. Rogers, 'Zero-Casualty Warfare', 837 IRRC (2000) 165-181, p.180.

[182] EOC, p.131, fn.36.

[183] See France's interpretative declaration to the Rome Statute, para.7, available from the ICRC website: <http://www.icrc.org/>

[184] EOC, pp.131-132.

attack was objectively likely to cause the disproportionate collateral damage and show that the perpetrator knew this. A footnote to the EOC explains that this Element requires a value judgement on behalf of the perpetrator.[185] Consequently, it must be shown that the perpetrator was aware, as a result of the information available to him at the time, that the collateral damage would be excessive in relation to the military advantage anticipated. The mental element of this offence will doubtless be difficult to prove in all but the clearest of cases and is criticised by Bothe as making the perpetrator "the judge in his own cause".[186]

Nevertheless, Dörmann states that the members of the Preparatory Commission accepted that the content of the footnote "should not benefit a reckless perpetrator who knows perfectly well the anticipated military advantage and the expected incidental injury or damage, but gives no thought to evaluating the latter's possible excessiveness".[187] Furthermore, he suggests that in any case "an unreasonable judgement or an allegation that no judgement was made would, in a case of death, injury or damage clearly excessive to the military advantage anticipated, simply not be credible".[188]

3.19 *(v) Attacking or Bombarding, by Whatever Means, Towns, Villages, Dwellings or Buildings which are Undefended and which are not Military Objectives*

3.20 **Origins**

The concept of an open or undefended town dates back centuries to the time when land armies would lay siege to walled cities. A practice arose of declaring a city or town open to the invading forces and therefore avoiding destruction and pillage.[189] In 1899 the Hague Regulations codified this rule,[190] in wording similar to Article 8(2)(b)(v), that "the attack or bombardment of towns, villages, habitations or

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[185] *Ibid.*, p.132, fn.37.
[186] M. Bothe, 'War Crimes', pp.379-426, in Cassese *et al*, *ICC Commentary*, p.400 and see J. Pejic, 'The International Criminal Court Statute: An Appraisal of the Rome Package', 34 Int.Law. (2000) 65-84, p.71 and fn.35.
[187] K. Dörmann, n.36 *supra*, p.474.
[188] K. Dörmann, *ibid.*, p.475.
[189] See A. de Zayas, 'Open Towns', pp.69-71, in Bernhardt, *Encyclopaedia Volume 4*.
[190] W. Hays Parks, 'Air War and the Law of War', 32 AFLR (1990) 1-225, p.14.

buildings which are not defended, is forbidden".[191] This was amended in 1907 by the addition of the words "bombardment, by whatever means",[192] and it is widely accepted that this phrase was introduced to cover bombardment from the air.[193]

The prohibition against attacks upon undefended towns was also provided for in Article 1 of the 1907 Hague Convention IX, but Article 2 stated that "[m]ilitary works, military or naval establishments, depots of arms or war *matériel*" were excluded from this prohibition unless destroyed by the local authorities when so commanded. This exception supports a reading of Article 25 of the IV Hague Regulations as only prohibiting destruction of undefended towns near the conflict zone, where the army is in a position to take possession of them and thus deny their military resources to the enemy. Since the navy would not be able to take possession of a place in order to deny its use to the opposing power, they were permitted to destroy military resources even when sited in undefended towns.[194] Jennings explains that "[t]he quality of being open to entry by the enemy is the essence of the rule" otherwise "a belligerent could secure the immunity of his production centres and lines of communication from lawful bombardment simply by omitting to defend them".[195]

3.21 **Development**

The modern approach to undefended or open towns is laid down in Article 59 of API, which refers to the prohibition against attacking by any means "non-defended localities". Places which may be declared as non-defended localities are "any inhabited place near or in a zone where armed forces are in contact which is open for occupation by an adverse Party" and must fulfil conditions including the prior evacuation of combatants and the absence of hostile use of fixed military

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[191] Article 25, 1899 Hague Convention II.

[192] Article 25, 1907 Hague Regulations. See the comparison between the 1899 and 1907 Hague Regulations pp.218-251, in A. Higgins, *The Hague Peace Conferences and other International Conferences Concerning the Laws and Usages of War, Texts of Conventions with Commentaries*, (1909, Cambridge University Press, Cambridge), p.237.

[193] R. Jennings, 'Open Towns', 22 BYIL (1945) 258-264, p.259; H. Elliott, 'Open Cities and (Un)defended Places', Army Lawy. (April 1995) 39-50, p.43; L. Nurick, 'The Distinction Between Combatant and Noncombatant in the Law of War', 39 AJIL (1945) 680-697, p.690 and Rogers, *Law on the Battlefield*, p.82, but see H. Lauterpacht, 'The Problem of the Revision of the Law of War', 29 BYIL (1952) 360-382, p.366, and H. Blix, n.14 *supra*, p.41.

[194] R. Jennings, n.193 *supra*, p.260.

[195] *Ibid.*, pp.260-261. This approach is supported by the *British Military Manual*, para.290.

establishments or support of military operations.[196] Attacking such places constitutes a grave breach under Article 85(3)(d) of API.

API introduces the concept of military objectives,[197] which are also referred to in Article 8(2)(b)(v). However, according to Oeter, non-defended localities under API cannot be military objectives by definition as "the adversary has deliberately excluded them from his military activities, so that the intended military advantage could be achieved by mere occupation without combat activity, whereas a bombardment would be evidently unnecessary".[198] Implicit in this statement is the assumption that locations lying behind the lines of defence cannot be undefended as they are not open to occupation.[199]

To date there have been no prosecutions for attacks upon undefended towns before the ICTY, nor allegations of the breach of this rule either in the Gulf or in Kosovo. One reason may be that the concepts of civilian objects and military objectives have to some extent overtaken the concept of the undefended town. As Elliott comments "[t]rue sieges are rare in modern warfare".[200]

3.22 **The Rome Statute**

The EOC for this offence, in addition those relating to the nature of the conflict, state that the perpetrator must have "attacked one or more towns, villages, dwellings or buildings" which did not constitute military objectives.[201] In addition the towns, villages, dwellings or buildings must have been "open for unresisted occupation".[202] Therefore, the Elements confirm that only a location near the combat zone can constitute an 'open' or 'undefended' location, given that no location behind the lines could be "open for unresisted occupation" irrespective of its civilian character.

This means that locations behind the lines of defence cannot be 'undefended' locations and so could be attacked by air or from the sea without committing this

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[196] Article 59(2), API.
[197] Article 52, API, defined *supra*, para.3.8.
[198] S. Oeter, n.18 *supra*, para.458.
[199] *Ibid.*, para.459 and see Green, *Contemporary Law of Armed Conflict*, p.100 and Rogers, *Law on the Battlefield*, p.82.
[200] H. Elliott, n.193 *supra*, p.48. The author considers the siege of Sarajevo in the Bosnian conflict and concludes that it was not an undefended place, *ibid.*, pp.48-50.
[201] EOC, p.132.
[202] *Ibid.*

offence.[203] However, the Elements of Article 8(2)(b)(v), unlike the Hague Regulations or API, do not prohibit attacks on military objects in 'undefended' towns.[204] This is nonsensical as attacks against military objects behind the lines are in any case allowed under Article 8(2)(b)(ii) and attacks against military objects which are in places "open for unresisted occupation" would not appear necessary as they could be taken without the need for an attack.[205] A footnote to the EOC for this Article does, in any case, confirm that "[t]he presence in the locality of persons specially protected under the Geneva Conventions of 1949 or of police forces retained for the sole purpose of maintaining law and order does not by itself render the locality a military objective".[206]

Finally, given that the EOC do not mention a mental element, the default *mens rea* of Article 30 must apply to this offence. Therefore, the perpetrator would have to intend to engage in the attack and be aware of the fact that the location was open for unresisted occupation and that the target was not a military objective.

3.23 *(vi) Killing or Wounding a Combatant Who, Having Laid Down his Arms or Having No Means of Defence, has Surrendered at Discretion*

3.24 **Origins**

Attacks upon wounded and disabled soldiers were prohibited as far back as the American Civil War.[207] More recently, Article 23(c) of the 1907 Hague Regulations prohibited killing or wounding combatants who have surrendered or have no means of defence. The term "surrendered at discretion" was explained by the British Manual of Military Law as meaning that the combatant must surrender unconditionally before obtaining the protection of this Article.[208]

Violations of this prohibition were punished in war crimes trials after WW2.[209] In the *Peleus Trial*, where the commander of a German submarine ordered

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[203] Although such an attack would have to be in accordance with Article 8(2)(b)(ii) and (iv).
[204] See Article 25, 1907 Hague Regulations and Article 59, API.
[205] Given that such bombardment would be unnecessary, it would probably fall foul of the proportionality test in 8(2)(b)(iv) in any case.
[206] EOC, p.132, fn.38.
[207] Article 71, Lieber Code.
[208] *British Military Manual*, para.119.
[209] See cases discussed below, and *Abbaye Ardenne Case*, 4 LRTWC 97, *Thiele and Steinert Case*, 3 LRTWC 56, *Jaluit Atoll Case*, 1 LRTWC 71.

the killing of survivors of a sunken vessel, the Judge Advocate stated that it was a "fundamental usage of war that the killing of unarmed enemies was forbidden".[210] Furthermore, in the *Almelo Trial*, where a British POW and a Dutch civilian who had been hiding were shot, the notes on the case comment that the decision of the military court was based on "the rule that it is a war crime to kill a captured member of the opposing armed forces...".[211]

3.25 **Development**

This prohibition was developed by Article 41 of API, which stated that "[a] person who is recognized or who, in the circumstances, should be recognized to be *hors de combat* shall not be made the object of attack" and under Article 85(3)(e) of API such an attack amounts to a grave breach.[212] The expression *hors de combat* is defined in Article 41(2) as someone who is in the power of an adverse party, has clearly expressed an intention to surrender, or has been rendered unconscious or incapacitated by wounds or sickness and so is incapable of defending himself. The Bothe *et al* and ICRC commentaries explain that these Articles avoid gaps in protection between the time when an individual is rendered *hors de combat* through injury or surrender and when he attains a more secure status such as prisoner of war.[213]

An important issue raised by Article 41 of API is the nature of "surrender". According to McCoubrey and White, "surrender itself is a positive act and not one which should, or safely could, be inferred from mere inaction or even retreat".[214] By way of example they refer to the withdrawal of Iraqi troops on the road to Basra during the Iraq-Kuwait Gulf conflict when, despite the Iraqi retreat, the Coalition forces continued to attack the armoured column causing many casualties.[215] McCoubrey and White argue that the Iraqi withdrawal did not constitute a surrender

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[210] *The Peleus Trial*, 1 LRTWC 1, p.11.
[211] *The Almelo Trial*, 1 LRTWC 35, p.44.
[212] See also Article 20(b)(iv), 1996 ILC Draft Code.
[213] Bothe *et al*, *New Rules*, pp.219-221 and Sandoz *et al*, *Commentary on the Additional Protocols*, p.481.
[214] H. McCoubrey and N. White, *International Law and Armed Conflict*, (1992, Dartmouth, Aldershot), p.227.
[215] *Ibid.*, pp.227-228.

because they were still a "potent military threat" as a fully armed and unyielding enemy, even if moving temporarily from the battle zone.[216]

The nature of surrender depends upon the type of conflict. In the call for surrender at Goose Green during the Falklands/Malvinas conflict the Argentine forces were instructed to leave the town, forming in military manner, removing their helmets and laying down their weapons.[217] During naval warfare it is customary to signal surrender by hauling down the ship's flag, and possibly by raising a white flag and stopping the engines.[218] Shipwrecked persons would automatically come under the protection of this article unless they attempted hostile acts.[219] The ICRC commentary to API suggests that in air warfare "it is generally accepted that a crew wishing to indicate their intention to cease combat, should do so by waggling the wings while opening the cockpit (if this is possible)", and this may be supplemented by radio signals.[220] For aircrew parachuting from an aircraft in distress Article 42 of API lays down the rule that they are not to be attacked during their descent, although Green suggests that such immunity may cease if the airman "manoeuvres his parachute so as to land behind his own lines".[221]

3.26 **The Rome Statute**

The wording of this Article in the Rome Statute is almost identical to Article 23(c) of the Hague Regulations, but the wording of the EOC is drawn from Article 41 of API. The Elements state, in addition to the requirements relating to the international status of the conflict, that the perpetrator must have killed or injured one or more persons who must have been *hors de combat* and the perpetrator must have been aware of the factual circumstances establishing that status.[222]

Cottier explains that laying down arms requires that a combatant not only cease to fight, but also demonstrate the intention not to fight any more.[223] Therefore,

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[216] *Ibid.*, p.228.
[217] Green, *Contemporary Law of Armed Conflict*, p.94.
[218] *Ibid.*, p.175 and Sandoz *et al*, *Commentary on the Additional Protocols*, p.487 and see the *Trial of von Ruchteschell*, 9 LRTWC 82, p.89.
[219] Article 41(2), API.
[220] Sandoz *et al*, *Commentary on the Additional Protocols*, p.487, but see Spaight on the difficulties of accepting surrender in the air, J. Spaight, *Air Power and War Rights*, (3rd ed., 1947, Longmans Green, London), pp.126-168.
[221] Green, *Contemporary Law of Armed Conflict*, p.152.
[222] EOC, p.132 and see Cottier *et al*, 'Article 8', p.200.
[223] *Ibid.*

ceasing to fight and withdrawing, whilst still retaining weapons, would not suffice to bring combatants under the protection of this article as they could be withdrawing to regroup and to launch a new attack. Cottier defines persons having no longer means of defence as those no longer capable of armed resistance.[224] Therefore, the wounded and sick, the shipwrecked and those parachuting from an aircraft in distress (unless manoeuvring back to their own lines) would be considered as having no longer means of defence.

To be brought under the protection of this article the persons *hors de combat* must have 'surrendered at discretion', which is defined by Cottier as meaning that "the individual concerned is not willing to fight any more and does not resist capture by the enemy".[225] It is, however, clear that although a severely wounded or unconscious person would not be capable of positive surrender that such a person may not be attacked or killed and the willingness to surrender at discretion presumed.[226] In any case, under the EOC it is simply required that the victim be *hors de combat*, and this would be the case *either* if he had laid down his arms and surrendered *or* if he had no means of defence.[227]

The mental element of this offence is not evident from Article 8(2)(b)(vi) and as the EOC do not define the *mens rea*, the default mental element of Article 30 of the Rome Statute must apply.[228] Therefore, the perpetrator must have intended or known that in the ordinary course of events his actions would kill or wound the victim and have been aware of the factual circumstances establishing the victim as *hors de combat*. However, whilst the perpetrator would have to be aware, for example, that the victim had laid down his arms and surrendered, he would not have to understand the legal status of the victim as *hors de combat*, nor the legal consequences of his actions in killing or wounding the victim.

3.27 *(vii) Making Improper Use of a Flag of Truce, of the Flag or of the Military Insignia and Uniform of the Enemy or of the United Nations, as well as of the Distinctive Emblems of the Geneva Conventions, Resulting in Death or Serious Personal Injury*

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[224] *Ibid.*
[225] *Ibid.*, p.200.
[226] *Ibid.*, p.202.
[227] *Ibid.*
[228] See *supra*, paras.2.3-2.8.

3.28 **Origins**

This article is based primarily on Article 23(f) of the 1907 Hague Regulations, although abuse of the flag of truce, emblems or flags of protection and the enemy's uniform were prohibited as far back as the Lieber Code.[229]

3.28.1 Improper Use of the Flag of Truce

Improper use of the flag of truce is forbidden by Article 23(f) of the Hague Regulations and Articles 32 to 34 explain the permitted use of the flag of truce on the battlefield. The white flag is used to enter into communication with the opposing belligerent and the bearer has the right to inviolability unless he abuses the position. Whilst the communication may frequently be the negotiation of terms for surrender, this is not the legal meaning of the flag of truce,[230] although the British Military Manual comments that "in practice, the white flag has come to indicate surrender if hoisted by individual soldiers or a small party in the course of an action".[231]

The success of the institution of the flag of truce is "dependent on good faith and lack of abuse"[232] and "the feigning of an intent to negotiate under a flag of truce or of a surrender" was prohibited as perfidy in Article 37(1)(a) of API.[233] Spaight suggests that a white flag raised "by a retreating force to stay the enemy's hand" may be legally ignored by the adverse party,[234] but it is unclear whether use of a white flag in such a situation would actually amount to the offence of improper use of the flag of truce.

3.28.2 Improper Use of the Flag or Military Insignia and Uniform of the Enemy

Article 23(f) of the Hague Regulations prohibits improper use "of the national flag or of the military insignia and uniform of the enemy". Whilst the meaning of 'national flag' is clear, Bothe describes a uniform as "a means of identification

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[229] Articles 114, 117, and 65, 1863 Lieber Code.
[230] Articles 32-34, 1907 Hague Regulations.
[231] *British Military Manual*, para.394.
[232] Y. Dinstein, 'Flag of Truce', pp.173-174, in Bernhardt, *Encyclopaedia Volume 3*, p.173.
[233] See *infra*, para.3.46.

showing that a person is a member of the armed forces of a State or is associated with an international organization" and explains that "[i]t is an established practice that some national insignia or emblem be fixed on the uniform".[235] It must, however, be noted that these are visual symbols and that this Article does not prohibit the ruse of using the enemy's codes or passwords.[236]

A more complex issue is: what is *improper use* of the flags, insignia and uniforms of the enemy? This has long been contentious and Spaight, writing in 1911, acknowledged the divide between those who believed that use of the enemy's flag, insignia and uniform was illegitimate in all circumstances and those who held that such material could be used provided that the disguise was shed before combat actually commenced.[237] Fleck states that the negotiations for Article 23(f) show that there was no intention by States to legalise any deception during conflict by use of enemy flag, insignia and uniform, asserting that such a ruse "was regarded as objectionable even prior to the Brussels Conference".[238] However, he admits of exceptions, where the "acts of deception are not conducive to facilitating acts of combat" such as use of enemy uniforms for training exercises or by POW's to aid escape.[239]

As Rowe indicates, "[t]he unanimous view of writers is that wearing of the uniform of the enemy while *engaging in attacks* is prohibited by international law"[240] and this is supported by the British Manual of Military law.[241] Indeed, this rule may be inferred by Article 1(2) of the Hague Regulations which requires that combatants have a fixed distinctive emblem recognisable at a distance. However, the WW2 case of *Skorzeny*, in which German parachutists were acquitted without a reasoned judgement after having penetrated behind the US lines whist wearing US uniforms

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[234] J. Spaight, *War Rights on Land*, (1911, MacMillan, London), p.225.
[235] M. Bothe, 'Flags and Uniforms in War', pp.174-175, in Bernhardt, *Encyclopaedia Volume 3*, p.174. See also P. Rowe, 'The Use of Special Forces and the Laws of War, Wearing the Uniform of the Enemy or Civilian Clothes and of Spying and Assassination', 33 Rev.Dr.Milit. (1994) 207-234, pp.219-220.
[236] Bothe *et al*, *New Rules*, p.214.
[237] J. Spaight, n.234 *supra*, pp.104-106.
[238] D. Fleck, 'Ruses of War and Prohibition of Perfidy', 13 Rev.Dr.Milit. (1974) 269-304, p.280. This is supported by V. Jobst III, 'Is the Wearing of the Enemy's Uniform a Violation of the Laws of War?', 35 AJIL (1941) 435-442, p.438
[239] D. Fleck, n.238 *supra*, p.282.
[240] P. Rowe, n.235 *supra*, p.213.
[241] *British Military Manual*, para.320.

under their parachute overalls, has not really assisted in clarifying this area of law further.[242]

The prohibition relating to improper use is restated by Article 39(2) of API, which prohibits making use of "the flags or military emblems, insignia or uniforms of adverse Parties while engaging in attacks or in order to shield, favour, protect or impede military operations". This clarifies the imprecise wording of Article 23(f) of the Hague Regulations, although Greenwood warns that this article is controversial and should not be regarded as declaratory of customary law.[243] However, it is not contentious to hold that the use during an attack of enemy uniforms or captured military vehicles without first removing enemy insignia, would be prohibited and it seems likely that use of those uniforms during military operations prior to attack would also be 'improper use'.[244] Nevertheless, the weight of evidence suggests that Fleck was correct in contending that use of such enemy material to assist in training exercises or the escape of a POW would indeed not constitute 'improper use'.[245]

Article 39(3) of API states that this definition of improper use shall not affect existing rules of international law applicable to espionage or "to the use of flags in the conduct of armed conflict at sea". With respect to espionage, this suggests that the wearing of the enemy's uniform by a spy behind enemy lines will not constitute a war crime. Whilst this may make little difference to the individual, who may be tried and executed for the act of spying, it has two important consequences. First, the commander who sent the spy will not be responsible for a war crime under the doctrine of command responsibility with regard to the uniform worn by the spy.[246] Second, if the spy returns to his own lines and is caught at a later date during combat and wearing the uniform of his own forces, he must be treated as a POW and cannot be punished for his previous act of espionage or, it would appear, for the fact that he wore the uniform of the enemy whilst committing such an act.[247]

A more complex issue is the extent to which warships during naval conflicts may use the flag of the enemy. Article 39(3) does not state that the use of such flags

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[242] *Trial of Skorzeny and Others*, 9 LRTWC 90, and see P. Rowe, n.235 *supra*, pp.215-217 and Sandoz *et al*, *Commentary on the Additional Protocols*, p.467, fn.26.
[243] C. Greenwood, 'Customary Law Status of the 1977 Geneva Protocols', pp.93-114, in Delissen and Tanja, *Humanitarian Law Challenges*, p.105.
[244] See also Bothe *et al*, *New Rules*, p.214.
[245] *Ibid.*
[246] *Ibid.*, p.215.

is legal, but it leaves the question open.[248] Although there are examples in State practice of warships flying an enemy or neutral flag until just prior to opening fire,[249] there have been no cases of such actions reported in post-WW2 conflicts.[250] Furthermore, such a practice has always been controversial and as early as 1913 was condemned as "treacherous and barbarous" in the Institute of International Law's Manual of the Laws of Naval War.[251]

Finally, with respect to air warfare, the 1923 Hague Draft Rules of Aerial Warfare state in Article 19 that the use of false external marks is forbidden. According to Spaight, the prohibition of false or enemy marks in air warfare has long been customary international law, as demonstrated in WW2 by accusations and "indignant denials" of such practice.[252] Furthermore, although Article 39(3) explicitly exempts naval warfare from the provision, it is silent with respect to air warfare, which suggests that air warfare must follow the same rules as land warfare on improper use of enemy emblems.

3.28.3 Improper Use of the Flag or Military Insignia and Uniform of the United Nations

The basis of this offence can be found in Article 37(d) of API, where "the feigning of protected status by the use of signs, emblems or uniforms of the United Nations" is prohibited and Article 38(2) which prohibits making unauthorised use "of the distinctive emblem of the United Nations".[253] Both commentaries to API, state with respect to Article 37(d) that the feigning of UN symbols is only prohibited as perfidy for so long as the UN are a neutral presence in a conflict.[254] This analysis is

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[247] See Article 31, 1907 Hague Regulations. For a general discussion of espionage in time of war see J. Kish, (D. Turns ed.) *International Law and Espionage*, (1995, Martinus Nijhoff, The Hague), pp.123-151.

[248] M. Bothe, n.235 *supra*, p.174 and G. Politakis, 'Stratagems and the Prohibition of Perfidy with a Special Reference to the Laws of War at Sea' 45 Austrian JPIL (1993) 253-308, p.270.

[249] For examples of this practice see G. Politakis, *ibid.*, pp.272-278 and 287-288.

[250] W. Heintschel von Heinegg, n.81 *supra*, p.422.

[251] Article 15(2), Manual of the Laws of Naval War, 9 August 1913, Institute of International Law.

[252] J. Spaight, n.220 *supra*, pp.85-86.

[253] Sandoz *et al*, *Commentary on the Additional Protocols*, p.459 and fn.42, comments that the use of the UN flag is governed by a code issued by the Secretary-General of the UN on 19 December 1947 and amended on 11 November 1952.

[254] Bothe *et al*, *New Rules*, p.206 and Sandoz *et al*, *Commentary on the Additional Protocols*, p.439.

supported by Bothe who comments that "where the United Nations itself is a party to the conflict, the rules relating to enemy uniforms, insignia, or flags apply".[255]

3.28.4 Improper Use of the Distinctive Emblems of the Geneva Convention

Improper use of the 'distinctive badges' of the Geneva Conventions was prohibited under Article 23(f) of the 1907 Hague Regulations. The WW2 case of *Hagendorf* recorded the breach of this prohibition by a German soldier who fired a weapon at American soldiers from an ambulance bearing the Red Cross symbol.[256] He was found guilty and the notes on the case state that "[i]t is hard to conceive of a more flagrant misuse than the firing of a weapon from an ambulance by personnel who were themselves protected by such emblems and by the Conventions".[257]

The more modern expression 'distinctive emblem' is used in Article 38 of API, which prohibits "improper use of the distinctive emblem of the red cross, red crescent or red lion and sun".[258] Article 8(l) of the Protocol defines 'distinctive emblem' as "the distinctive emblem of the red cross, red crescent or red lion and sun on a white ground *when used for the protection* of medical units and transports, or medical and religious personnel, equipment or supplies".[259] Therefore, it is the improper use of the Geneva Conventions emblems when used for protective purposes, rather than indicative purposes, that constitutes a war crime.[260]

A definition of improper use of the distinctive emblems of the Geneva Conventions can only be arrived at by examining the 1949 Geneva Conventions and the 1977 Additional Protocol in order to ascertain what amounts to 'proper use' of the protective emblems. Those entitled to wear or display the protective emblems of the Geneva Conventions include medical and religious personnel of armed forces, medical establishments, mobile units, ships and aircraft of armed forces and in

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[255] M. Bothe, n.235 *supra*, p.174.
[256] *Trial of Hagendorf*, 13 LRTWC 146.
[257] *Ibid.*, p.148.
[258] The red lion and sun is no longer in use and there are currently negotiations for a new emblem in addition to the red cross and crescent, see F. Bugnion, 'Vers une Solution Globale de la Question de l'Emblème', 838 IRRC (2000) 427-477, pp.440-442 and 456-463.
[259] Emphasis added.
[260] Bothe *et al*, *New Rules*, p.103 and Sandoz *et al*, *Commentary on the Additional Protocols*, pp.450-451.

certain circumstances civilian medical and religious personnel and civilian medical units and transports.[261]

The medical establishments protected by the red cross and crescent remain protected at all times, unless "they are used to commit, outside their humanitarian duties, acts harmful to the enemy".[262] This suggests that improper use of the distinctive signs would include using them in such a way as to conduct acts harmful to the enemy, and therefore those personnel and establishments using the protective emblems must indeed be neutral and concerned solely with humanitarian duties.[263] Perfidious use of the red cross and crescent would also clearly constitute improper use.[264] It must also be noted that this prohibition on misuse of the distinctive emblems of the Geneva Convention applies equally to naval warfare.[265]

3.29 **Development**

A recent example of abuse of the flag of truce may be taken from the Iraq-Kuwait Gulf conflict. The US Department of Defence Report records an incident where Iraqi soldiers waved a white flag and laid down their weapons, but the Saudi Arabian patrol who advanced to accept the surrender were fired upon by other Iraqi forces hidden in buildings on either side of the street.[266] This would clearly be improper use of the flag of truce on behalf of the soldiers waving the flag if they knew that their fellow soldiers were intending to open fire. However, during a similar incident in Goose Green in the Falklands/Malvinas conflict, it would appear that the Argentinean soldiers displaying the white flag did so without authorisation from their commander and the British soldiers who went to investigate were killed by

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[261] See Articles 38-44, Geneva Convention I; Articles 41-45, Geneva Convention II; Articles 18, 20 and 21-22, Geneva Convention IV and Articles 12-13 and 18, API. See generally, F. Bugnion, 'The Red Cross and Red Crescent Emblems', 29 IRRC (1989) 408-419, A. Bouvier, 'Special Aspects of the Use of the Red Cross or Red Crescent Emblem', 272 IRRC 438-458 and H. Slim, 'Protection of the Red Cross and Red Crescent Emblems and the Repression of Misuse', 272 IRRC (1989) 420-437.

[262] Article 21, Geneva Convention I; Article 34, Geneva Convention II; Article 19, Geneva Convention IV and Article 13, API.

[263] See W. Rabus, 'Protection of the Wounded, Sick and Shipwrecked', pp.293-319, in Fleck, *Handbook*, para.640.

[264] Article 85(3)(f), API prohibits perfidious use of the distinctive emblems of the Geneva Convention as a grave breach.

[265] Note that Article 38, API does not exclude naval warfare, unlike Article 39 on emblems of nationality.

[266] US Department of Defence Report, p.632.

Argentinean troops who were unaware that the white flag had been displayed.[267] This incident would not constitute improper use on the part of the soldiers flying the flag of truce, provided that they had done so in good faith, and instead serves as a warning to those observing the white flag to ensure that the situation is safe before taking action.

Improper use of the flag, military insignia and uniform of the enemy during naval conflicts is dealt with by Article 110 of the San Remo Manual, which states that warships "are prohibited from launching an attack whilst flying a false flag". The explanation to the Manual states that "[t]he traditional right regarding the use of false flags is reflected in the present text".[268] Therefore, whilst the San Remo Manual confirms that launching an attack whilst flying the enemy flag would constitute 'improper use', it leaves open the question of whether a warship could properly fly an enemy flag during manoeuvres prior to combat.

The San Remo Manual provides a more clear-cut approach to the flying of the United Nations flag and the emblems of the Geneva Convention. Under Article 110 warships are at all times prohibited from simulating the status of "vessels protected by the United Nations flag" or "vessels entitled to be identified by the emblem of the red cross or red crescent". However, the explanation to the manual restricts the complete prohibition against flying the UN flag to situations where such colours would be protective and states that this would clearly be the case in a conflict where the UN was neutral.[269]

3.30 **The Rome Statute**

The nature of 'improper use', as has already been shown, is dependent in each case upon the current conventional and customary laws which apply to the use of that material. Although Cottier rightly points out that "'[i]mproper use' is not necessarily synonymous to perfidious use", it is generally correct to say that perfidious use of many of the signs or symbols in this Article would amount to improper use of that material under customary international law and therefore could

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[267] C. Greenwood, 'Scope of Application of Humanitarian Law', pp.39-63, in Fleck, *Handbook*, para.223.
[268] *San Remo Manual: Explanation*, p.185.
[269] *Ibid.*

be charged as such under this article provided that the criteria of the other Elements were fulfilled.[270]

The EOC require, in respect of each of the improper use offences under Article 8(2)(b)(vii), that the conduct has resulted in death or serious personal injury.[271] There is no definition of 'serious personal injury' and no indication of whether this can encompass psychological as well as physical injury. Guidance may be taken from the ICRC commentary to 85(3), which defines "serious injury to body or health" as injury which will "affect people in a long-lasting or crucial manner, either as regards their physical integrity or their physical *and mental health*".[272] This reflects the approach taken by English law, which has held grievous bodily harm, defined as "really serious harm",[273] to include such injuries as broken bones, internal injuries and serious psychological harm.[274]

The perpetrator must also have been aware that death or serious personal injury could result from his conduct and therefore must have been subjectively reckless in respect of this result.[275] Cottier comments that the death or serious personal injury is not restricted to enemy combatants, but includes "the death of other persons including civilians, wounded or sick and UN and associated personnel".[276]

Each of the improper use offences, with the exception of improper use of a flag, insignia or uniform of the United Nations, contains the Element "[t]he perpetrator knew *or should have known* of the prohibited nature of such use".[277] The footnote to this Element, in each case, states "[t]his mental element recognizes the interplay between article 30 and article 32. The term 'prohibited nature' denotes illegality".[278] This is an unusual Element and appears to give an accused a defence based on lack of knowledge of the law, when he could not have known the law. The footnote refers to Article 30, which is the default mental element requiring intent and

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[270] For a discussion of the overlap between Article 8(2)(b)(vii) and Article 8(2)(b)(xi), see *infra*, para.3.46.
[271] EOC, pp.133-134.
[272] Sandoz *et al*, *Commentary on the Additional Protocols*, p.995, emphasis added. This approach is taken in Cottier *et al*, 'Article 8', p.208.
[273] *DPP v Smith*, [1961] AC 290, p.334.
[274] *Burstow*, (1997) AC [1998] 147-167, p.159.
[275] EOC, pp.133-134. This requirement is less strict than that which would have been imposed by the default mental element of Article 30, Lee, *ICC: Elements*, p.158.
[276] Cottier *et al*, 'Article 8', p.208.
[277] EOC, pp.133-134, emphasis added.
[278] *Ibid.*, fns.39, 40 and 43.

knowledge on behalf of the accused and Article 32, which provides that a mistake of law may exclude criminal responsibility "if it negates the mental element required by such a crime".

Dörmann, explains the background to this Element as a compromise between those delegates who believed that ignorance of the prohibited use of the signs and symbols should be a complete defence, and those who believed that such a defence would encourage States to avoid their responsibility to teach the military the proper use of important signs such as those of the Red Cross or Crescent.[279] The 'knew or should have known' "standard of negligence" was adopted as a compromise.[280] Therefore, the accused would have a defence to an 'improper use' crime if he did not know and was not negligent in this lack of knowledge that the use to which he put the material was illegal.

3.30.1 Improper Use of the Flag of Truce

For the war crime of "improper use of a flag of truce" the Elements of Crimes, in addition to those discussed above and those regarding the nature of the conflict, state that the perpetrator "used a flag of truce... in order to feign an intention to negotiate when there was no such intention".[281] This is fairly straightforward, but it must be remembered that it is applied in conjunction with the other Elements discussed above. To take Spaight's example, discussed earlier, of using the flag of truce to "stay the enemy's hand" in order to buy time to retreat, this article would not be breached unless that conduct resulted in death or serious personal injury.[282]

3.30.2 Improper Use of the Flag or Military Insignia and Uniform of the Enemy

The Elements which apply specifically to the improper use of enemy material are that the perpetrator must have "used a flag, insignia or uniform of the hostile party" and made such use "in a manner prohibited under the international law of

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[279] K. Dörmann, 'The First and Second Sessions of the Preparatory Commission for the International Criminal Court', 2 YIHL (1999) 283-306, p.301.
[280] *Ibid.*, p.302.
[281] EOC, p.133.
[282] See discussion *supra*, para.3.28.1.

armed conflict *while engaged in an attack*".[283] The Elements of this offence have restricted improper use of enemy material to that agreed by all commentators as improper, in land, air and sea warfare,[284] and therefore it appears that this Article applies to all types of warfare.

3.30.3 Improper Use of the Flag or Military Insignia and Uniform of the United Nations

The Elements of this improper use offence simply state that the perpetrator must have "used a flag, insignia or uniform of the United Nations... in a manner prohibited under the international law of armed conflict".[285] This makes it clear that improper use of the insignia and uniform of UN civilian staff is within this prohibition as well as improper use of the military insignia and uniform of UN combat personnel.[286] Furthermore, unlike the other improper use offences, the Elements state that the perpetrator "knew of the prohibited nature of such use" and therefore, for the offence of improper use of UN signs and symbols, ignorance of the law would constitute a defence.[287]

3.30.4 Improper Use of the Distinctive Emblems of the Geneva Conventions

The Elements for improper use of the distinctive emblems state that the perpetrator must have used the distinctive emblems of the Geneva Conventions "for *combatant purposes* in a manner prohibited under the international law of armed conflict".[288] A footnote to the Elements of this offence states that 'combatant purposes' means "purposes *directly related to hostilities* and not including medical, religious or similar activities".[289] Whilst the exact scope of 'directly related to hostilities' is uncertain, the carrying out of activities outside a medical or religious role which militarily assist a combatant party, under the protection of the distinctive emblems, would clearly constitute improper use.

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[283] EOC, p.133, emphasis added.
[284] See P. Rowe, n.235 *supra*, p.213 and discussion *supra*, para.3.28.2.
[285] EOC, p.134.
[286] See Cottier *et al*, 'Article 8', p.205.
[287] EOC, p.134, fn.41.
[288] EOC, p.134, emphasis added.
[289] *Ibid.*, fn.42.

3.31 *(viii) The Transfer, Directly or Indirectly, by the Occupying Power of Parts of its Own Civilian Population into the Territory it Occupies, or the Deportation or Transfer of All or Parts of the Population of the Occupied Territory Within or Outside this Territory*

3.32 **Origins**

The two alternative offences in this article of the Rome Statute are based on Article 49 of the Fourth Geneva Convention and Article 85(4)(a) of API. The offence of deporting or transferring 'all or parts of the population of the occupied territory within or outside this territory' is familiar as Article 49 of the Fourth Geneva Convention is also the basis for the grave breach of 'unlawful deportation or transfer', dealt with under Article 8(2)(a)(vii) above.[290] The offence of transfer by the occupying power 'directly or indirectly... of parts of its own civilian population into the territory it occupies' has roots in Article 49, but is prohibited under Article 85(4)(a) of API in wording very similar to this offence under the Rome Statute.[291] The following discussion will concentrate on the latter of the alternative offences, commenting only in respect of the former where it differs from the grave breach of 'unlawful deportation or transfer'.

These offences deal with actions by the 'Occupying Power', necessitating an explanation of when territory can be considered to be occupied. Article 42 of the Hague Regulations defines occupied territory as that which is "actually placed under the authority of the hostile army" and explains that the "occupation extends only to the territory where such authority has been established and can be exercised". Article 2 common to the Geneva Conventions of 1949 asserts that an occupation can arise even if it meets with no armed resistance and therefore, as Schindler explains, there is an occupation "[w]henever a State intervenes with its armed forces in another State, be it to alter the régime of that State or to exercise other acts of sovereign power".[292]

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[290] See *supra*, paras.2.39-2.39.1, 2.40.1 and 2.41.
[291] Pictet, *Commentary: IV Convention*, pp.277-283 and Bothe *et al*, *New Rules*, p.518.
[292] D. Schindler, 'The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols', 163 Rec.des Cours (1979) II, 117-163, p.132.

The definition of occupation is elaborated upon by Greenspan who states that a military occupation occurs when "organized resistance has been overcome in the area and the troops in possession have established their authority to such an extent that they are in a position to assert that authority within a reasonable time in any part of the occupied area".[293] The British Military Manual further explains that an occupation does not become invalid because of rebellious activities by some of the inhabitants or even because of occasional successes by resistance fighters provided that "the authority of the legitimate government is not effectively re-established and that the Occupant suppresses the rebellion at once".[294] As to the exact commencement and ending of an occupation, Bothe states that it begins "with the establishment of actual control over the territory" and ends "when the occupation is in fact terminated by the withdrawal of the occupying power or by a determination of the final fate of the territory after the re-establishment of peaceful relations between the parties".[295]

The commentaries to the Geneva Conventions and API do not greatly assist in an understanding of transfer by the occupying power of parts of its own civilian population into the territory it occupies.[296] In particular, it is unclear how many people constitute 'part' of the civilian population and it is uncertain whether a transfer is only prohibited if carried out forcefully. Furthermore, the necessary link between the perpetrator of the offence and the occupying power is not entirely clear. However, it is clear that the prohibition against such transfer by the occupying power in Article 49(6) of the Fourth Geneva Convention is absolute, with no derogation permitted,[297] there are no exceptions based on military necessity or the security of the population.

3.33 **Development**

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[293] M. Greenspan, *The Modern Law of Land Warfare*, (1959, University of California Press, Berkely), p.214 and see J. Spaight, n.234 *supra*, pp.321-327.
[294] *British Military Manual*, para.509.
[295] M. Bothe, 'Occupation, Belligerent', pp.64-67 in Bernhardt, *Encyclopaedia Volume 4*, pp.65-66 and see generally H. McCoubrey, 'Civilians in Occupied Territory', pp.205-223, in Rowe, *The Gulf War*, pp.206-208.
[296] Pictet, *Commentary: IV Convention*, p.283 and Sandoz *et al*, *Commentary to the Additional Protocols*, p.1000.
[297] C. Meindersma, 'Legal Issues Surrounding Population Transfers in Conflict Situations', 41 NILR (1994) 31-83, p.52.

The offence of transferring parts of the civilian population into the occupied territory has been subjected to scrutiny in recent years because of the policy of Israel (who is a party to the 1949 Geneva Conventions, but not to API) of establishing Jewish settlements in the Occupied Territories held by Israel after the 1967 Six Day War.[298] The view of the US State Department Legal Advisor Mr. Hansell, in a 1978 letter on this issue, was that the non-forcible as well as forcible transfers of parts of the civilian population into occupied territory breached Article 49(6) of the Fourth Geneva Convention.[299] His argument was based on a comparison between the wording of Article 49(1) of API, which specifies 'forcible transfers' in prohibiting transfers of the population out of the occupied territory, and the wording of Article 49(6), which omits the word 'forcible' when prohibiting transfers into occupied territory, raising the presumption that all transfers in this context were forbidden.[300] An example of non-forcible methods facilitating transfers, given by Meindersma, is a policy which "induces or encourages specific population movements by providing financial and other incentives for people to move".[301]

The subject of 'settlers' has also received scrutiny in recent years by the Special Rapporteur, Mr. Al-Khasawneh, for the Commission on Human Rights. In a 1994 progress report, whilst acknowledging that the implantation of settlers into occupied territory was prohibited in order to "prevent alteration of the composition of a population in an occupied territory in order for it to retain its ethnic identity" and to prevent such transfers from being used "as a means of asserting title or sovereignty over an occupied territory",[302] he emphasised that transfers remain prohibited irrespective of motive.[303] In his final report he concluded that "[u]nlawful population transfer involves a practice or policy that has the purpose or effect of moving persons into or out of an area, whether within or across an international

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[298] Israeli courts have only considered this question in the context of whether Geneva Convention IV was applicable at all and have held that it was not, for example, *Ayub v Minister of Defence*, Israel Supreme Court sitting as the High Court of Justice, 1978, reproduced in summary in M. Sassoli and A. Bouvier, *How Does Law Protect in War?*, (1999, ICRC, Geneva), Case No.102, pp.812-816.

[299] H. Hansell, Letter of the State Department Legal Advisor Concerning the Legality of Israeli Settlements in the Occupied Territories, 21 April 1978, reprinted in 17 ILM (1978) 777-779.

[300] *Ibid.*

[301] C. Meindersma, n.297 *supra*, p.33.

[302] Mr. A. Al-Khasawneh, Special Rapporteur Progress Report, 'The Realization of Economic, Social and Cultural Rights: The Human Rights Dimensions of Population Transfer, Including the Implantation of Settlers', Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/1994/18, 30 June 1994, para.77.

[303] *Ibid.*, para.73.

border, or into or out of an occupied territory, without the free and informed consent of the transferred population or any receiving population".[304]

3.34 The Rome Statute

The position of Israel on the issue of transfer of civilians into occupied territory complicated the issue of defining this offence.[305] Indeed, according to Dörmann, this war crime "gave rise to the most difficult negotiations of all".[306] The Elements for the first alternative offence, in addition to the requirements relating to the nature of the conflict, state that the perpetrator "(a) Transferred directly or indirectly, parts of its own population into the territory it occupies".[307] A footnote to the word 'transferred' states that this term "needs to be interpreted in accordance with the relevant provisions of international humanitarian law".[308] Dörmann comments that this "states the obvious, without giving any further clarification",[309] but given the expression 'directly or indirectly' it would appear that inducements or facilitation of population transfer, or perhaps even failure to prevent a voluntary transfer, would also be an offence under this section.[310] Suggested examples of such inducements or facilitation given by Cottier include "[c]onfiscation laws, government settlement plans, protection of unlawful settlements and other economic and financial measures such as incentives, subsidies... ".[311]

The issue of the number of individuals which must be transferred to commit this offence remains unclear.[312] It is submitted that the amount of individuals necessary to constitute part of the population must be sufficiently numerous to affect

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[304] Mr. A. Al-Khasawneh, Special Rapporteur Final Report, 'Freedom of Movement: Human Rights and population Transfer', Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/1997/23, 27 June 1997, para.66.

[305] Schabas states that "Israel felt itself particularly targeted by the provision", Schabas, *An Introduction to the ICC*, p.48.

[306] K. Dörmann, n.36 *supra*, p.481. Israel initially voted against the Rome Statute primarily because the inclusion of this offence, but has since signed the Statute.

[307] EOC, p.135.

[308] *Ibid.*, fn.44.

[309] K. Dörmann, n.36 *supra*, p.482.

[310] See Cottier *et al*, 'Article 8', p.214 and H. von Hebel and D. Robinson, n.123 *supra*, p.113. See also the ICRC working paper submitted to the Preparatory Commission on the Elements of Crimes of Article 8(2)(b), 18 June 1999, available at: <http://www.igc.apc.org/icc> comments on Article 8(2)(b)(viii).

[311] Cottier *et al*, 'Article 8', p.214.

[312] Cottier and the ICRC working paper simply state that a "certain number of individuals" must be transferred, Cottier *et al*, *ibid.*, and the ICRC working paper, n.310 *supra*, comments on Article 8(2)(b)(viii).

the receiving population in some way, such as creating a settlement of 100 or more people, rather than transferring a few people who may be absorbed into the local population.[313] Another issue is that, whilst the statute refers to 'parts of its own civilian population', the EOC omit the word 'civilian', raising the question of whether the transferred population must be indeed civilian. However, the Statute is clear in the use of the words 'civilian population' and whilst the EOC shall be used to assist in the interpretation of the Statute, in the face of a contradiction, the Court should apply the wording of the Statute.[314]

On the issue of the necessary link between the perpetrator and the occupying power, the Elements are somewhat ambiguous.[315] However, the wording of this offence in the Rome Statute suggests that the transfer must be attributable to the occupying power and therefore appears to require government involvement, so that "individuals who act in wholly private capacity and whose actions are not attributable to the Occupying power do not appear to be criminally responsible under article 8 para.2(b)(viii)".[316]

The EOC for the second alternative offence read that the perpetrator "[d]eported or transferred all or parts of the population of the occupied territory within or outside this territory".[317] As previously suggested, this offence should be defined similarly to the grave breach of Article 8(2)(a)(vii), except that the offence requires the transfer or deportation of 'all or parts' of the population of the occupied territory, rather the transfer or deportation of protected persons.[318] For this offence 'parts' of the population should perhaps be read as a reasonably substantial number of 100 or more. However, it is arguable that this number could be reduced if those transferred or deported were the leaders or intellectuals of the population, as this would disproportionately affect the population remaining in the occupied territory.

The mental element of this offence is not defined and therefore must be that of intention and knowledge as defined in Article 30 of the Rome Statute.

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[313] This is not to be understood as suggesting an additional mental element for this offence, rather as a method of measuring whether the number of transferred individuals amounts to a 'part' of the population.
[314] See Articles 9(1) and 21(1)(a), Rome Statute and comments by K. Dörmann, n.36 *supra*, p.482.
[315] *Ibid.*
[316] *Ibid.* Note that government involvement in this offence could theoretically lead to the prosecution of the Prime Minister or President of a country, given Article 27, Rome Statute on the irrelevance of official capacity.
[317] EOC, p.135.

3.35 *(ix) Intentionally Directing Attacks against Buildings Dedicated to Religion, Education, Art, Science or Charitable Purposes, Historic Monuments, Hospitals and Places Where the Sick and Wounded are Collected, Provided they are not Military Objects*

3.36 **Origins**

This provision has its roots in Article 27 of the IV Hague Regulations,[319] with the extension of the protection to educational buildings,[320] and is influenced by the provisions for the protection of cultural property in the 1954 Hague Convention and Articles 53 and 85(4)(d) of API.[321] Although, in essence this offence is very similar to Article 52 of API which prohibits attacks against civilian objects, its particular importance is explained by Driver who states that following a conflict "refugees will return to their homes and somehow communities will be rebuilt. The preservation of cultural property aids the rebuilding process by facilitating the re-establishment of community identity by linking their past to their present and their future".[322]

3.37 **Development**

The offence of attacking cultural property has been discussed recently in the ICTY cases of *Blaskic* and *Kordic and Cerkez* in respect of a similar provision in Article 3(d) of the ICTY statute.[323] Both cases stated that the "damage or destruction must have been committed intentionally to institutions which may clearly be identified as dedicated to religion or education and which were not being used for military purposes at the time of the acts".[324] The *Kordic and Cerkez* Judgement emphasised that "protection of whatever type will be lost if cultural property... is

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[318] For a definition of occupied territory see *supra*, para.3.32.
[319] See also Article 5, 1907 Hague Regulations IX.
[320] This innovation was proposed by New Zealand and Switzerland, M. Arsanjani, n.100 *supra*, pp.33-34.
[321] See generally M. Sersic, 'Protection of Cultural Property in Time of Armed Conflict', 27 NYIL (1996) 3-38, pp.8-27.
[322] M. Driver, 'The Protection of Cultural Property During Wartime', 9 RECIEL (2000) 1-12, p.1. For a WW2 case on the destruction of monuments in occupied territory under Article 56, 1907 Hague Regulations, see *Trial of Lingenfelder*, 9 LRTWC 67.
[323] *Blaskic*, Trial Judgement, para.185 and *Kordic and Cerkez*, Trial Judgement, para.359-362.
[324] *Blaskic*, Trial Judgement, para.185 and a similar statement is made in *Kordic and Cerkez*, Trial Judgement, para.361.

used for military purpose" and according to the *Blaskic* Trial Chamber "the institutions must not have been in the immediate vicinity of military objectives".[325]

3.38 **The Rome Statute**

The EOC for the offence of attacking cultural objects, in addition to the requirements concerning the international nature of the conflict, state that the perpetrator must have directed an attack, the object of which "was one or more buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected, which were not military objectives" and furthermore, that the perpetrator must have intended such places to be the object of the attack.[326] A footnote to these Elements explains that the presence in the locality of protected persons under the Geneva Conventions or of police forces retained solely to maintain law and order "does not by itself render the locality a military objective".[327]

The requirement that the perpetrator direct an attack has already been discussed above, and defined as combat action by one or more combatants.[328] Neither the Statute nor the Elements impose the requirement of damage or destruction as a result of the attack and therefore an attack which failed because of a weapons malfunction would still constitute an offence under this Article.[329] The offence is not committed if the cultural object concerned has become a military objective. However, this in-built defence is more limited than that provided by Article 27 of the Hague Regulations, which removed protection merely on the basis that the property was being used for 'military purposes', because here it is necessary to demonstrate that the object concerned is making an effective contribution to military action and that its destruction would offer a definite military advantage.[330] The suggestion by the *Blaskic* Trial Chamber that an offence would not be committed if the cultural object is in the immediate vicinity of military objectives is not supported by the EOC. In such a situation, collateral damage to cultural property

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[325] *Kordic and Cerkez*, Trial Judgement, para.362 and *Blaskic*, Trial Judgement, para.185.
[326] EOC, p.135.
[327] *Ibid.*, fn.45.
[328] See discussion *supra*, para.3.6.
[329] K. Dörmann, n.36 *supra*, pp.466-467.
[330] See discussion *supra*, para.3.8 and comments by M. Arsanjani, n.100 *supra*, pp.33-34.

would have to be considered as collateral damage to civilian objects in the proportionality test under Article 8(2)(b)(iv).[331]

Finally the mental element of this offence is an intentional attack upon the cultural object with awareness of the status of the object as religious, educational etc and of the fact that it is not a military objective.

3.39 *(x) Subjecting Persons who are in the Power of an Adverse Party to Physical Mutilation or to Medical or Scientific Experiments of any Kind which are Neither Justified by the Medical, Dental or Hospital Treatment of the Person Concerned Nor Carried out in his or her Interest, and Which Cause Death to or Seriously Endanger the Health of Such Person or Persons*

3.40 **Origins**

The background to this offence was the experiments carried out by the Nazis in concentration camps during WW2. The WW2 cases of *In re Brandt* and *Trial of Hoess*,[332] among others,[333] looked at these experiments in depth, particularly condemning them for taking place upon persons who had not given consent.[334] Whilst the Judgement of *In re Brandt* attempted to lay out "moral, ethical and legal concepts" which should be satisfied prior to experimentation upon humans,[335] the 1949 Geneva Conventions prohibited such experiments absolutely.[336]

Mutilation and medical or scientific experiments are prohibited under Articles 13 and 32 of the Third and Fourth Geneva Conventions. An important question is whether there is a difference between these types of experiments and the 'biological' experiments prohibited by Article 12(2) of the First and Second Geneva Conventions. It would appear that these terms are inter-changeable, given that the grave breach provisions of each Convention refer only to 'biological' experiments,

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[331] See *supra*, paras.3.15-3.18. It is arguable that cultural objects should be given more weight in the proportionality test than an ordinary civilian object, given that they are considered worthy of specific protection in international humanitarian law.

[332] *In re Brandt and Others*, 14 AD 296 (also discussed in the 'Notes on the Case' of the *Trial of Milch*, 7 LRTWC 27, pp.49-53) and *Trial of Hoess*, 7 LRTWC 11.

[333] See also *Trial of Milch*, 7 LRTWC 27 and the *Trial of Pohl*, (discussed in 'Notes on the Case' of the *Trial of Milch*) 7 LRTWC p.49.

[334] *Trial of Milch*, 7 LRTWC 27, p.52.

[335] *Ibid.*, pp.49-53.

[336] As protected persons cannot renounce their rights under the Geneva Conventions, consent could not now legitimate such experiments.

although this expression is used nowhere else in the Third or Fourth Geneva Convention.[337] Additionally, the UN notes on the *Trial of Hoess* make it clear that the 'medical experiments' at Auschwitz were such in name only and in reality were "devised at finding the most appropriate means with which to lower or destroy the reproductive power of the Jews, Poles, Czechs and other non-German Nations... they were preparatory to the carrying out of the crime of genocide".[338] It would surely be inappropriate to determine whether an experiment was 'biological' or 'medical or scientific' on the basis of the classification given by the defendant.[339]

Mutilations and medical or scientific experiments which endanger the "physical or mental health and integrity" of persons "in the power of the adverse Party" and which are "not indicated by the state of health of the person concerned", have also been prohibited by Article 11 of API, which emphasises that even consent of the individual concerned cannot justify such actions. The Bothe *et al* commentary states that persons 'in the power of the adverse Party' is a wide definition which comprises all prisoners held by the adverse party, including those not entitled to POW status and all civilians in occupied territory or civilian aliens in the territory of the adverse Party, whether or not interned.[340] The commentary emphasises that not all mutilation or experimentation is prohibited, an amputation of a limb which was necessary to save life would be permissible, as would medical experiments in the situation where new medication, which has not passed all required tests, is given to a patient in the attempt to save his life when he would otherwise die.[341]

3.41 **Development**

The offence of scientific or medical experiments has not been alleged in recent conflicts and although physical mutilation occurred upon a large scale during the recent non-international conflict in Sierra Leone, the tribunal established to deal with such offences is only just commencing operation and has not as yet issued any

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[337] See the ICRC commentary to Article 32, Geneva Convention IV, Pictet, *Commentary: IV Convention*, p.224.
[338] *Trial of Hoess*, 7 LRTWC 11, pp.24-25.
[339] The *Concise Oxford Dictionary* defines 'medical' as "of or relating to the science of medicine in general" and 'biological' as "of or relating to biology or living organisms" and therefore it would appear than when conducted upon humans all 'medical' experiments would in any case also be classifiable as 'biological' experiments.
[340] Bothe *et al*, *New Rules*, pp.111-112.

Judgements.[342] The ICTY identified certain conduct as "sexual mutilation" in the *Tadic* Case, where a prisoner was forced to bite off one of the testicles of another prisoner, although the offences charged did not explicitly include the offence of mutilation.[343]

3.42 The Rome Statute

The EOC describing mutilation states that the perpetrator must have "subjected one or more persons to mutilation, in particular by permanently disfiguring the person or persons, or by permanently disabling or removing an organ or appendage".[344] This definition is fairly clear and would cover the situation of 'sexual mutilation' discussed above.[345] The EOC describing forbidden experiments simply states that the perpetrator must have "subjected one or more persons to a medical or scientific experiment".[346] The meaning of such experiments and their relation to biological experiments has been discussed earlier.[347]

The other EOC for the offences of mutilation and medical or scientific experiments are very similar. In addition to the requirements relating to the nature of the conflict as international, they both require that the victim be in the power of an adverse party, an element which should be defined broadly.[348] Furthermore the conduct or experiment must have "caused death or seriously endangered the physical or mental health" or additionally, in the case of experiments, the "integrity" of the persons concerned.[349] It must be noted that this Element does not require that the victim's health is *actually* seriously affected, rather it must be seriously 'endangered'.[350] Zimmermann interprets this as meaning that "the act or omission

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[341] *Ibid.*, p.114. See *supra*, para.2.19 and M. Gunn and H. McCoubrey, 'Medical Ethics and the Laws of Armed Conflict', 3 JACL (1998) 133-161, p.148.
[342] R. Cryer, 'A "Special Court" for Sierra Leone?', 50 ICLQ (2001) 435-446.
[343] *Tadic*, Trial Judgement, paras.198, 206, and 237. Offences charged included cruel and inhuman treatment, but Tadic was found not guilty with respect to this incident as, although present, he did not take an active role.
[344] EOC, p.136.
[345] *Supra*, para.3.41.
[346] EOC, p.136.
[347] See *supra*, para.3.40.
[348] See *supra*, para.3.40 and Cottier *et al*, 'Article 8', p.216.
[349] EOC, p.136.
[350] Cottier *et al*, 'Article 8', p.217.

causes an objective danger in the concrete case which... could have easily turned into a violation of the health of the victim".[351]

Finally, it must also be shown that the "conduct was neither justified by the medical, dental or hospital treatment of the person or persons concerned nor carried out in such person's or persons' interest".[352] A footnote to this element explains that consent is not a defence to this crime.[353] It further attempts to show when such actions may take place legally by explaining that "[t]he crime prohibits any medical procedure which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the party conducting the procedure and who are in no way deprived of liberty".[354] This footnote is taken directly from Article 11(1) of API and the ICRC commentary explains that the tempering of generally accepted medical standards with "an element related to local medical conditions", demonstrates an acknowledgement that medical treatment may be unavoidably inadequate in time of armed conflict.[355]

The Elements do not specify the *mens rea* of this offence and therefore the perpetrator must, according to the default mental element laid down in Article 30, intend to mutilate or perform medical or scientific experiments on the persons concerned and know that the conduct was not justified by their medical treatment and that it was not in their interest. This would mean that an operation, with the consent of the person in the power of an adverse party, to remove a kidney in order to transplant it into the body of a seriously ill relative would, on the face of it, contravene this Article. The removal of the organ would amount to mutilation and it would not be justified by the medical condition of the donor, nor would it be in his physical interest, although it could be argued that it was in his emotional interest.[356]

3.43 *(xi) Killing or Wounding Treacherously Individuals belonging to the Hostile Nation or Army*

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[351] *Ibid.*
[352] EOC, p.136.
[353] *Ibid.*, fn.46.
[354] *Ibid.*
[355] Sandoz *et al*, *Commentary on the Additional Protocols*, p.155 and see M. Gunn and H. McCoubrey, n.341 *supra*, pp.139-140.

3.44 Origins

Perfidy or treachery has long been prohibited in warfare, indeed the Lieber Code, proclaimed that "the common law of war allows even capital punishment for clandestine or treacherous attempts to injure an enemy".[357] More recently, Article 23(b) of the Hague Regulations stated that it is forbidden "[t]o kill or wound treacherously individuals belonging to the hostile nation or army" and this is the basis of this offence in the Rome Statute. However, given that Article 24 of the Hague Regulations confirmed the permissibility of ruses of war, the difficulty arose of differentiating between forbidden treachery and permissible ruses.

An example of treacherous killing is the WW2 assassination of SS General Heydrich, who was killed by two Czech nationals in civilian clothing who had parachuted from a British plane in order to carry out this act. Kelly states that "[t]he treachery lay... in the fact that the attackers hid their intent under the cloak of civilian innocence".[358] The difference between treacherous killing and ruses was raised by Spaight, who argued that the WW2 air fighting practice of stimulating a fall out of control in order to induce attacking aircraft to draw off was a legitimate ruse of war even if the airman intended to resume combat immediately after recovering from the nose-dive.[359]

3.45 Development

The prohibition against treacherous killing or wounding was significantly developed by Article 37 of API, which defined perfidy as: killing, injuring or capturing an adversary through "[a]cts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence".[360] The Bothe *et al* commentary explains that the objectives of this Article were "to reaffirm the prohibitions of Hague Regulations, Art.23(b), as

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[356] See J. Paust, 'The Preparatory Committee's "Definition of Crimes" - War Crimes', 8 Crim.LF (1997) 431-444, pp.434-435.
[357] Article 101, Lieber Code.
[358] J. Kelly, 'Assassination in War Time', 30 Milit.LR (1965) 101-111, p.104.
[359] J. Spaight, n.220 *supra*, pp.170-172.
[360] See Article 2, API for a definition of 'rules of international law applicable in armed conflict', and see Sandoz *et al*, *Commentary on the Additional Protocols*, p.435.

unambiguously as possible, to define perfidy using objective and easily understandable criteria... and to distinguish perfidy from permissible ruses by defining ruses and providing illustrative examples".[361]

Examples of perfidy given by Article 37 of API include "the feigning of an incapacitation by wounds or sickness" and "the feigning of civilian, non-combatant status".[362] Article 37 also provides a definition of ruses of war, describing them as "acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of international law applicable in armed conflict and which are not perfidious because they do not invite the confidence of an adversary with respect to protection under that law".[363] However, as the ICRC commentary emphasises, "[a] ruse can never legitimize an act which is not lawful".[364]

Applying the API definition to the assassination of Heydrich and the example of the aeroplane pilot feigning distress, discussed above, the former would clearly constitute perfidy as the killers invited the confidence of the adversary as to their protected 'civilian' status by wearing civilian clothes, which they used to get close enough to kill him. However, in the latter example, the pilot's actions would have been carried out in order to enable him to escape, not in order to kill, injure or capture his adversary and therefore would not amount to perfidy under this Article.[365] A recent example of perfidy or treacherous killing, or at least an attempt to commit this offence, is described in the US report on the Gulf War, where "an Iraqi officer approached Coalition forces with his hands in the air, indicating his intention to surrender. When near his would-be captors, he drew a concealed pistol from his boot, fired, and was killed during the combat that followed".[366]

3.46 **The Rome Statute**

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[361] Bothe *et al*, *New Rules*, p.203 and see p.204, *ibid.*, which suggests that treacherous killing is broader than perfidy.

[362] This is subject to the provisions of Article 44, API.

[363] See generally Sandoz *et al*, *Commentary on the Additional Protocols*, p.443 and K. Ipsen, 'War, Ruses', pp.330-331, in Bernhardt, *Encyclopaedia Volume 4*.

[364] Sandoz *et al*, *Commentary on the Additional Protocols*, p.441.

[365] For further comments on perfidy in air warfare see J. Gómez, 'The Law of Air Warfare', 323 IRRC (1998) 347-363, p.356 and regarding perfidy in sea warfare, see Article 111, 1994 San Remo Manual and *San Remo Manual: Explanation*, p.185

[366] It is unclear from the report whether anyone was killed or wounded by this man, see US Department of Defence Report, p.632.

An important question when dealing with this offence under the Rome Statute, is whether treacherous wounding or killing is equivalent to perfidy as defined in Article 37 of API. Cottier argues, when discussing this offence under the Rome Statute, that "the terms perfidy and treachery can be understood as synonyms".[367] This approach is supported by the EOC which, in very similar language to Article 37, state that the perpetrator "invited the confidence or belief of one or more persons that they were entitled to, or were obliged to accord, protection under the rules of international law applicable in armed conflict",[368] and that the perpetrator intended to betray that confidence or belief and in killing or injuring persons of the adverse party "made use of that confidence or belief".[369]

There is an overlap between this offence and the offence under Article 8(2)(b)(vii) of the Rome Statute of 'improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury'.[370] However, whilst the two offences have much in common, they are not identical. For example, an offence under both articles would be committed by the use of the flag of truce with intent to shoot soldiers of the adverse party when they approached and thus wounding or killing one of them. This would amount to both improper use of the flag of truce, by feigning an intention to negotiate when there was no such intention, and treacherous killing as the perpetrator was inviting the belief of the adverse party that they were obliged to accord him protection, a belief he was intending to betray.

On the other hand, improper use of the uniform of the hostile party by attacking the enemy whilst wearing their uniform, would only amount to an offence under Article 8(2)(b)(vii) and would not constitute treachery, as the confidence obtained from the uniforms would not be in respect of the rules of international law applicable in armed conflict.[371] Finally, an example of treacherous killing, which would not amount to an improper use crime, would be the use of civilian clothing in order to attack soldiers of the adverse party, as it would be inviting and betraying the belief that the adverse party was obliged to accord protection to the individual as a

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[367] Cottier *et al*, 'Article 8', p.219.
[368] EOC, p.137.
[369] *Ibid.*
[370] See discussion *supra*, paras.3.27-3.30.4.
[371] K. Ipsen, 'Perfidy', pp.130-133, in Bernhardt, *Encyclopaedia Volume 4.*

civilian under the laws of armed conflict,[372] but would not contravene Article 8(2)(b)(vii) as this does not prohibit improper use of civilian clothing.

It must be emphasised that the offence of treacherous wounding or killing is only committed if the perpetrator made use of the confidence or belief in the entitlement or obligation of protection under the laws of armed conflict in killing or injuring members of the adverse party. Therefore use of civilian clothing by a POW in order to escape from the enemy would not be prohibited by this article, nor would feigning death in order to save one's life or to prevent capture.[373] The mental element required is that the perpetrator intended to betray the confidence or belief in the entitlement or obligation of protection under the laws of armed conflict, knowing that he was making use of that confidence or belief which he had created in killing or injuring persons from the adverse party. There is no requirement that the persons who are killed or injured as a result of this offence must be combatants and they could equally be innocent enemy civilians.

3.47 *(xii) Declaring that no Quarter will be given*

3.48 **Origins**

The denial of quarter was condemned by Grotius as early as 1646 and with some exceptions this practice was prohibited by the Lieber Code in 1863.[374] However, it was not until 1899 that an absolute prohibition of the denial of quarter was stated in what is now Article 23(d) of the IV Hague Regulations of 1907. Despite this provision the 'Commando order', issued by Hitler and circulated by his officers during WW2, clearly breached this prohibition by ordering that "all members of Allied 'Commando' units... whether armed or not, were to be 'slaughtered to the last man' even if they attempted to surrender".[375] In several war crimes trials following WW2 German officers were found guilty of ordering that no

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[372] This is subject to the proviso in Article 44(3), API.
[373] Cottier, *et al*, 'Article 8', p.224.
[374] H. Grotius, *On the Rights of War and Peace: An Abridged Translation, by William Whewell*, (1853, Cambridge University Press, Cambridge), pp.375-377 and Articles 60-63, Lieber Code.
[375] 22 Trial of German Major War Criminals, (1950, HMSO, London), (hereinafter: '*IMT Judgement*'), p.450. See also *Trial of Falkenhorst*, 11 LRTWC 18, especially pp.27-29.

quarter be given, both on land, in the cases of *Wickman* and *Meyer*, and at sea, in the case of *Moehle*.[376]

3.49 Development

The prohibition against declaring that no quarter shall be given was reaffirmed in more modern wording in 1977 by Article 40 of API which states that "[i]t is prohibited to order that there shall be no survivors, to threaten an adversary therewith, or to conduct hostilities on this basis".[377] The British Manual of Military Law emphasises that the old rule that quarter could be denied to an enemy under siege who refused to surrender is now obsolete.[378]

3.50 The Rome Statute

The EOC of this offence incorporate the approach of Article 40 of API. In addition to the Elements in respect of the nature of the conflict, it must be shown that "[t]he perpetrator declared or ordered that there shall be no survivors" and that such declaration or order "was given in order to threaten an adversary or to conduct hostilities on the basis that there shall be no survivors".[379] An additional Element requires that the perpetrator "was in a position of effective command or control over the subordinate forces to which the declaration or order was directed".[380]

The *actus reus* of this offence is the declaration or order that there shall be no survivors. It is not necessary to show that this order was in fact carried out. Therefore, a declaration that "adversaries proffering surrender be killed or left to a foreseeable death" would amount to this offence,[381] and Kittichaisaree suggests that making surrender impossible by ordering a particular method or means of warfare should amount to a denial of quarter if the accused possesses the mental element of this offence.[382] This mental element is the intention to "conduct hostilities on the

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[376] *Trial of Wickman*, 15 LRTWC 133, *Trial of Meyer*, 4 LRTWC 97 and *Trial of Moehle*, 9 LRTWC 75.
[377] Note that this extends the prohibition against denial of quarter to the threat of such denial as a method of combat, Bothe *et al*, *New Rules*, p.216.
[378] *British Military Manual*, para.118.
[379] EOC, p.137.
[380] *Ibid.*
[381] Cottier *et al*, 'Article 8', p.226.
[382] Kittichaisaree, *International Criminal Law*, p.174.

basis that there shall be no survivors" or "to threaten an adversary". The alternative *mens rea* ensures that a superior who uses the declaration that no quarter shall be given in order to strike fear into an adversary, perhaps to make him surrender immediately or to withdraw, without the intention that the order be carried out, would still commit this offence.

Finally, the Elements state that the order or declaration that there shall be no survivors, must be given by a superior to subordinate forces. A declaration that there should be no quarter given by a soldier to others of his rank and above would not, therefore, breach this prohibition.[383] The expression "effective command and control" encompasses both those superiors with official, *de jure*, command and those with *de facto* command over troops,[384] such as an officer who assumes command of a unit which has been cut off from its *de jure* superior.

3.51 *(xiii) Destroying or Seizing the Enemy's Property Unless Such Destruction or Seizure be Imperatively Demanded by the Necessities of War*

3.52 **Origins**

This offence is based upon Article 23(g) of the Regulations attached to the 1907 Hague Convention IV and bears similarities to the grave breach of extensive destruction and appropriation of property not justified by military necessity.[385] Whilst Article 23(g) is situated in Section II, Chapter I, of the Hague Regulations dealing with hostilities and means of injuring the enemy, sieges and bombardments, this does not necessarily restrict the application of this offence to the battlefield.[386] Indeed, Articles 46, 53, 55 and 56 of the 1907 Hague Regulations IV, which lay down limits for belligerent dealings with property, are situated in Section III of the Convention, dealing with military authority in occupied territories.

WW2 war crimes trials in respect of seizure or destruction of property under the 1907 Hague Regulations emphasise that a belligerent does not though occupation

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[383] Although he could be liable for inducing the offence under Article 25(3)(b), Rome Statute, provided that the offence occurred.
[384] See W. Fenrick, 'Article 28, Responsibility of Commanders and other Superiors', pp.515-522, in Triffterer, *Commentary on the Rome Statute*, p.518.
[385] Discussed *supra*, paras.2.26-2.29 and therefore identical aspects of the offence under this Article will not be discussed in detail.
[386] This is supported by *Trial of Szabados*, 9 LRTWC 59.

"acquire the right to dispose of property in that territory, except according to the strict rules laid down in the Regulations".[387] Indeed, the *Flick Trial* noted that this offence may be committed, even though the original seizure was within the rules set down in the 1907 Hague Regulations, if the "subsequent detention from the rightful owners was wrongful".[388] Finally, the notes on the case of *Szabados*, comment that the exception of imperative military necessity can only "exist in the course of active military operations".[389]

3.53 **Development**

The crime of destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war has been developed by the rules on the protection of property in the Geneva Conventions of 1949. Therefore, when deciding whether military necessity admits of seizure or destruction, any particular protection of property set out in the Geneva Conventions must also be considered.[390]

The Iran-Kuwait Gulf conflict raised two potential issues. First, "the abolition of the Kuwaiti dinar and its replacement by the Iraqi dinar at an artificial exchange rate of 1:1", when the pre-war rate had been 12:1, as McCoubrey observed, had the effect of devastating personal and public savings and amounted to "a seizure of private and public assets without compensation upon a huge scale".[391] Secondly, there was the environmental damage caused by Iraq. In respect of this, Liebler concluded that the expression 'property' indicates that the object seized or destroyed must be the subject of ownership in order to be protected, and that "objects such as the climate, the atmosphere, the sea and marine life, which are not capable of being the objects of such a 'proprietary relationship' could not be characterized as

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[387] *The Krupp Trial*, 10 LRTWC 69, p.134 and see comments in *In re Weizsaecker and Others (Ministries Trial)*, 16 AD (1949) 344, pp.360-361. See generally, W. Downey 'Captured Enemy Property: Booty of War and Seized Enemy Property', 44 AJIL (1950) 488-504.
[388] *The Flick Trial*, 9 LRTWC 1, p.23.
[389] *Trial of Szabados*, 9 LRTWC 59.
[390] Discussion *supra*, para.2.27.
[391] H. McCoubrey, n.295 *supra*, pp.214-215.

'property'.[392] Lijnzaad and Tanja concurred with this conclusion, but considered that this offence may be helpful for environmental damage to real or personal property.[393]

3.54 The Rome Statute

An important question is the scope of this offence under the Rome Statute and whether it is broader than the grave breach of extensive destruction and appropriation of property prohibited under Article 8(2)(a)(iv) of the Rome Statute.[394] It has already been suggested that this offence should not be restricted to means and methods of warfare, and this is supported by Zimmermann, who comments that as Article 8(2)(b)(ii) and (iv) already deal with means and methods of warfare, such a restriction of this offence would render it largely superfluous.[395] He therefore argues that this offence should apply only to destruction or seizure of property located in occupied territories.[396] However, it is submitted that in light of the history of the Article it should apply to both situations and that in the case of an overlap, the prosecutor should charge the most appropriate offence in the circumstances. Furthermore, unlike Article 8(2)(a)(vi), this offence is not restricted to the property of 'protected persons' but applies to 'the enemy's property', which should be read as including all property of the belligerent State and all the property of its nationals or those acting on behalf of the belligerent State[397].

Another question which arises is whether there is a difference between the word 'appropriation' used in the grave breach provision in respect of property and the expression 'seizing' used in this provision. The ICRC working paper on Article 8(2)(b) comments that "the terms 'seizure' and 'appropriation' seem to have different meanings", but they did not discover a specific meaning for the word 'seizure' in international law.[398] A dictionary definition of 'appropriation' is to "take possession of, especially without authority", whereas the dictionary definition of 'seize' is "to

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[392] A. Leibler, n.150 *supra*, pp.105-106.
[393] L. Lijnzaad and G. Tanja, 'Protection of the Environment in Times of Armed Conflict: The Iraq-Kuwait War', 40 NILR (1993) 169-199, p.176 and A. Leibler, n.150 *supra*, p.106.
[394] This was suggested by the ICRC working paper, n.310 *supra*, comments on Article 8(2)(b)(xiii).
[395] Cottier *et al*, 'Article 8', p228.
[396] *Ibid.*, p.229.
[397] *Ibid.*, p.230.
[398] ICRC working paper, n.310 *supra*, comments on Article 8(2)(b)(xiii).

take hold of forcibly or suddenly", or to be "put in possession of".[399] It therefore seems that for all practical purposes these words must have the same meaning under international law as, by definition, all destruction or taking of property by a belligerent during conflict or in occupied territory would be carried out by force, coercion or compulsion. Kittichaisaree suggests that seizure "encompasses any kind of depriving a person of the property legally belonging to him; it may be temporary or permanent in nature" and this definition, if expanded to include taking property belonging to legal personalities or to the State, would be an appropriate description of the expression 'seizure'.[400]

The EOC of this offence follow the wording of this Article in the Rome Statute closely and require that the perpetrator "destroyed or seized certain property" and that the property "was property of a hostile party".[401] Furthermore, the property must have been "protected from that destruction or seizure under the international law of armed conflict" and the perpetrator was "aware of the factual circumstances that established the status of the property".[402] The final Element, apart from those in respect of the nature of the conflict, requires that the "destruction or seizure was not justified by military necessity".[403]

Therefore, the *mens rea* of this offence, taking into account the wording of the Elements and the default mental element of Article 30 of the Rome Statute, is that the perpetrator must have intended to destroy or seize property and have been aware that such property belonged to a hostile party and was aware of the factual circumstances which established the protected status of the property. The *actus reus* of this offence is the destruction or seizure of protected property not justified by military necessity.

Military necessity has been discussed in respect of Article 8(2)(a)(iv).[404] It is interesting, however, that the Elements do not repeat the phrase 'imperative' military necessity. Zimmermann suggests that the expression 'imperatively demanded by the necessities of war', in this Article means that "there are no other means to secure

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[399] *Concise Oxford Dictionary*, although in English law 'appropriation' has the specific legal meaning of 'any assumption by a person of the rights of an owner', s.3, 1968 Theft Act.
[400] Kittichaisaree, *International Criminal Law*, p.174.
[401] EOC, pp.137-138.
[402] *Ibid.*
[403] *Ibid.*
[404] *Supra*, para.2.27.

military safety".[405] Therefore, although the Elements do not use the expression 'imperative', the wording of the Rome Statute demands that for this offence a high level of necessity, such as that suggested by Zimmermann, is applied by the Court.

3.55 *(xiv) Declaring Abolished, Suspended or Inadmissible in a Court of Law the Rights and Actions of the Nationals of the Hostile Party*

3.56 **Origins**

This offence is based upon the first paragraph of Article 23(h) of the 1907 Hague Regulations. However, even at the time of its adoption, this offence caused some confusion. Higgins suggested in his commentary on the Hague Conventions that this article constitutes a "reversal of a rule of the English and American Common Law that contracts entered into by British subjects and subjects of the belligerent states, before the outbreak of war, become extinguished or suspended according to their nature".[406] This view of Article 23(h) as purely affecting contracts between the civilians of opposing belligerents was questioned by Professor Oppenheim in a letter to the Foreign Office in 1911. The reply from the Foreign Office reasoned that owing to the placing of Article 23(h) in the section dealing with hostilities in the Hague Regulations, its effect was restricted to the armies in the field and it was intended to prevent a commander from attempting to "terrorize the inhabitants of the theatre of war by depriving them of existing opportunities of obtaining relief to which they are entitled in respect of private claims".[407]

However, this reply is not without ambiguities as it is unclear whether the prohibition extends to criminal law actions in addition to civil actions. In this respect Spaight commented that the *Times* reports of the work of the Hague Conference showed that the German delegate proposed "that the inviolability which the existing Convention secures for private property should be extended to contracts, and that the exigencies of military occupation should not furnish sufficient reason for annulling

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[405] Cottier *et al*, 'Article 8', p.232.
[406] A. Higgins, n.192 *supra*, p.265.
[407] L. Oppenheim, 'Letter to the Foreign Office', 28 February 1911, and F. Campbell, 'Letter from Foreign Office to L. Oppenheim', 27 March 1911, reprinted in 'International Law Pamphlets', LSE Library, E(I) 651-660, 665.

these".[408] He concluded that the Article protects the civil law actions of inhabitants of occupied territories.[409] This approach was supported by a 1915 English Court of Appeal case, *Porter v Freudenberg*, in which Lord Reading stated that Article 23(h) was "to be read, in our judgement, as forbidding any declaration by the military commander of a belligerent force in the occupation of the enemy's territory which will prevent the inhabitants of that territory from using their courts of law in order to assert or protect their civil rights".[410]

3.57 **Development**

The treatment of inhabitants of occupied territories during WW2 gave rise to a discussion of Article 23(h) in post-war tribunals. The Netherlands Special Court of Cassation in the *Trial of Zuehlke* held that Article 23(h) of the Hague Regulations "was meant only to protect rights at civil law" and therefore did not apply in respect of a charge of detaining civilians on account of their race or religion contrary to the Netherlands Constitution.[411] However, a US military tribunal in the *Trial of Altstötter* held that the introduction and enforcement of discriminatory laws against Poles and Jews, the purpose of which was their extermination, was a violation of Article 23(h),[412] which suggests that criminal rights and actions are also protected by this article.

This approach is supported by Freeman who argues that "outrageous devices such as refusal of counsel and prohibition of any plea other than guilty in abrogation of essential rights guaranteed by the local law; the exclusion of entire groups of the population from legal recourse; and the application of retroactivity of the criminal law could also be viewed as a violation of Article 23(h) of the regulations".[413] However, there have been no recent deliberations in respect of this article and the contents of this prohibition remain unclear.

3.58 **The Rome Statute**

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[408] J. Spaight, n.234 *supra*, p.141, footnoted as *Times*, 4 July 1907.
[409] *Ibid.*, p.141.
[410] *Porter v Freudenberg*, All ER Reprint [1914-1915] 918, p.929.
[411] *Trial of Zuehlke*, 14 LRTWC 139, p.145.
[412] *Trial of Altstötter*, 6 LRTWC 1, pp.62-63.
[413] A. Freeman, 'War Crimes by Enemy Nationals Administering Justice in Occupied Territory', 41 AJIL (1947) 579-610, p.600.

The ICRC working paper for the Preparatory Committee stated that the object of this offence was "to prohibit belligerents from depriving enemy subjects by legislation or otherwise of the means of enforcing their legal rights through resort to courts".[414] However, the EOC of this Article do not greatly clarify the definition given in Article 8(2)(b)(xvi) and state that the perpetrator must have "effected the abolition, suspension or termination of admissibility in a court of law of certain rights or actions", that this abolition, suspension or termination, must have been directed at, and intended to be directed at, "the nationals of a hostile party".[415]

The question of whether these rights and actions can include criminal law rights in addition to civil rights and actions is left unclear. Cottier argues that it is unlikely that the delegates at the diplomatic conference at Rome intended to restrict this offence to civil contracts and claims, arguing that "[n]othing in the wording of the article necessarily restricts it to civil claims", and that it is possible that the WW2 "abolition of most or all rights of Poles and Jews or other groups in occupied territories or in Germany had influenced the support for this provision and its inclusion in the ICC Statute".[416]

Therefore, whilst there is still some doubt, it would appear that the mental element of this offence is an intention to suspend or remove certain rights or actions in a court of law, either civil or criminal, by nationals of the hostile party and that the *actus reus* of the offence is the suspension or removal of those rights.[417] The weight of authority suggests that this offence applies in occupied territory, but it may also apply to aliens in the territory of one of the belligerents. Cottier comments that the wording "the rights and actions" suggests "that the denial must be a general one... [but] the abolition, suspension and inadmissibility of the rights and actions of solely one particular group within the entirety of adversary nationals, for instance and ethnic group, should also qualify".[418]

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[414] ICRC working paper, n.310 *supra*, comments on Article 8(2)(b)(xiv).
[415] EOC, p.138. Use of the word 'effected' requires a result, Lee, *ICC: Elements*, pp.173-4.
[416] Cottier *et al*, 'Article 8', p.234.
[417] For a discussion of the rights of a defendant in a criminal trial see *supra*, paras.2.34-2.37.
[418] Cottier *et al*, 'Article 8', p.235.

3.59 *(xv) Compelling the Nationals of the Hostile Party to take Part in the Operations of War Directed against their own Country, even if they were in the Belligerent's Service before the Commencement of the War*

3.60 **Origins**

This article is based on the second paragraph of Article 23(h) of the IV Hague Regulations of 1907 and is very similar to the grave breach of 'compelling a prisoner of war or other protected person to serve in the forces of a hostile power' prohibited under Article 8(2)(a)(v) of the Rome Statute.[419] However, this offence appears to be broader as the prohibition extends to all 'operations of war' against a national's own country. The expression, 'operations of war', has been described as "unsatisfactorily vague" by Higgins,[420] but Spaight suggested that it would include such acts as "building fortifications, making munitions, repairing arms, or giving information as to the enemy's position and numbers".[421]

3.61 **Development**

Whilst the post WW2 war crimes trials were quick to condemn forced conscription, they were slower to deal with the issue of employing POWs or the civilians of occupied territory in operations of war.[422] Indeed, as the notes on the *Trial of Von Leeb and Others* comment, "prosecuting staffs have preferred to charge accused with exposing prisoners of war to danger rather than with employing them in work directly connected with operations of war, when the facts of cases could have given reasonable prospects of a conviction on either".[423] However, the *Trial of Krauch* condemned using POWs for work with a direct relation to war operations and held that employment of POWs in coal mines was contrary to the laws of war.[424]

3.62 **The Rome Statute**

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[419] *Supra*, paras.2.30-2.33.
[420] A. Higgins, n.192 *supra*, p.268.
[421] J. Spaight, n.234 *supra*, p.152.
[422] *Trial of Wagner*, 3 LRTWC 23, *In re Weizsaecker and Others*, 16 AD (1949) 344, p.357 and see discussion *supra*, para.2.31.
[423] *Trial of Von Leeb and Others*, 12 LRTWC 1, p.101.

The EOC of this offence are similar to those for the grave crime of compelling a protected person to serve in the forces of a hostile power under Article 8(2)(a)(v).[425] They require that the perpetrator "coerced one or more persons by act or threat to take part in military operations against that person's own country or forces" and that "[s]uch person or persons were nationals of a hostile power".[426] Given that no specific *mens rea* is laid down, the default mental element of Article 30 applies and the perpetrator would have to intend to coerce the persons to take part in the military operations against their own forces and be aware that they were nationals of a hostile power.

The concept of coercion by act or threat has already been discussed in respect of Article 8(2)(a)(v), as has the expression 'military operations'.[427] However, it is interesting that the EOC use the expression 'military operations', rather than, 'operations of war'.[428] Although Higgins suggests that the latter is wider in scope,[429] the Preparatory Commission cannot be taken to have intended to narrow the scope of this prohibition and therefore either the two expressions must be read as identical in meaning, or the wording of the Rome Statute must prevail.[430]

It is left to the Court to decide in the circumstances of the case whether employing hostile nationals upon a particular type of work is prohibited by this offence. Cottier suggests that the expression 'operations of war' is wider than direct participation in hostilities and includes "other implication in war-related work".[431] Guidance may be taken from the EOC proposed by Costa Rica, Hungary and Switzerland, which included the Element "[t]he compelled acts were not permissible as prisoner of war or civilian labour, as defined under international humanitarian law".[432] This suggests that work specifically allowed under international

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[424] *Trial of Krauch*, 10 LRTWC 1, p.54, although it is not entirely clear to what extend the dangers of working in a coal mine and the conditions faced by the POWs contributed to this decision.
[425] *Supra*, para.2.33.
[426] EOC, p.138.
[427] *Supra*, para.2.33.
[428] See Lee, *ICC: Elements*, p.175.
[429] A. Higgins, n.192 *supra*, p.269.
[430] See Article 21(1)(a), Rome Statute.
[431] Cottier *et al*, 'Article 8', p.236.
[432] Proposal submitted by Costa Rica, Hungary, and Switzerland on certain provisions of Article 8(2)(b) of the Rome Statute of the International Criminal Court, submitted to the Preparatory Commission for the International Criminal Court Working Group on Elements of Crimes, 26 July - 13 August 1999, available at: <http://www.igc.apc.org/icc>.

humanitarian law would not breach this prohibition, but any other work must be scrutinised as potentially involving 'operations of war'.[433]

3.63 *(xvi) Pillaging a Town or Place, Even When Taken by Assault*

3.64 **Origins**

Pillage has been forbidden since the 1863 Lieber Code,[434] but this Article of the Rome Statute is based upon the prohibition of pillage in the second sentence of Article 23(h) of the IV Hague Regulations. After WW2, the Nuremberg Charter included the similar offence of "plunder of public or private property", an offence also charged under CCL No.10 in *The Krupp Trial* among others.[435] However, neither pillage nor plunder were adequately defined under international law, and have often been used synonymously.[436] Steinkamm commented that in the traditional sense pillage implied "an element of violence", but that "[t]he notion of appropriation or obtaining against the owner's will... with the intention of unjustified gain, is inherent in the idea of pillage so that it is also perceived as a form of theft through exploitation of the circumstances and fortunes of war".[437]

3.65 **Development**

The prohibition of pillage was repeated by Article 33 of the Fourth Geneva Convention and the commentary states that this prohibition "concerns not only pillage through individual acts without the consent of the military authorities, but also organized pillage... it leaves no loophole".[438] Furthermore, the commentary contends that this prohibition "is applicable to the territory of a Party to the conflict

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[433] See Articles 50 and 51 of 1949 Geneva Conventions III and IV on permitted labour.
[434] Article 44, Lieber Code.
[435] *The Krupp Trial*, 10 LRTWC 69, p.138, and see *Trial of Baus*, 9 LRTWC 68 and *Trial of Bommer*, 9 LRTWC 62.
[436] A. Steinkamm, 'Pillage', pp.139-140, in Bernhardt, *Encyclopaedia Volume 4*, p.139 and G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals, Volume II, The Law of Armed Conflict*, (1968, Steven & Sons, London), p.250.
[437] *Ibid.*
[438] Pictet, *Commentary: IV Convention*, p.226.

as well as to occupied territories. It guarantees all types of property, whether they belong to private persons or to communities or the State".[439]

The crime of pillage has been examined recently by the ICTY in respect of the offence of 'plunder of public or private property' under Article 3(e) of the ICTY Statute.[440] The *Celebici* Judgement held that action taken by an occupying power to levy contributions and make requisitions in accordance with international humanitarian law does not amount to pillage.[441] However, it supported the commentary to the 1949 Geneva Conventions, by emphasising that both "looting committed by individual soldiers for their private gain" and "the organized seizure of property undertaken within the framework of a systematic economic exploitation of occupied territory" are prohibited under this offence.[442] No decisions upon whether the expressions 'pillage' and 'plunder' were synonymous were made by the Trial Chamber, which viewed it as unnecessary in this case, although the Judgement refered to the fact that "pillage in the traditional sense implied an element of violence".[443]

3.66 **The Rome Statute**

Zimmermann acknowledges that there is no official definition of the word 'pillage' and suggests that it should be understood as "the unauthorised appropriation or obtaining by force of property in order to confer possession of it on oneself or on a third party".[444] This definition includes the concept of taking property by force which is referred to by the Tribunal in the *Celebici* Judgement.[445] However, the EOC do not include this concept, only requiring, in addition to the Elements in respect of the nature of the conflict, that the perpetrator "appropriated certain property", "without the consent of the owner" and "intended to deprive the owner of the property and to appropriate it for private or personal use".[446] A footnote to this

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[439] *Ibid.*, pp.226-227.
[440] See also comments on looting by Iraqi soldiers in US Department of Defence report at p.620.
[441] *Celebici*, Trial Judgement, paras.587-591, followed in *Blaskic*, Trial Judgement, para.184 and *Kordic and Cerkez*, Trial Judgement, paras.351-353. See also *Jelesic*, Trial Judgement, para.48, which defined plunder as "the fraudulent appropriation of public or private funds belonging to the enemy".
[442] *Celebici*, Trial Judgement, para.590.
[443] *Ibid.*, para.591.
[444] Cottier *et al*, 'Article 8', p.238.
[445] *Supra*, para.3.65.
[446] EOC, pp.138-139.

last Element states that "appropriations justified by military necessity cannot constitute the crime of pillaging".[447]

In practical terms this definition does not alter the nature of the offence. Indeed, in a conflict situation it is difficult to imagine pillage taking place in the presence of the owner without the use of force or at the least coercion. The Elements do not expand upon the type of property which may be the subject of pillage and it is therefore submitted that, in light of the history of this offence, Zimmermann is correct in stating that "the prohibition extends to all types of property, whether they belong to private persons or to communities or the State".[448]

Finally, the mental element of the offence is defined as the intention to deprive the owner of the property and "to appropriate it for private or personal use". This clearly prohibits the situation where a soldier takes possession of an article of value, such as jewellery, for personal enrichment. However, this wording should not exclude the situation of mass organised pillage upon the orders of commanding officers where the individual soldier does not gain personally, referred to in the *Celebici* Judgement as "the organized seizure of property undertaken within the framework of a systematic economic exploitation of occupied territory".[449] The concept of 'private use' should be read as including such a situation, or the EOC would have unacceptably restricted this provision.

3.67 *(xvii) Employing Poison or Poisoned Weapons*

3.68 **Origins**

The use of poisoned weapons has been condemned since the time of Grotius and was prohibited by the Lieber Code.[450] This offence in the Rome Statute is taken from Article 23(a) of the 1907 Hague Regulations, which state that it is especially forbidden to "employ poison or poisoned weapons", but does not define poison. In the absence of a legal definition of poison, the dictionary definition of poison as "a substance that when introduced into or absorbed by a living organism causes death or

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[447] *Ibid.*, p.139, fn.47.
[448] Cottier *et al*, 'Article 8', p.238.
[449] *Celebici*, Trial Judgement, para.590.
[450] Article 70, Lieber Code and see H. Grotius, n.374 *supra*, pp.327-328.

injury, especially one that kills by rapid action even in a small quantity" should be taken as a guide.[451]

3.69 **Development**

There are no recorded post WW2 Trials in respect of the use of poison or poisoned weapons,[452] nor have any ICTY or ICTR indictments charged this offence.

3.70 **The Rome Statute**

The EOC relating to the use of poison and poisoned weapons do not define 'poison'. In addition to the requirements relating to the nature of the conflict, they state that the perpetrator must employ "a substance or a weapon that releases a substance as a result of its employment".[453] Then, rather than defining poison, the Elements establish a "specific threshold with regard to the effects of the substance"[454] and require that "it causes death or serious damage to health in the ordinary course of events, through its toxic properties".[455] No specific mental element is provided in the EOC and so, applying the default mental element of Article 30, the perpetrator must intentionally use a specific substance or weapon and know that in the ordinary cause of events the substance or weapon would cause death or serious injury to health through its toxic properties.

3.71 *(xviii) Employing Asphyxiating, Poisonous or other Gases, and all Analogous Liquids, Materials or Devices*

3.72 **Origins**

The 1899 Hague Declaration II prohibited the "use of projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases" in war between

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[451] *Concise Oxford Dictionary*. A similar definition is suggested by A. Thomas and A. Thomas, *Legal Limits on the Use of Chemical and Biological Weapons*, (1970, Southern Methodist University Press, Dallas), p.50.
[452] W. Fenrick, 'New Developments in the Law Concerning the Use of Conventional Weapons in Armed Conflict', 19 Can.YBIL (1981) 229-256, p.237.
[453] EOC, p.139.
[454] K. Dörmann, n.36 *supra*, p.476.

States Parties. However, this did not prevent the use of gas in WW1 when 90,000 men were killed by chlorine, mustard and other chemical agents and another 1,000,000 men were blinded, disfigured or injured,[456] although technically it could be argued that the Germans had opened cylinders rather than used projectiles.[457]

The prohibition was reaffirmed in broader terms by the 1925 Geneva Protocol, which forbid the "use in war of asphyxiating, poisonous or other gases and of all analogous liquids materials or devices", a definition which forms the basis of this Article of the Rome Statute.[458] The impact of the Protocol was restricted to a prohibition of first use of such weapons owing to a series of reservations.[459] However, in terms of the actual prohibition, Baxter and Buergenthal comment that the Geneva Protocol "could hardly have been expressed in more sweeping and all-embracing language".[460] In view of this it can be said with certainty that the Protocol does not merely prohibit the use of toxic substances which are gaseous at room temperature, but also prohibits atomised toxic liquids.[461] Falk comments that "[t]he operative clause of the Protocol, in effect, restates a preexisting prohibition on poison gas that clearly pertained to chemical weaponry".[462]

McDougal and Feliciano observe that the Geneva Protocol's "prohibition is cast in language of such inclusive compass as to permit future interpreters mechanically to subsume there-under even nonlethal chemical agents, which produce merely temporary if distressing effects entailing no enduring damage to the human organism".[463] This raises the contentious issue of whether the Geneva Protocol

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[455] EOC, p.139.

[456] OPCW, Fact Sheet 1, 'The Chemical Weapons Convention and the OPCW - How they Came About', available at: <http://www.opcw.org> and see M. Eshbaugh, 'The Chemical Weapons Convention: with every Step Forward, we take two Steps Back', 18 Ariz.J.Int'l&Comp.L (2001) 209-244, pp.212-213 who gives slightly different figures.

[457] M. Eshbaugh, *ibid.*, p.216.

[458] The 1925 Geneva Protocol also extended this prohibition 'to the use of bacteriological methods of warfare', but as this is not included in the Rome Statute it will not be discussed here.

[459] M. Bothe, 'Chemical Warfare', pp.83-85, in Bernhardt, *Encyclopaedia Volume 3*, p.85.

[460] R. Baxter and T. Buergenthal, 'Legal Aspects of the Geneva Protocol of 1925', 64 AJIL (1970) 853-879, p.856.

[461] See the OPCW website, discussion of 'Chemical Warfare Agents', available at: <http://www.opcw.org>

[462] R. Falk, 'Inhibiting Reliance on Biological Weaponry: The Role and Relevance of International Law', 1 Am.UJ.Int'l.L&Pol'y (1986) 17-34, p.21 and see K. Fitzgerald, 'The Chemical Weapons Convention: Inadequate Protection from Chemical Warfare', 20 Suffolk Transnat'l.LR (1997) 425-448, p.430 and M. Bothe, n.186 *supra*, p.407.

[463] M. McDougal and F. Feliciano, *The International Law of War, Transnational Coercion and World Public Order*, (1994, New Haven Press, New Haven), p.636.

prohibits the use of non-lethal riot gases or herbicides,[464] the US being the main proponent of the view that such non-lethal substances are excluded from its ambit.[465]

3.73 **Development**

The US used both CS gas and defoliants in Vietnam, prior to ratification of the 1925 Geneva Protocol.[466] Partially in response to this the General Assembly adopted a Resolution which recognised that the Geneva Protocol prohibited "all biological and chemical methods of warfare" and declared that use in international armed conflicts of "[a]ny chemical agents of warfare - chemical substances, whether gaseous, liquid or solid - which might be employed because of their direct toxic effects on man, animals or plants" were prohibited.[467] Although upon ratification of the Geneva Protocol the US maintained its position that non-lethal gases or defoliants were not prohibited, an Executive Order prescribed new limited circumstances in which such substances would be used.[468]

The Geneva Protocol was briefly analysed by the ICJ in the *Nuclear Weapons Advisory Opinion* in the context of whether it could be found to prohibit the use of nuclear weapons. Whilst the Court found that "[c]hemical and bacteriological weapons were then prohibited by the 1925 Geneva Protocol",[469] it explained that the term 'analogous materials or devices' in the Protocol has been understood in the practice of States as "covering weapons whose prime, or even exclusive, effect is to

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[464] This is controversial as the French text used the words 'ou similaires', a more restrictive expression than 'or other gases' used in the English text, Detter, *The Law of War*, p.256 and R. Baxter and T. Buergenthal, n.460 *supra*, pp.856-857.

[465] International Affairs Department of the British Council of Churches, Friends' Peace and International Relations Committee and the UN Association, 'Geneva Protocol: CS Gas', (1970, Headley Brothers., London, held in BLPES, Special Pamphlets Collection, HU B49), US position, para.4, other UN Member positions, para.11. See also UK support of the US view, statement of S. Stewart, Secretary of State FCO, Official Report 5th Series, Hansard, Vol.795 (1969-1970), written answers, 2 February 1970, cols.17-18.

[466] See H. Levie, 'Weapons of War', pp.153-160, in P. Trooboff ed., *Law and Responsibility in Warfare: The Vietnam Experience*, (1975, University of North Carolina Press, Chapel Hill).

[467] GA Res.2603 A (XXIV), 16 December 1969, opposed only by the US, Australia and Portugal.

[468] Statement by the President on the Geneva Protocol, 22 January 1975, 14 ILM (1975), p.299 and US, 'Executive Order on the Renunciation of Certain Uses in War of Chemical Herbicides and Riot Control Agents', 8 April 1975, *ibid.*, p.794. See comments by F. Kalshoven, 'Arms, Armaments and International Law', 191 Rec.des Cours (1985) II, 183-341, pp.268-270 and D. Fidler, 'The International Legal Implications of "Non-Lethal" Weapons', 21 Mich.J.Int'l.L (1999) 51-100, pp.72-74.

[469] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Rep. (1996) 226, para.76.

poison or asphyxiate" and therefore it is clear that the Protocol does not prohibit nuclear weapons.[470]

A recent allegation of use of chemical weapons contrary to the Geneva Protocol, was the use of mustard and nerve gas in the 1980-1988 Iran-Iraq war.[471] This use was condemned as contrary to international law by a Security Council Resolution, but no legal action was taken.[472]

3.74 **The Rome Statute**

The EOC for this offence, in addition to those relating to the nature of the conflict, require that the perpetrator "employed a gas or other analogous substance or device" and that the "gas, substance or device was such that it causes death or serious damage to health in the ordinary course of events, through its asphyxiating or toxic properties".[473] Therefore, the Preparatory Commission defined this weapon by reference to its effects in a similar approach to that taken with poisoned weapons.[474] Dörmann comments that as a result of this method "the use of riot control agents in most circumstances would not be covered".[475]

A footnote to the EOC states that "[n]othing in this element shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law with respect to the development, production, stockpiling and use of chemical weapons".[476] Although it seems clear that most chemical weapons would be prohibited by this Article of the Rome Statute, this proviso ensures that the exclusion of riot control agents and defoliants from the jurisdiction of the ICC does not necessarily reflect the situation under customary international law.

Therefore, the *actus reus* of this offence is the employment of a gas or other analogous substance or device. Although the *mens rea* is not explicit in the Elements, applying the default mental element of Article 30, it must be shown that the perpetrator intentionally employed the weapon with the knowledge that it would

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[470] *Ibid.*, paras.55-56.
[471] H. McCoubrey, 'The Regulation of Biological and Chemical Weapons', pp.123-139, in H. Fox and M. Meyer ed., *Armed Conflict and the New Law, Volume II, Effecting Compliance*, (1993, BIICL, London), p.132 and T. McCormack, 'International Law and the Use of Chemical Weapons in the Gulf War', 21 Calif.West.ILJ (1990-1991) 2-30, pp.20-21.
[472] SC Res.582, 24 February 1986 and 598, 20 July 1987.
[473] EOC, p.139.
[474] See comments *supra*, para.3.70.
[475] K. Dörmann, n.36 *supra*, p.477.

ordinarily cause death or serious damage to health through its asphyxiating or toxic properties.

3.75 *(xix) Employing Bullets which Expand or Flatten Easily in the Human Body, such as Bullets with a Hard Envelope which does not Entirely Cover the Core or is Pierced with Incisions*

3.76 **Origins**

Expanding bullets were first prohibited by the 1899 Hague Declaration III in words identical to this Article of the Rome Statute. They are often referred to as 'dumdum' bullets, having been originally manufactured at the Dum Dum Arsenal near Calcutta, where they were initially created for big game hunting before being adapted for military use by the British Army.[477]

3.77 **Development**

Whilst there have been no recent cases in which the use of expanding bullets has been alleged, more modern bullets with a tumbling effect in the body have been compared to expanding bullets. McCoubrey and White conclude that *prima facie* such bullets fall beyond the scope of the 1899 Declaration, but emphasise that the proscription against expanding bullets is not limited to bullets *manufactured* in contravention of the Declaration and that "the 'conversion' of a standard bullet to the same effect would be equally unlawful".[478] However, there is a move towards the extension of the prohibition against expanding bullets, and the German Military Manual, also prohibits projectiles "of a nature to burst or deform while penetrating the human body, to tumble early in the human body, or to cause shock waves leading to extensive tissue damage or even a lethal shock".[479]

3.78 **The Rome Statute**

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[476] EOC, p.139, fn.48.
[477] H. McCoubrey and N. White, n.214 *supra*, p.252.
[478] *Ibid.*

The EOC for this offence, in addition to the Elements related to the nature of the conflict, require that the perpetrator "employed certain bullets" and that "[t]he bullets were such that their use violates the international law of armed conflict because they expand or flatten easily in the human body".[480] Furthermore, the accused must have been aware that "the nature of the bullets was such that their employment would uselessly aggravate suffering or the wounding effect".[481]

The second Element may allow for a defence that the accused was not aware that expanding bullets violate the laws of armed conflict, given that Article 32 allows a mistake of law to exclude criminal responsibility "if it negates the mental element required by such a crime".[482] However, the *mens rea* of this offence is unclear and it is arguable that the second Element simply contains an objective requirement that the bullets breached the laws of armed conflict, rather than a requirement that the accused was aware of that fact. This can be supported by the wording of the third Element which, unlike the second Element, specifies that the perpetrator must have been "aware" that the nature of the bullets were such that "their employment would uselessly aggravate suffering or the wounding effect".

Therefore, although there is some doubt in the matter,[483] this offence appears to require that the perpetrator employed bullets, which objectively breached the law of armed conflicts because of their expanding or flattening effect in the human body. Additionally, it must be shown that the perpetrator was aware that the bullets were such that "their employment would uselessly aggravate suffering or the wounding effect". This third Element may be difficult to establish, requiring proof of an assessment by the defendant at the time of the employment of the bullets. How will the ICC deal with a defendant who claims that he did not know, nor care, about the effect of the bullets when he employed them?

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[479] Translation of this part of the German Military Manual in Fleck, *Handbook*, p.122 and see H. Meyrowitz, 'The Principle of Superfluous Injury or Unnecessary Suffering', 299 IRRC (1994) 98-122, p.118.
[480] EOC, p.140.
[481] *Ibid.*, and see Lee, *ICC: Elements*, p.182.
[482] Article 32(2).
[483] The default *mens rea* of Article 30 requires that unless "otherwise provided" the material elements must be committed "with intent and knowledge". Therefore, knowledge would be required in relation to the second Element, unless it can be argued that the 'awareness' required in the third Element shows that the mental element is "otherwise provided", so Article 30 does not apply.

3.79 *(xx) Employing Weapons, Projectiles and Material and Methods of Warfare which are of a Nature to Cause Superfluous Injury or Unnecessary Suffering or which are Inherently Indiscriminate in Violation of the International Law of Armed Conflict, Provided that such Weapons, Projectiles and Material and Methods of Warfare are the Subject of a Comprehensive Prohibition and are Included in an Annex to this Statute, by an Amendment in Accordance with the Relevant Provisions set Forth in Articles 121 and 123*

3.80 **Origins**

The basis for the prohibition referred to in this Article of the Rome Statute was laid down in the 1868 St Petersburg Declaration, which stated that the only legitimate object of warfare was to weaken the military forces of the enemy, for which it was sufficient to disable the greatest possible number of men. The Declaration further pronounced that "this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable" and that such employment would be "contrary to the laws of humanity".

3.81 **Development**

The concept of the prohibition of certain types of weapons on the basis of their effects was developed by Article 22 and 23(e) of the regulations attached to the 1907 Hague Convention IV. These Articles state that "[t]he right of belligerents to adopt means of injuring the enemy is not unlimited" and that it is forbidden "to employ arms, projectiles, or material calculated to cause unnecessary suffering".[484] This prohibition was developed by Article 35(2) of API, which states that "[i]t is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering".[485] Additionally, API also prohibited indiscriminate attacks in Article 50(4), which it defined in part as "those which employ a method or means of combat which cannot be directed at a

[484] The expression "unnecessary suffering" was initially translated from the French "propres à causer des maux superflus" as "superfluous injury" in Article 23(e), 1899 Hague Convention.
[485] A similar expression is also used in the Preamble of the 1980 Conventional Weapons Convention and a reference to the prohibition is made in Article 3(3) of the 1996 Amended Protocol II.

specific military objective" or "those which employ a method or means of combat the effects of which cannot be limited as required by this protocol".

3.81.1 Weapons, Projectiles and Material and Methods of Warfare

The phrase used in the Hague Regulations "arms, projectiles, or material" became "weapons, projectiles and material or methods of warfare" in API, and indeed in this Article of the Rome Statute. Whilst the words 'weapons', 'projectiles' and 'material' are fairly self-explanatory, the expression 'methods of warfare' has been the subject of more discussion. Hays Parks explained that "*means* of warfare traditionally has been understood to refer to the effect of weapons in their use against combatants, while *method* of warfare refers to the way weapons are used in a broader sense".[486] He suggested that in Article 35(2) of API, the word 'means' would have been more appropriate than 'methods'.[487]

3.81.2 Of a Nature to Cause Superfluous Injury or Unnecessary Suffering

The expression 'of a nature to cause' used in API is wider than the phrase 'calculated to cause' used in the Hague Regulations, as the former includes weapons which were not designed to cause superfluous injury or unnecessary suffering and yet have such an outcome as an inevitable side effect of their use.[488] The expression 'superfluous injury or unnecessary suffering' is more complex.[489] The ICRC commentary to API, states that this double expression is an appropriate translation of the French 'maux superflus' because the French term covers "simultaneously the sense of moral and physical suffering".[490]

Article 35(2) of API, according to the ICRC commentary, requires that the "nature of the injury or the intensity of suffering" is weighed up against the 'military necessity', in order to decide whether there is a case of superfluous injury or

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[486] W. Hays Parks, 'Memorandum of Law: Travaux Preparatoires and Legal Analysis of Blinding Laser Weapons Protocol', Army Lawy. (1997) 33-41, Department of the Army Pamphlet 27-50-295, pp.34-35, emphasis added, and see Sandoz *et al*, *Commentary on the Additional Protocols*, p.621.
[487] W. Hays Parks, n.486 *supra*, p.35, but see H. Meyrowitz, n.479 *supra*, p.103.
[488] F. Kalshoven, 'The Conference of Government Experts on the Use of Certain Conventional Weapons, Lucerne, 24 September - 18 October 1974', 6 NYIL (1975) 77-102, p.90.
[489] See comments by S. Oeter, n.18 *supra*, para.402.
[490] Sandoz *et al*, *Commentary on the Additional Protocols*, p.407.

unnecessary suffering".[491] However, as the commentary acknowledges, this concept has a "relative and imprecise character".[492] Cassese suggests that the construction of this prohibition in military manuals reveals three factors that this balancing test should take into account: whether the effect of the weapons is disproportionate to their aim; whether the use of weapons with such an effect is not absolutely necessary when measured against the military advantage to be gained from their use and when the weapons are analogous to other weapons which have already been prohibited.[493]

Robblee suggests that factors "such as medical effects, the degree of disability inflicted, the risk of death, and the strain on medical resources" resulting from the use of a particular weapon are factors which may weigh against a particular weapon in this balancing act, as indeed might "public opinion, the laws of humanity, and treachery".[494] This list demonstrates an issue identified by Meyrowitz, that "those factors which define the unnecessary or superfluous character of suffering or injury... may be either quantitative or qualitative in nature".[495]

3.81.3 Inherently Indiscriminate

Indiscriminate attacks are prohibited by Article 50(4) of API, which defined these in part as "those which employ a method or means of combat which cannot be directed at a specific military objective" or "those which employ a method or means of combat the effects of which cannot be limited as required by this protocol". Therefore, the definition of indiscriminate includes both the method by which a

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[491] *Ibid.*, pp.408. Hays Parks suggests a similar balancing test, W. Hays Parks, 'Memorandum of Law - Sniper Use of Open-Tip Ammunition', Army Lawy. (1991) 86-89, Department of the Army Pamphlet, 27-50-218, p.87.

[492] Sandoz *et al*, *Commentary on the Additional Protocols*, p.410.

[493] A. Cassese, 'Weapons Causing Unnecessary Suffering: Are they Prohibited?', 58 RDI (1975) 12-42, pp.26-30, note that this comment was written prior to the conclusion of API and was therefore an analysis of Article 23(e) of the 1907 Hague Convention IV.

[494] P. Robblee, 'The Legitimacy of Modern Conventional Weaponry', 71 Milit.LR (1976) 95-148, pp.96-97.

[495] H. Meyrowitz, n.479 *supra*, p.111. See generally R. Coupland and P. Herby, 'Review of the Legality of Weapons: A New Approach, the SIrUS Project', 835 IRRC (1999) 583-592; J. sur Vevey, 'ICRC Expert Meeting on Legal Reviews of Weapons and the SIrUS Project', 842 IRRC (2001) 539-542 and R. Coupland, 'The SIrUS Project: Towards a Determination of which Weapons Cause 'Superfluous Injury or Unnecessary Suffering'', pp.99-118, in Durham and McCormack, *The Changing Face of Conflict.*

particular weapon is used in an attack and the use of a type of weapon which is by nature indiscriminate, such as the use of a contagious disease as a weapon.[496]

3.82 The Rome Statute

No EOC have as yet been drafted for this offence because no 'weapons, projectiles or material or methods of warfare' are presently included in an annex to the Statute.[497] Prohibited weapons may be added to this annex as an amendment to the Rome Statute under Articles 121 and 123 at the Review Conference to be held in 2009. However, in the opinion of Cassese, an amendment to this Article is so unlikely to be agreed upon that in all probability the Court will never have jurisdiction over such offences.[498]

Mathews and McCormack comment that this Article "introduces an unprecedented nexus between the prohibition on 'superfluous injury or unnecessary suffering' and the conclusion of multilateral negotiations for a comprehensive ban on a weapons type".[499] For example, whilst the 1980 Weapons Convention refers to this prohibition in its preamble, "the Conference ended with no finding that the restrictions and prohibitions contained in the weapons convention were imposed because of any agreed belief or finding that those weapons were in fact excessively injurious or had indiscriminate effects or that its rules were statements of customary international law".[500]

The requirement that the weapon be subject to a comprehensive prohibition prior to being included in the annex to the Statute would appear to rule out the possibility of nuclear weapons being prohibited under this Article for the foreseeable future.[501] However, Cottier suggests that the concept of a 'comprehensive prohibition' may include a prohibition under customary international law in addition

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[496] See generally: F. Kalshoven, n.468 *supra*, pp.236-237; the same author, n.488 *supra*, pp.90-92 and M. Schmitt, n.39 *supra*, p.55.
[497] See comment in the EOC, p.140.
[498] A. Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections', 10 EJIL (1999) 144-171, p.152.
[499] R. Mathews and T. McCormack, 'The Relationship Between International Humanitarian Law and Arms Control', pp.65-98, in Durham and McCormack, *The Changing Face of Conflict*, p.88.
[500] J. Roach, 'Certain Conventional Weapons Convention: Arms Control or Humanitarian Law?', 105 Milit.LR (1984) 3-72, p.35 and see W. Fenrick, n.452 *supra*, p.240.
[501] See R. Mathews and T. McCormack, n.499 *supra*, pp.88-89.

to a prohibition under conventional law.[502] The obvious candidates for prohibition include: chemical weapons,[503] to the extent they are not already prohibited by Article 8(2)(b)(xviii); biological weapons,[504] in particular contagious diseases, and landmines.[505]

3.83 *(xxi) Committing Outrages upon Personal Dignity, in Particular Humiliating and Degrading Treatment*

3.84 **Origins**

The wording of this Article is identical to that of Article 3(1)(c), common to the four Geneva Conventions of 1949. Whilst Common Article 3 applies by its terms solely to non-international armed conflicts, according to the ICJ in the *Nicaragua Case* "these rules also constitute a minimum yardstick... which are also to apply to international conflicts".[506] Indeed, API repeats this prohibition in Article 75(2)(b) and in Article 85(4)(d) condemns as a grave breach "practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination". The commentary to Article 75(2)(b) states that this offence "refers to acts which, without directly causing harm to the integrity and physical and mental well-being of persons, are aimed at humiliating and ridiculing them, or even forcing them to perform degrading acts".[507]

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[502] Cottier *et al*, 'Article 8', p.243. Although, given the advisory opinion in the *Legality of the Threat or Use of Nuclear Weapons*, it would be difficult to state definitively that nuclear weapons were subject to a comprehensive prohibition under customary international law, ICJ Rep. (1996) 226, decision para.E. See also the 'understanding' of several States to API, including the UK, France, Canada and Spain, that API does not restrict the use of nuclear weapons, and the similar 'understanding' made by France in relation to Article 8 of the Rome Statute, available at: <http://www.icrc.org>.

[503] 1993 Chemical Weapons Convention. See generally M. Eshbaugh, n.456 *supra*.

[504] 1972 Biological Weapons Convention. See H. Dagen, 'Bioterrorism: Perfectly Legal', 49 Catholic ULR (2000) 535-573 and B. Appleyard, 'When the Wind Blows', 14 October 2001, *The Sunday Times Magazine*, 67-75.

[505] 1996 Amended Protocol II and 1997 Ottawa Landmine Convention. See M. Lacey, 'Passage of Amended Protocol II', Army Lawy. (2000) 7-15, Department of the Army Pamphlet 27-50-328 and A. Petrarca, 'An Impetus of Human Wreckage?: The 1996 Amended Landmine Protocol', 27 Calif.West.ILJ (1996) 205-239.

[506] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, (*Merits*) Nicaragua v US, ICJ Rep. (1986) 14, para.218.

[507] Sandoz *et al*, *Commentary on the Additional Protocols*, p.873.

WW2 jurisprudence reveals three cases which today might be considered to breach this prohibition.[508] The *Maelzer Trial* concerned the parade of British and American POWs through the streets of Rome where, according to the Prosecution witness, the population threw stones and sticks at the prisoners.[509] The accused was found guilty of exposing POWs to acts of violence, insults and public curiosity.[510] In the Trial of *Chuichi and Others*, the accused were found guilty of ill-treatment of Indian Sikh POWs.[511] The physical ill-treatment was aggravated by the fact that the POWs had their hair and beards cut off and one was forced to smoke a cigarette, when this was forbidden by their religion.[512] Finally, the *Trial of Schmid* concerned the ill-treatment of an unknown dead US serviceman.[513] The accused, a German medical officer, removed the head from the body of the serviceman, boiled it, removed the skin and flesh and then bleached the skull which he kept on his desk for several months.[514] Despite his claim that he had not acted out of hatred and had only kept the skull for instructional purposes, he was found guilty of this offence.[515]

3.85 **Development**

This crime has been examined in some depth by the ICTY.[516] In *Furundzija* the Trial Chamber found that the rapes and sexual assaults upon the victim, in front of soldiers who were watching and laughing, caused "severe physical and mental pain, along with public humiliation" and amounted to "outrages upon her personal dignity and sexual integrity".[517] In the *Aleksovski* case, the Trial Chamber defined outrages upon personal dignity as a particularly deplorable species of inhuman treatment which occasioned "more serious suffering than most prohibited acts falling within the *genus*".[518] They defined the mental element of the crime as the intention to humiliate or ridicule the victim,[519] but the *Aleksovski* Appeals Judgement

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[508] Identified by the ICRC in the ICRC working paper, n.310 *supra*, comments on Article 8(2)(b)(xxi).
[509] *Trial of Maelzer*, 11 LRTWC 53.
[510] *Ibid.*, p.55.
[511] *Trial of Tanaka Chuichi and Others*, 11 LRTWC 62.
[512] *Ibid.*
[513] *Trial of Schmid*, 14 LRTWC 151.
[514] *Ibid.*, p.151.
[515] *Ibid.*, and see the examples on p.152.
[516] See also the ICTR Judgement in *Musema*, Trial Judgement, para.285.
[517] *Furundzija*, Trial Judgement, para.272.
[518] *Aleksovski*, Trial Judgement, para.54.
[519] *Ibid.*, para.56. The Trial Chamber specifically ruled out recklessness from the mental element, *ibid.*

explained that this offence did not necessarily require "a *specific intent* on the part of a perpetrator to humiliate, ridicule or degrade the victims".[520]

With respect to the *actus reus* of the crime the *Aleksovski* Trial Chamber held that the act "must cause serious humiliation or degradation to the victim", which they interpreted as entailing "real and lasting suffering to the individual arising from the humiliation or ridicule".[521] Although this necessitated a subjective element to this offence, as sensitive persons would be more prone to perceive their treatment as humiliating, they added an objective element that "the humiliation to the victim must be so intense that the reasonable person would be outraged".[522]

The Trial Chamber in the *Foca* case re-examined the offence of outrages upon personal dignity and criticised part of the *Aleksovski* Judgement. They found both the Trial and Appeals Judgements ambiguous on the issue of the mental element for this offence.[523] The *Foca* Judgement stated that the perpetrator must, in addition to intending the relevant act or omission, be aware of its objective character and therefore know that his act or omission could cause "serious humiliation, degradation or affront to human dignity".[524] However, the Trial Chamber also commented that a perpetrator who has met the objective threshold of the offence is unlikely to be unaware of the nature of his acts.[525]

With respect to the *actus reus*, the *Foca* Trial Chamber concurred with the definition of an outrage upon personal dignity as an act causing "serious humiliation or degradation to the victim".[526] However, they did not agree that humiliation or degradation which was real and serious also needed to be lasting and stated that a minimum temporal requirement of the effects of an outrage was not an element of the offence.[527] The *Foca* Judgement summarised the *actus reus* of this offence as "any act or omission which would be generally considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity" and this was approved on appeal.[528]

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[520] *Aleksovski*, Appeal Judgement, para.27, original emphasis. However, this was not the subject of the appeal and so this statement was effectively *obiter dicta*.
[521] *Aleksovski*, Trial Judgement, para.56.
[522] *Ibid.*
[523] *Foca*, Trial Chamber, para.508.
[524] *Ibid.*, para.512.
[525] *Ibid.*, para.513, approved on appeal, *Foca*, Appeal Judgement, paras.165-166.
[526] *Foca*, Trial Judgement, para.501.
[527] *Ibid.*
[528] *Ibid.*, para.507 and *Foca*, Appeal Judgement, para.163.

This approach to both the *mens rea* and *actus reus* of outrages upon personal dignity was followed by the case of *Kvocka*.[529] However, the *Kvocka* Judgement approved the part of the *Aleksovski* Trial Chamber Judgement which took subjective criteria into account, including the victim's temperament or sensitivity, in addition to applying a 'reasonable person' standard, when deciding whether the act was an outrage upon personal dignity.[530] Finally, the *Kvocka* Trial Chamber held that the conditions of confinement in Omarska camp amounted to an outrage upon personal dignity as "[t]he detainees were forced to perform subservient acts demonstrating Serb superiority, forced to relieve bodily functions in their clothing, and they endured the constant fear of being subjected to physical, mental, or sexual violence in the camp".[531]

3.86 **The Rome Statute**

The EOC for this offence, in addition to the Elements in respect of the nature of the conflict, require that the perpetrator "humiliated, degraded or otherwise violated the dignity of one or more persons".[532] This text clarifies the fact that humiliating and degrading treatment are merely examples of outrages upon personal dignity and that an outrage upon personal dignity could be committed by some other violation of dignity.[533] Although the Elements do not elaborate upon the nature of this other violation of dignity, it is submitted that this could be found in some extreme form of inhuman treatment.[534] The Elements also include the objective requirement that "[t]he severity of the humiliation, degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity".[535]

A footnote to the first Element explains that "[f]or this crime, "persons" can include dead persons", and that the victim "need not personally be aware of the existence of the humiliation or degradation or other violation",[536] which shows that this offence may equally be committed against sleeping, unconscious or dead

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[529] *Kvocka, et al*, Trial Judgement, para.168.
[530] *Ibid.*, 167.
[531] *Ibid.*, para.173.
[532] EOC, p.140.
[533] Lee, *ICC: Elements*, p.184, but Kittichaisaree takes a more restrictive view, Kittichaisaree, *International Criminal Law*, p.181.
[534] See Cottier *et al*, 'Article 8', p.246 and discussion *supra*, paras.2.19, 2.20.3 and 2.21.2.
[535] EOC, p.140.
[536] *Ibid.*, fn.49.

victims. The footnote also explains that "[t]his element takes into account relevant aspects of the cultural background to the victim", so retaining a subjective aspect to this offence, whereby a cultural or religious specific humiliation, degradation or violation of dignity could constitute an outrage upon personal dignity, even if the same action perpetrated against a person from a different background would not amount to this offence. In such a situation the objective Element could be satisfied by showing that the violation was severe enough to be generally recognised as an outrage upon personal dignity when perpetrated against persons of that particular cultural or religious background.

Therefore, the Rome Statute and EOC define the crime of outrages upon personal dignity in much the same way as the jurisprudence of the ICTY.[537] In respect of the *actus reus* of the offence, both subjective and objective elements are present. The EOC do not refer to the requirement for the harm to be lasting, suggested by the *Aleksovski* Trial Chamber,[538] and so it would seem that this would not need to be proven in a case before the ICC. The standard of *mens rea* is not explicit in the EOC and so the default mental element of Article 30 of intent and knowledge applies.[539] Therefore, it would seem that the perpetrator must intend to commit the act concerned with the knowledge that it would humiliate, degrade or violate the dignity of the victim.[540]

3.87 *(xxii) Committing Rape, Sexual Slavery, Enforced Prostitution, Forced Pregnancy, as Defined in Article 7, Paragraph 2 (f), Enforced Sterilization, or any Other Form of Sexual Violence also Constituting a Grave Breach of the Geneva Conventions*

3.88 **Origins**

[537] Most of the ICTY jurisprudence for this offence concerns sexual violence, but see comments of B. Moshan, 'Women, War, and Words: The Gender Component in the Permanent International Criminal Court's Definition of Crimes Against Humanity', 22 Fordham Int'l.LJ (1998) 154-184, p.180 and J. Campanaro, 'Women, War and International Law: The Historical Treatment of Gender-Based War Crimes', 89 Geo.LJ (2001) 2557-2592, p.2589.
[538] See *supra*, para.3.85.
[539] See *supra*, paras.2.3-2.8.
[540] This is the mental element suggested in the *Foca*, Trial Chamber Judgement, para.512.

Rape and sexual assault have been described as "one of the oldest and most horrible aspects of war",[541] though the Rome Statute is not the first instrument to prohibit this abhorrent crime and rape has long been considered an offence against the laws of war. In 1646 Grotius opined that in respect of the "violation of women", the act "ought to be no more unpunished in peace than in war: and this latter rule is the Law of Nations, not of all, but of the best".[542] In 1863, the Lieber Code prohibited sexual violence against women in two articles, Article 37, which stated that offences against "the persons of the inhabitants, especially those of women: and the sacredness of domestic relations" should be rigorously punished and Article 44, which proclaimed that rape was punishable by the death penalty.[543]

Whilst the 1899 and 1907 Hague Regulations did not expressly prohibit sexual offences, such an offence could be read into Article 46, which stated, somewhat obliquely, that "[f]amily honor and rights... must be respected".[544] Nevertheless, rape and sexual violence occurred during WW1 and were committed on a massive scale during WW2.[545] Crimes of sexual violence were not among those charged in the Leipzig Trials after WW1 and the Nuremberg Charter following WW2 did not even list rape either as a war crime or as a crime against humanity.[546] Furthermore, although evidence of sexual violence was given during the Nuremberg Trial, the Judgement of the Tribunal did not even mention the word 'rape'.[547]

Crimes of sexual violence were prosecuted after WW2 in the IMTFE, particularly in respect of the 'rape of Nanking'. On this atrocity the Judgement stated that even "girls of tender years and old women were raped in large numbers"

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[541] P. Davis, 'The Politics of Prosecuting Rape as a War Crime', 34 Int.Law. (2000) 1223-1248, p.1223.
[542] H. Grotius, n.374 *supra*, p.330.
[543] Lieber Code.
[544] See comments of M. Lippman, 'Humanitarian Law: War on Women', 9 Mich.SU-Detroit Col.LJIL (2000) 33-119, p.38.
[545] On WW1, see M. Lippman, *ibid.*, pp.35-37 and the inclusion of 'rape' and 'enforced prostitution' on the list of charges suggested by the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Report Presented to the Preliminary Peace Conference, 29 March 1919, reprinted in 14 AJIL (1920) 95-126, p.114. On WW2 see C. Niarchos, 'Women, War, and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia', 17 HRQ (1995) 649-690, pp.663-666 and T. Meron, 'Shakespeare's Henry the Fifth and the Law of War', 86 AJIL (1992) 1-45, p.30. See also S. Ryan, 'From the Furies of Nanking to the Eumenides of the International Criminal Court: The Evolution of Sexual Assaults as International Crimes', 11 Pace ILR (1999) 447-486, pp.454-459; T. Meron, 'Rape as a Crime under International Humanitarian Law', 87 AJIL (1993) 424-428, pp.425-426 and S. Chesterman, 'Never Again... and Again: Law, Order, and the Gender of War Crimes in Bosnia and Beyond', 22 Yale J.Int'l.L (1997) 299-343, pp.329-331.
[546] Article 6(b) and 6(c), Nuremberg Charter. However, Article II(1)(c), CCL No.10 listed rape as a crime against humanity.
[547] C. Niarchos, n.545 *supra*, p.665 and J. Campanaro, n.537 *supra*, pp.2560-2562.

and found that "approximately 20,000 cases of rape occurred in the city during the first month of occupation".[548] Although the Tokyo Charter did not specifically include the offence of rape, and thus this crime was subsumed under alternative headings such as "other inhumane acts",[549] nevertheless, the findings of the IMTFE implicitly recognised that rape was a category of international crime.[550]

Another well-known military trial in the Far East after WW2 which implicitly accepted that rape was a breach of humanitarian law, was the *Trial of Yamashita*.[551] The Judgement stated that "where murder and rape and vicious, revengeful actions are widespread offences, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops... ".[552] A further WW2 military trial in the East Indies considered a charge of forced prostitution in the *Trial of Awochi*.[553] The defendant, a Japanese hotelkeeper was charged with the war crime of enforced prostitution of Dutch women in his club. The Court found the defendant guilty on the basis that he confined the women to part of the club's premises and threatened them with the Japanese military police when they wished to leave, threats which were "rightly considered as being synonymous with ill-treatment, loss of liberty or worse".[554]

The 1949 Geneva Conventions contain prohibitions against crimes of sexual violence against women. However, they do not develop the elements of these offences and indeed, the provision of Article 14 in the Third Geneva Convention states in euphemistic language that prisoners of war are entitled to "respect for their persons and their honour" and that "[w]omen shall be treated with all the regard due to their sex", and it is left to the commentary, under the heading of 'honour and modesty', to spell out that "[t]he main intention is to defend women prisoners against rape, forced prostitution and any form of indecent assault".[555] Article 27 on sexual violence in the Fourth Geneva Convention is more explicit, but the prohibition of

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[548] 1 The Tokyo Judgment: The International Military Tribunal for the Far East, 29 April 1946 - 12 November 1948, (B. Röling and C. Rüter eds., 1977-1978, UPA University Press, Amsterdam), p.389.
[549] Article 5(c), (crimes against humanity) Tokyo Charter and comments by P. Davis, n.541 *supra*, p.1234.
[550] M. Lippman, n.544 *supra*, pp.60-61 and see J. Campanaro, n.537 *supra*, pp.2563-2565.
[551] *Trial of Yamashita*, 4 LRTWC 1.
[552] *Ibid.*, p.35.
[553] *Trial of Awochi*, 13 LRTWC 122.
[554] *Ibid.*, p.124.
[555] Pictet, *Commentary: III Convention*, p.147.

"rape, enforced prostitution or any form of indecent assault" is still framed in terms of an attack on women's honour.

Classifying sexual violence as a crime against modesty and honour is both an inadequate description of the suffering caused by the offence and "on the scale of wartime violence, rape as a mere injury to honor or reputation appears less worthy of prosecution than injury to the person".[556] The 1977 Additional Protocols also contain prohibitions against rape, forced prostitution and indecent assault, expressions which are not further elaborated either in the Protocols or in the commentaries.[557] Whilst under the Protocols references to honour have been dropped in favour of 'outrages upon personal dignity', it is arguable that this is still not a satisfactory description of sexual offences.[558]

3.89 **Development**

Recent events in the former Yugoslavia and Rwanda have been the catalyst for in depth legal examination of sexual violence as a breach of humanitarian law and the elements of the various sexual offences before the ICTY and ICTR. The Final Report of the Yugoslavia Commission of Experts described rape as a "crime of violence of a sexual nature against the person" and emphasised that "acts of sexual assault against women, men and children are prohibited by international humanitarian law through normative provisions prohibiting violence against the physical integrity and dignity of the person".[559] Thus, rape was recognised as a crime of violence and the Commission of Experts also acknowledged that crimes of sexual violence could be perpetrated against both sexes.[560] This approach of treating rape as a crime of violence was later confirmed by the ICTR in the *Akayesu* Judgement which emphasised that "rape is a form of aggression".[561]

3.89.1 Rape

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[556] C. Niarchos, n.545 *supra*, p.674.
[557] See Articles 75(2)(b) and 76(1), API and 4(2)(e), APII.
[558] See comments by K. Askin, 'Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status', 93 AJIL (1999) 97-123, p.101.
[559] Yugoslavia Commission of Experts' Report, para.103.
[560] This approach has academic support, see J. Falvey, 'Criminal Sexual Conduct as a Violation of International Humanitarian Law', 12 St. John's JLC (1997) 385-410, pp.389-390.

Rape has various definitions in different national laws and prior to the establishment of the ICTY and ICTR there was no authoritative definition of rape in international law.[562] The first Judgement of an International Tribunal to define the elements of the crime of rape, albeit as a crime against humanity, was the ICTR Trial Chamber Judgement in the case of *Akayesu*.[563] The accused was the bourgmestre (mayor) in the commune of Taba in Rwanda where he was, *inter alia*, found to have ordered, instigated and aided and abetted sexual violence, including rape, against Tutsi women.[564]

The Tribunal found that "the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts" and therefore defined rape broadly as "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive".[565] This definition included coercive circumstances as opposed to lack of consent as an element of the offence, the latter being consigned to the RPE as an evidential rule.[566] The Judgement explained that coercive circumstances may be constituted by "[t]hreats, intimidation, extortion and other forms of duress which prey on fear or desperation", that they "need not be evidenced by a show of physical force" and that "coercion may be inherent in certain circumstances, such as armed conflict... ".[567] This definition of rape was followed by the ICTY in the *Celebici* case, which stated that it was wide enough to include forced oral sex.[568]

In *Furundzija*, a Bosnian Croat commander was found guilty of torture and aiding and abetting rape and serious sexual violence upon a Bosnian Muslim woman in his custody.[569] Although the Trial Chamber considered the *Akayesu* definition, it

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[561] *Akayesu*, Trial Judgement, para.687.
[562] The ILC's 1996 Draft Code prohibits rape in Article 20(d) but does not define it. For a general discussion of rape before the ICTY and ICTR see B. Stephens, 'Humanitarian Law and Gender Violence: An End to Centuries of Neglect?', 3 Hof.LPS (1999) 87-109.
[563] *Akayesu*, Trial Judgement, para.688.
[564] *Ibid.*, paras.692-697.
[565] *Ibid.*, paras.687-688 and see *Musema*, Trial Judgement, paras.226-229.
[566] Rule 96, ICTR RPE, "(ii) Consent shall not be allowed as a defence if the victim: (a) Has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression; or (b) Reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear; (iii) Before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber in camera that the evidence is relevant and credible". Rule 96 in the ICTY RPE contains the same provision on consent. Rule 96 has remained unchanged despite several amendments to the ICTY and ICTR RPE.
[567] *Akayesu*, Trial Judgement, para.688.
[568] *Celebici*, Trial Judgement, paras.479 and 1065-1066 and on the issue of forced oral sex also see *Furundzija*, Trial Judgement, para.183.
[569] *Furundzija*, Trial Judgement, paras.269 and 275.

derived a more detailed definition of rape by examining national laws on this offence.[570] The Judgement set out the elements of rape as "(i) the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; (ii) by coercion or force or threat of force against the victim or a third person".[571]

Therefore, the *Furundzija* Trial Chamber defined rape more precisely than *Akayesu*, but still used the concept of coercion, rather than consent, as part of the definition of rape, consent being dealt with under the RPE.[572] However, in the *Foca* case, where three accused were found liable for crimes including enslaving Bosnian Muslim women and subjecting them to rape and sexual violence for prolonged periods,[573] the Judgement replaced the expression "by coercion or force or threat of force", used in *Furundzija*, with the expression "where such sexual penetration occurs without the consent of the victim".[574] The Trial Chamber also defined the mental element of rape as "the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim".[575] This definition of the *actus reus* and *mens rea* of rape was followed by the Trial Chamber in *Kvocka*.[576]

On the issue of consent to sexual intercourse, the *Foca* Trial Chamber explained further that it must be "given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances".[577] However, it acknowledged that in practice lack of consent may be evidenced by the presence of various factors such as "force, threats of force, or taking advantage of a person who is unable to resist".[578] This statement was clarified by the *Foca* Appeal Chamber

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[570] *Ibid.*, paras.176-184.
[571] *Ibid.*, para.185.
[572] *Furundzija*, Trial Judgement, para.185. See comments by C. Coan in 'Rethinking the Spoils of War: Prosecuting Rape as a War Crime in the International Criminal Tribunal for the Former Yugoslavia', 26 NCJIL & Com.Reg. (2000) 183-237, p.217.
[573] *Foca*, Trial Judgement, paras.883, 886 and 888. For a commentary on this case see C. Maravilla, 'Rape as a War Crime: The Implications of the International Criminal Tribunal for the Former Yugoslavia's Decision in prosecutor v Kunarac, Kovac, and Vukovic on International Humanitarian Law', 13 Fla.J.Int'l.L (2001) 321-341.
[574] *Foca*, Trial Judgement, para.460, approved on appeal, *Foca*, Appeal Judgement, para.128. This approach was also supported by J. Falvey, n.560 *supra*, p.391.
[575] *Foca*, Trial Judgement, para.460.
[576] *Kvoca et al*, Trial Judgement, paras.176-177 and 179.
[577] *Foca*, Trial Judgement, para.460.
[578] *Ibid.*, para.458. Compare with the requirement for forcible resistance by the victim in the US Court Martial of a serviceman accused of rape in Vietnam, *US v Steele*, 30 March 1971, 43 CMR 845.

which emphasised that whilst force or threat of force may provide clear evidence of non-consent, "force is not an element *per se* of rape".[579]

Nevertheless, in practical terms, the difference between the focus on coercion in *Furundzija*, or the focus on consent in *Foca*, did not greatly effect the outcome, given the limited circumstances in which the issue of consent could be raised under Rule 96 of the RPE.[580] The *Furundzija* Judgement stated that in their opinion "any form of captivity vitiates consent",[581] and the Appeal Chamber in *Foca* asserted that the circumstances which prevail in most cases charged as war crimes or crimes against humanity will be almost "universally coercive" and so true consent will not be possible.[582]

The issue of consent to rape in detention was examined by the Trial Chamber in the case of *Kvocka*.[583] Here a witness complained of forced sexual intercourse by Radic, a guard shift leader in the Omarska Camp.[584] Although the witness admitted in cross-examination that Radic had helped her by bringing her food and water and moving her husband to a another detention building, the Trial Chamber found that this did not discredit the witness.[585] The evidence suggested that Radic "regularly attempted to bribe or coerce victims to "agree" to sexual intercourse in exchange for favors" and the Trial Chamber recalled with approval previous holdings by the ICTY that "a status of detention will normally vitiate consent in such circumstances".[586]

3.89.2 Sexual Violence

The definition of sexual violence has also been considered in cases before the ICTY and ICTR. The Judgement in *Akayesu* defined sexual violence as "any act of a sexual nature which is committed on a person under circumstances which are

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[579] *Foca*, Appeal Judgement, para.129.
[580] See n.566 *supra*.
[581] *Furundzija*, Trial Judgement, para.271, followed by *Kvocka et al*, Trial Judgement, para.178. This approach was also taken by G. McDougall, Special Rapporteur, Final Report, 'Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-Like Practices During Armed Conflict', Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc.E/CN.4/Sub.2/1998/13, 22 June 1998 (hereinafter G. McDougall, Contemporary Forms of Slavery, Final Report), para.25.
[582] *Foca*, Appeal Judgement, para.130.
[583] *Kvocka et al*, Trial Judgement, paras.554-555.
[584] The exact status of Radic was a contested issue, but on the facts the Trial Chamber found that he was a guard shift leader at the Camp, *ibid.*, para.517.
[585] *Ibid.*, para.555.
[586] *Ibid.*

coercive" and explained that "[s]exual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact".[587] The Trial Chamber gave as an example of this an incident in which Akayesu "ordered the Interahamwe to undress a student and force her to do gymnastics naked in the public courtyard of the bureau communal, in front of a crowd".[588]

The definition of sexual violence given by *Akayesu* was followed by the ICTY in the *Celebici* and *Kvocka* cases.[589] However, the Trial Chamber in *Furundzija* defined sexual violence as "all serious abuses of a sexual nature inflicted upon the physical and moral integrity of a person by means of coercion, threat of force or intimidation in a way that is degrading and humiliating for the victim's dignity".[590] This is a narrower definition of sexual assault than the one given in *Akayesu* requiring, in addition to a serious sexual act in coercive circumstances, that the abuse is carried out in a way degrading and humiliating for the victim's dignity. An alternative and broader definition of sexual violence was given by the Special Rapporteur for the Human Rights Commission on Contemporary Forms of Slavery, Gay McDougall, as "any violence, physical or psychological, carried out through sexual means or by targeting sexuality".[591] Indeed, the Trial Chamber in *Kvocka* suggested in a footnote that the crime of sexual violence was broad enough to include "sexual mutilation, forced marriage, and forced abortion".[592]

3.89.3 Sexual Slavery[593]

The issue of sexual slavery in armed conflict has been considered in detail by McDougall, who defined slavery as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including sexual access through rape or other forms of sexual violence".[594] Therefore, 'sexual' was an adjective to describe a form of slavery and McDougall gave as particularly

[587] *Akayesu*, Trial Judgement, para.688.
[588] *Ibid.*
[589] *Celebici*, Trial Judgement, para.479 and *Kvocka et al*, Trial Judgement, para.180.
[590] *Furundzija*, Trial Judgement, para.186.
[591] G. McDougall, Contemporary Forms of Slavery, Final Report, para.21.
[592] *Kvocka et al*, Trial Judgement, para.180, fn. 343.
[593] See discussion of enslavement *infra*, paras.5.15-5.18.
[594] G. McDougall, Contemporary Forms of Slavery, Final Report, para.27.

severe examples of sexual slavery the 'comfort stations'[595] maintained by the Japanese during WW2 and the 'rape camps'[596] from the former Yugoslavia.[597]

In an update to her final report McDougall explained that "[c]ritical elements in the definition of slavery are limitations on autonomy and on the power to decide matters relating to one's sexual activity and bodily integrity",[598] but that slavery differs from imprisonment or arbitrary detention in that these limitations on autonomy can be "solely psychological or situational, with no physical restraints".[599] In particular, McDougall argued that "while slavery requires the treatment of a person as chattel, the fact that a person was not bought, sold or traded does not in any way defeat a claim of slavery"[600] and that "[t]he mere ability to extricate oneself at substantial risk of personal harm from a condition of slavery should not be interpreted as nullifying a claim of slavery".[601]

Two examples of sexual slavery in modern conflicts given by McDougall are, firstly, the practice of the Ugandan Lord's Resistance Army of abducting children, including girls as young as twelve to give to commanders as 'wives'.[602] McDougall stated that "[t]he repeated rape and sexual abuse of women and girls under the guise of 'marriage' constitutes slavery, as the victims do not have the freedom to leave, to refuse the sham 'marriage' or to decide whether and on what terms to engage in sexual activity".[603] Secondly, young virgin girls in Sierra Leone were ordered to report each night for sexual abuse by rebel fighters who abducted some of the girls when they retreated.[604] Again McDougall described this as sexual slavery as "the

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[595] See T. Okada, 'The "Comfort Women" Case: Judgement of April 27, 1998, Shimonoseki Branch, Yamaguchi Prefectural Court, Japan', 8 Pac.Rim LPJ (1999) 63-108 and E. Totsuka, 'Commentary on a Victory for "Comfort Women": Japan's Judicial Recognition of Military Sexual Slavery', 8 Pac.Rim LPJ (1999) 47-61. See also the summary of findings of the Women's International War Crimes Tribunal, in *The Prosecutors and the Peoples of the Asia-Pacific Region v Emperor Hirohito et al and the Government of Japan*, 12 December 2000 and the discussion of this in C. Chinkin, 'Women's International Tribunal on Japanese Military Sexual Slavery', 95 AJIL (2001) 335-341.

[596] See *Foca*, although sexual slavery was dealt with as rape and as enslavement as a crime against humanity, *supra*, para.3.89.1 and *infra*, para.5.17

[597] G. McDougall, Contemporary Forms of Slavery, Final Report, para.30.

[598] G. McDougall, Special Rapporteur, Update to Final Report, 'Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-Like Practices During Armed Conflict', Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc.E/CN.4/Sub.2/2000/21, 6 June 2000, (hereafter G. McDougall, Contemporary Forms of Slavery, Update to Final Report) para.8.

[599] *Ibid.*, para.50.

[600] G. McDougall, Contemporary Forms of Slavery, Final Report, para.28.

[601] *Ibid.*

[602] G. McDougall, Contemporary Forms of Slavery, Update to Final Report, para.13.

[603] *Ibid.*

[604] *Ibid.*, para.17.

victims did not have the freedom to leave or to refuse to comply with the orders, and as repeated sexual access to the victims was gained through the use and threat of force, the control of the physical environment and abduction".[605]

3.90 **The Rome Statute**

3.90.1 Rape

In addition to the Elements in respect of the nature of the conflict, the Elements of the crime of rape require that "[t]he Perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body".[606] A footnote to the expression 'invaded' states that this concept is intended to be broad enough to be gender neutral.[607] Therefore, this Element clarifies the fact that the crime of rape may be perpetrated by either sex upon a victim of either sex and additionally reflects the nature of this offence as "an assault upon the integrity of a person".[608] It appears to reflect a compromise between the somewhat vague language used in *Akayesu* and the more specific wording of this offence in *Furundzija*.

The second Element of rape states that "[t]he invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent".[609] A footnote to the word consent states that "[i]t is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity".[610]

Once more this seems to be a compromise between different approaches taken by Judgements of the ICTY and ICTR, with the 'coercion' approach of

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[605] *Ibid.*
[606] EOC, p.141.
[607] *Ibid.*, fn.50.
[608] C. Hall, 'The First Five Sessions of the UN Preparatory Commission for the International Criminal Court', 94 AJIL (2000) 773-789, p.778 and see K. Boon, 'Rape and Forced Pregnancy under the ICC Statute: Human Dignity, Autonomy, and Consent', 32 Colum.Hum.Rts.L.Rev. (2001) 625-675, pp.630-631.
[609] EOC, p.141.
[610] *Ibid.*, fn.51.

Akayesu, *Celebici* and *Furundzija* prevailing over the 'consent' approach of *Foca*.[611] The Women's Caucus for Gender Justice, an NGO group at the Preparatory Commission, expressed approval of the inclusion of the word 'coercion' as opposed to 'force' on the basis that it deals with a less direct, although equally menacing, situation.[612] They suggest that "abuse of authority and threats to deny or promises to provide the means of survival" should be viewed as constituting coercive circumstances, rendering any apparent consent immaterial.[613]

3.90.2 Sexual Slavery

The EOC of sexual slavery require that the perpetrator "exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty".[614] This Element reflects exactly that of enslavement as a crime against humanity, demonstrating that the ICC have taken the same position as McDougall in seeing 'sexual' as an adjective to the offence of slavery.[615] The second Element in respect of the 'sexual' nature of this offence requires that "[t]he perpetrator caused such person or persons to engage in one or more acts of a sexual nature".[616] This is very broad expression and would include any conceivable sexual exploitation of a person enslaved during an armed conflict.

3.90.3 Enforced Prostitution

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[611] However, as with the ICTY/R consent is dealt with in the RPE, where Rule 70 states that "[i]n cases of sexual violence, the Court shall be guided by and, where appropriate, apply the following principles: (a) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent; (b) Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent, (c) Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence", RPE, p.44.

[612] Women's Caucus for Gender Justice, 'Priority Concerns Relating to the Elements Annex', submitted to the 16-26 Preparatory Committee for the International Criminal Court, available at: <http://www.iccwomen.org/icc/>.

[613] *Ibid.*

[614] EOC, p.141. A similar deprivation of liberty would include those not physically locked up, but in fear of their lives and with nowhere else to go, Lee, *ICC: Elements*, pp.191-192.

[615] See *infra*, para.5.18.

[616] EOC, p.141.

The Elements of enforced prostitution were difficult to agree upon, given that many delegates were of the opinion that "in situations of armed conflict, most factual scenarios that could be described as forced prostitution would also amount to sexual slavery and could more appropriately and more easily be characterized and prosecuted as slavery".[617] However, they require that "[t]he perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent".[618] Furthermore the perpetrator "or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature".[619]

Given this definition it is still difficult to imagine a situation in which forced prostitution, other than as a 'one-off' would not amount to sexual slavery,[620] although the requirement of pecuniary or other advantage arising from the acts of a sexual nature has the implication that not all crimes of sexual slavery will amount to forced prostitution. For example, the situation of the Dutch women in the case of *Awochi*,[621] although charged at the time as forced prostitution, would also appear to constitute sexual slavery. The women had deprivation of liberty imposed upon them, given that they were kept in a particular place without freedom of movement, and they were also forced to engage in acts of a sexual nature.

3.90.4 Forced Pregnancy

This offence was included as a result of a practice during the conflict in the former Yugoslavia of raping women and then detaining them until it was too late for them to obtain an abortion, thus forcing them to bear a child of a different ethnicity.[622] However, it proved difficult to frame at the Rome Conference, owing to

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[617] G. McDougall, Contemporary Forms of Slavery, Final Report, para.33 and see K. Dörmann, n.36 *supra*, p.480.
[618] EOC, p.142.
[619] *Ibid.*
[620] But see K. Askin, 'Crimes within the Jurisdiction of the International Criminal Court', 10 Crim.LF (1999) 33-59, pp.44-45 and N. Demleitner, 'Forced Prostitution: Naming an International Offence', 18 Fordham Int'l.LJ (1994) 163-197, pp.193-194.
[621] Discussed *supra*, para.3.88.
[622] Yugoslavia Commission of Experts' Report, para.248.

fears by delegates that it could be construed as giving all women the right to an abortion.[623]

Article 7(2)(f), to which Article 8(2)(b)(xxii) refers, defines 'forced pregnancy' as "the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law" and explicitly states that "[t]his definition shall not in any way be interpreted as affecting national laws relating to pregnancy". It must be noted, however, that sexual intercourse is not a necessary ingredient of this offence and indeed that "forced pregnancy is broader than rape in that it applies to any situation or technology by which a woman is made pregnant against her will".[624]

The Elements merely repeat this definition and therefore the mental element of this offence would include knowledge that the woman was forcibly made pregnant and that she was being confined,[625] coupled with the intention to affect the ethnic composition of a population, or to commit another grave violation of international law.[626] Boon suggests that an intention to commit another crime within the Rome Statute, such as persecution, torture or inhuman treatment would fulfil the mental element of this offence by amounting to an intention to commit another grave violation of international law.[627]

3.90.5 Enforced Sterilization

The Elements of this offence require that the perpetrator "deprived one or more persons of biological reproductive capacity" and that this conduct "was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent".[628] Footnotes to these EOC explain that birth control measures which have a non-permanent effect are not included in this offence and that 'genuine consent' does not include consent obtained through deception.[629]

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[623] H. von Hebel and D. Robinson, n.123 *supra*, p.100.
[624] K. Boon, n.608 *supra*, p.661.
[625] Lack of knowledge that the confinement was unlawful should not provide a defence for an accused on the basis that ignorance of the law is no defence, but see Articles 32(1) and 33 of the Rome Statute.
[626] EOC, p.142. Therefore depriving a woman forcibly made pregnant of an abortion because national laws did not allow abortions would not amount to this offence.
[627] K. Boon, n.608 *supra*, p.665.
[628] EOC, p.142.
[629] *Ibid.*, fns.54 and 55.

Therefore, any method of permanent sterilisation which was not justified by medical or hospital treatment would amount to this offence provided that the perpetrator intended to sterilise the victim and knew that it was not justified and that he did not have the genuine consent of the person affected. It is difficult to imagine a conflict situation in which genuine consent could truly be obtained in respect of permanent sterilisation which was not justified by medical or hospital treatment. An example of justified treatment which might result in permanent sterilisation could include emergency treatment for testicular or ovarian cancer.

3.90.6 Sexual Violence

The Elements of sexual violence were difficult to frame as Article 8(2)(b)(xxii) uses the expression "or any other form of sexual violence also constituting a grave breach of the Geneva Conventions". This gave rise to two different interpretations at the Preparatory Commission, an affirmation that gender crimes could already be prosecuted as grave breaches or an additional requirement that gender offences must also fulfil all the requirements of one of the grave breaches of the Geneva Conventions.[630] The compromise is reflected in the Elements, with this comment being restricted to the sexual violence offence and requiring that "[t]he conduct was of a gravity comparable to that of a grave breach of the Geneva Conventions" and the perpetrator must have been "aware of the factual circumstances that established the gravity of the conduct".[631]

It is submitted that when measuring the gravity of the conduct in order to decide whether it is comparable to a grave breach, the cultural circumstances of the incident must taken into account. For example, the forced nudity of a Muslim woman from a traditional society would probably be much more severe in its effects upon the victim than the forced nudity of a woman from a Western country who was used to sunbathing topless on the beach.[632]

The Element which defines sexual violence states that the perpetrator "committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature". The phrase 'act of a sexual

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[630] K. Dörmann, n.36 *supra*, pp.480-481.
[631] EOC, p.143 and see Lee, *ICC: Elements*, p.198.
[632] This is not to suggest that in either circumstance such conduct would not be of a comparable gravity to a grave breach.

nature' is a broad expression which would cover such things as "sexual contact or conduct, sexual mutilation, forced or coerced performance of sexual acts or sexual entertainment, forced or coerced nudity...".[633] The act of a sexual nature must be "by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent".[634] This expression is essentially the one used in the EOC for rape and enforced prostitution.[635]

3.91 *(xxiii) Utilizing the Presence of a Civilian or other Protected Person to Render Certain Points, Areas or Military Forces Immune from Military Operations*

3.92 **Origins**

The 1949 Geneva Conventions prohibited the presence of civilians or prisoners of war from being used to "render certain points or areas immune from military operations".[636] These provisions arose from a few instances of the use of 'human shields' during WW2 to protect areas of strategic importance and to accompany military convoys, although this practice had in fact been employed by the British forces during the Boer War.[637] The commentary to the Geneva Conventions defines 'military operations' as "any acts of warfare committed by the enemy's land, air or sea forces, whether it is a matter of bombing or bombardments of any kind or of attacks by units near at hand".[638]

The prohibition of the use of human shields was extended by Article 51(7) of API to forbid such use of the 'movement' as well as the 'presence' of civilians and forms the basis of this provision of the Rome Statute. The concept of movement in this Article of API covers both the situation in which a belligerent takes advantage of the 'voluntary' movement of people, such as fleeing refugees, as well as the situation

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[633] Women's Caucus for Gender Justice, n.612 *supra*.
[634] EOC, p.143.
[635] See *supra*, paras.3.90.1 and 3.90.3.
[636] Article 28, Geneva Convention IV and Article 23, Geneva Convention III respectively.
[637] Pictet, *Commentary: IV Convention*, p.208 and Lord Wright, 'The Killing of Hostages as a War Crime', 25 BYIL (1948) 296-310, p.301.

where a belligerent forces civilians into an area to impede the movement of the adversary's troops.[639]

3.93 Development

The crime of using human shields has attracted much attention in recent years, most notably because of the use of this tactic in the Iraq-Kuwait Gulf War and in the Balkan Conflict.[640] The use of Western and Kuwaiti civilian hostages and POWs by Iraq in an attempt to render certain military objectives immune from attack lead to world-wide condemnation as a breach of the Geneva Conventions.[641]

With respect to the Balkan Conflict, the ICTY indictment of Karadzic and Mladic accuses them of the grave breach of inhuman treatment for using UN peacekeepers as human shields, a charge confirmed by the Rule 61 Decision.[642] The peacekeepers were held against their will at potential NATO air targets, including ammunition bunkers, and a communications centre "in order to render these locations immune from further NATO airstrikes".[643] Inhumane and cruel treatment was also charged in the case of *Blaskic*, a Bosnian Croat, who was found to have used Bosnian Muslim civilians as human shields to protect his headquarters.[644] However, as a result of the characterisation of this conduct as inhuman or cruel treatment in both of the above cases, the elements of the offence of detaining an individual as a human shield *per se* were not elaborated.

3.94 The Rome Statute

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[638] Pictet, *Commentary: IV Convention*, p.209. See definition of 'military operations' in S. Oeter, n.18 *supra*, para.441(2).
[639] Sandoz *et al*, *Commentary on the Additional Protocols*, p.627 and Bothe *et al*, *New Rules*, p.316.
[640] Turns also comments that Hizbollah made use of the presence of the UN and civilians as shields when launching attacks against Israel in the Lebanon, D. Turns, 'Some Reflections on the Conflict in Southern Lebanon: The 'Qana Incident' and International Humanitarian Law', 5 JCSL (2000) 177-209, pp.203-204.
[641] Note that Iraq is not a party to API, but this still constituted a breach of Articles 28 and 23, Geneva Conventions IV and III respectively. See A. DeSaussure, n.61 *supra*, pp.52-54; R. Bailey, 'Why do States Violate the Law of War?: A Comparison of Iraqi Violations in Two Gulf Wars', 27 Sy.J.Int.L (2000) 103-129, p.125 and US Department of Defence Report, pp.624-626.
[642] First indictment of *Karadzic and Mladic*, 24 July 1995, Counts 15 and 16 and *Karadzic and Mladic*, Rule 61 Review, para.20.
[643] First indictment of *Karadzic and Mladic*, 24 July 1995, para.47.
[644] *Blaskic*, Trial Judgement, paras.716 and 743.

The EOC for this offence, in addition to those concerning the nature of the conflict, first require that the perpetrator "moved or otherwise took advantage of the location of one or more civilians or other persons protected under the international law of armed conflict" in order to fulfil the *actus reus* of this offence.[645] Importantly, the wording of this Element, which reflects that of the Rome Statute, confirms that other protected persons, such as POWs, are protected by this Article in addition to civilians. This Element also demonstrates that, as with Article 51(7) of API, rendering areas immune from military operations through the movement of such individuals as well as their presence is prohibited.

The second Element lays down the *mens rea* of the offence by requiring that the perpetrator "intended to shield a military objective from attack or shield, favour or impede military operations".[646] This is phrased somewhat differently from the Article in the Rome Statute, which prohibits the perpetrator from using the presence or movement of individuals "to render certain points, areas or military forces immune from military operations". *Prima facie* it appears unlikely that human shields would be used to render objectives without military value immune to attack. However, it is possible that a belligerent could hold civilians or POWs in a building of debatable military value, such as a TV and radio station, claiming that it was not a military objective and should not be attacked in any event, yet clearly utilising their presence to render the point immune from military operations. Nevertheless, such a situation would probably constitute an intention to "shield, favour or impede military operations" and thereby still fulfil the *mens rea* of this offence. The wording of this Element also demonstrates that this offence may be committed when an individual uses a human shield with the intention of rendering an area immune from military operations, it is not necessary to show this plan was successful and that the area was not attacked.

Upon ratification of the ICC, France entered an interpretative declaration to this Article of the Rome Statute, stating that the use of human shields contrary to this Article "does not preclude France from directing attacks against objectives considered as military objectives under international humanitarian law".[647] Whilst this is a valid statement, an attack against a military objective with a large human

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[645] EOC, p.143.
[646] *Ibid.*
[647] France's interpretative declaration, para.4, available from the ICRC website: <http://www.icrc.org>.

shield would risk breaching Article 8(2)(b)(iv) of the Statute prohibiting excessive incidental loss of life or injury to civilians.[648]

3.95 *(xxiv) Intentionally Directing Attacks against Buildings, Material, Medical Units and Transport, and Personnel Using the Distinctive Emblems of the Geneva Conventions in Conformity with International Law*

3.96 **Origins**

The distinctive emblems of the Geneva Conventions are defined by Article 8(1) of API as "the red cross, red crescent or red lion and sun", although the red lion and sun has since fallen out of use. The Geneva Conventions and Protocols do not contain an article prohibiting attacks upon personnel, transport or buildings using the distinctive emblems, *per se*, though attacks upon such persons and objects entitled to use the distinctive emblems are in any case prohibited.[649] The Conventions and Protocols also set out provisions for the proper use of the emblems as a protective device under international law.[650]

3.97 **Development**

There have been no recent prosecutions or legal debate on the issue of attacking objects or persons using the emblems of the Geneva Conventions.[651]

3.98 **The Rome Statute**

The EOC of this offence, in addition to those in relation to the nature of the conflict, require that the perpetrator "attacked one or more persons, buildings, medical units or transports or other objects using, in conformity with international

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[648] See Article 51(8), API.
[649] See Articles 19, 24-26, 33 and 36, Geneva Convention I; Articles 22, 24-25, 27, 36-37 and 39, Geneva Convention II; Articles 18 and 20-22, Geneva Convention IV and Articles 18(3-4) and 23-24, API.
[650] See Articles 38-44, Geneva Convention I; Articles 41-45, Geneva Convention II; Articles 18, 20 and 21-22, Geneva Convention IV and Articles 12-13 and 18, API and see discussion *supra* para.3.28.4.
[651] But see reference to an Israeli attack on an ambulance in the Lebanon during 'Operation Grapes of Wrath', in D. Turns, n.640 *supra*, pp.202-203.

law, a distinctive emblem or other method of identification indicating protection under the Geneva Conventions".[652] Additionally, it must be shown that the perpetrator "intended such persons, buildings, units or transports or other objects so using such identification to be the object of the attack".[653]

The wording of this offence in the Rome Statute commences with the phrase "intentionally directing attacks", the same expression is used in the offences defined by Article 8(2)(b)(i), (ii), (iii) and (ix). However, the EOC for this crime, unlike those referred to, state that "[t]he perpetrator attacked... ", rather than "[t]he perpetrator directed an attack". Nevertheless, it seems unlikely that this slight alteration in wording was intended to alter the sense of this crime, and in line with the other offences it is submitted that this is referring to combat action by one or more combatants.[654]

The *actus reus* of this offence is only fulfilled if the persons or objects attacked are using the distinctive emblems of the Geneva Conventions in conformity with international law. Therefore, the emblems must be used in conformity with the regulations set out in the Geneva Conventions and their Additional Protocols.[655] The Elements also prohibit an attack on a person or object using any "other method of identification indicating protection under the Geneva Conventions". This ensures that an attack upon an Israeli military hospital displaying the Red Shield of David would contravene this provision.[656] Additionally, this would encompass an attack upon a hospital ship or medical helicopter transmitting an agreed distinctive signal.[657]

Finally, the *mens rea* of this offence is clear from the second Element. The perpetrator must intend the persons or objects displaying the emblem to be the object of the attack. This suggests that the accused must either see the emblem, or see or hear a distinctive signal (or other method of identification) used to show that the persons or objects are protected under the Geneva Conventions. There is no suggestion that the perpetrator must make a legal analysis as to whether such emblem

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[652] EOC, pp.143-144.
[653] *Ibid.*, p.144.
[654] See *supra*, para.3.6.
[655] See *supra*, para.3.96.
[656] Israel uses the Red Shield of David in place of the red cross or crescent as its distinctive emblem, see reservation entered to Geneva Conventions I, II and IV, available from the ICRC website: <http://www.icrc.org/>.

or identification is being used in conformity with international law, or indeed be aware of the fact that such an emblem demonstrates protection under international law. This appears to be an objective part of the *actus reus* and is in accordance with the general principle that knowledge of the law is not a relevant factor when assessing liability for an alleged offence.[658]

3.99 *(xxv) Intentionally using Starvation of Civilians as a Method of Warfare by Depriving them of Objects Indispensable to their Survival, Including Wilfully Impeding Relief Supplies as Provided for under the Geneva Conventions*

3.100 **Origins**

Starvation has been used as a method of warfare throughout history,[659] and even the Lieber Code admitted that "[i]t is lawful to starve the hostile belligerent, armed or unarmed, so that it leads to the speedier subjection of the enemy".[660] Nevertheless, although the 1907 Hague Regulations did not outlaw starvation as a method of warfare directly, such actions were indirectly limited by the prohibition against destroying or seizing the enemy's property unless imperatively demanded by the necessities of war.[661] Furthermore, "[d]eliberate starvation of civilians" was listed as a war crime after WW1 by the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties.[662]

Starvation of civilians in the context of siege warfare was considered in post-WW2 tribunals. In particular, the US Military Tribunal reviewed the orders of Field Marshal von Leeb who authorised his artillery to fire upon Russian civilians attempting to leave the besieged city of Leningrad. However, the tribunal held that this was not unlawful as "the cutting off of every source of sustenance from without

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[657] See Article 18(4) and (5). This phrasing is important to prevent a loophole where the person targeting an aircraft or ship is not close enough to see whether or not the distinctive emblem is displayed.

[658] Although ignorance of the law is a limited defence under Articles 32 and 33 of the Rome Statute.

[659] E. Rosenblad, *International Humanitarian Law of Armed Conflict, Some Aspects of the Principle of Distinction and Related Problems*, (1979, Henry Dunant Institute, Geneva), pp.103-104.

[660] Article 17, Lieber Code, but see C. Allen, 'Civilian Starvation and Relief During Armed Conflict: The Modern Humanitarian Law', 19 Georgia J.Int.Comp.L (1989) 1-85, pp.33-35.

[661] Article 23(h), 1907 Hague Regulations, C. Allen, n.660 *supra*, pp.35-36, and discussion, *supra*, paras.3.51-3.54.

[662] Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Report Presented to the Preliminary Peace Conference, 29 March 1919, reprinted in 14 AJIL (1920) 95-126, p.114.

is deemed legitimate" and that "if the commander of a besieged place expels the non-combatants, in order to lessen the number of those who consume his stock of provisions, it is lawful, though an extreme measure, to drive them back so as to hasten the surrender".[663] Additionally, during both WW1 and WW2 naval blockades were used by several States and excluded all shipping from the declared areas, including those transporting foodstuffs, leading to hardship and even starvation of civilians.[664]

In the light of these experiences, the Geneva Conventions of 1949 laid down provisions to ensure an adequate food supply for POWs and civilians in occupied areas.[665] However, they failed to prohibit starvation of civilians as a method of combat or to deal adequately with the situation of sieges or blockades. The Fourth Convention merely requires that the parties "endeavour" to agree to allow certain vulnerable persons to leave besieged areas.[666] During a blockade the Parties are required to allow free passage of "essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases" only provided that certain conditions are met.[667]

Starvation of civilians as a method of warfare was finally prohibited unambiguously by Article 54 of API,[668] the basis of this article of the Rome Statute.[669] Article 54 states that "[s]tarvation of civilians as a method of warfare is prohibited", and that "[i]t is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs,

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[663] *Trial of von Leeb and Others*, 12 LRTWC 1, p. 84. See comments of E. Rosenblad, n.659 *supra*, p.109 and Y. Dinstein, 'Siege Warfare and the Starvation of Civilians', pp.145-152, in Delissen and Tanja, *Humanitarian Law Challenges*, pp.146-147.

[664] Adler comments on the British blockade of Germany in WW1, G. Adler, 'Targets in War: Legal Considerations', 8 Hous.LR (1970) 1-46, p.38. Levie comments on the US blockade of Japan in WW2, in ''Means and Methods of Combat at Sea', pp.227-237, in M. Schmitt and L. Green eds., *Levie on the Law of War*, 70 US Naval War College International Law Studies (1998, Naval War College, Rhode Island), p.229. The IMT at Nuremberg found the Commander-in-Chief of the German Navy, Dönitz, not guilty on the charge of unrestricted submarine warfare on the basis that the British Merchant ships were armed and the British and US navies acted similarly, *IMT Judgement*, pp.507-510.

[665] See Articles 20 and 26, Geneva Convention III and Articles 55 and 59, Geneva Convention IV.

[666] Article 17, Geneva Convention IV.

[667] Article 23, Geneva Convention IV. See comments by Y. Dinstein, n.663 *supra*, p.148 and E. Rosenblad, n.659 *supra*, pp.113-114.

[668] This advance may have been influenced by starvation in the Biafran and Vietnam conflicts, G. Mudge, 'Starvation as a Means of Warfare', 4 Int.Law. (1969-70) 228-268 and R. Falk, 'Methods and Means of Warfare', pp.37-53, in P. Trooboff ed., *Law and Responsibility in Warfare: The Vietnam Experience*, (1975, University of North Carolina Press, Chapel Hill), pp.45-46.

[669] See J. Paust, 'The Human Rights to Food, Medicine and Medical Supplies, and Freedom From Arbitrary and Inhumane Detention and Controls in Sri Lanka', 31 Vand.J.Transnat'l.L (1998) 617-642, p.628.

agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive". Furthermore, Article 70 of API states that if the civilian population in a non-occupied territory (which would include a besieged city) does not have an adequate food supply, "relief actions which are humanitarian and impartial in character and conducted without any adverse distinction shall be undertaken, subject to the agreement of the Parties concerned in such relief actions".[670] Detter comments that these Articles "prohibits siege in the old meaning and function of the term".[671]

The ICRC commentary to API states that to use starvation as a method of warfare would be to use it as "a weapon to annihilate or weaken the population", provoking starvation deliberately, "causing the population to suffer hunger, particularly by depriving it of its sources of food or supplies".[672] Oeter argues that the list of objects indispensable to the survival of the civilian population in Article 54(2) of API is illustrative only, and that in harsh climates other items such as clothing or basic shelter would be included, thus deprivation of such items as a method of warfare would amount to this offence.[673] However, Allen comments that in view of the fact that the items illustrated are all consumables it is unlikely that other objects are protected under this provision.[674]

It must be noted that API does not prohibit the destruction of objects indispensable to the survival of the civilian population as an incidental side effect of military action, but only where the perpetrator intended to deny their sustenance value to the civilian population. Therefore, "a belligerent might reasonably attack an irrigation canal used as a defensive position, a water tower used as an observation post, or an orchard used as cover for the enemy".[675] However, if the intention of the perpetrator is to deny the sustenance value to the civilian population, the motive

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[670] See C. Allen, n.660 *supra*, pp.71-72.
[671] Detter, *The Law of War*, p.298.
[672] Sandoz *et al*, *Commentary on the Additional Protocols*, p.653.
[673] S. Oeter, n.18 *supra*, para.463(4) and see also G. Aldrich, n.27 *supra*, p.779.
[674] C. Allen, n.660 *supra*, p. 64, and C. Shotwell, 'Food and the Use of Force: The Role of Humanitarian Principles in the Persian Gulf Crisis and Beyond', 30 Rev.Dr.Milit. (1991) 345-385, p.366, but see Bothe *et al*, *New Rules*, p.340.

behind such action, whether to kill the civilians or force them to move, is irrelevant. Finally, despite the fact that Article 49(3) states that this section of API (including Article 54) does not alter humanitarian law applicable to war at sea, nevertheless this Article also states that this section is binding upon naval and air operations where they affect the civilian population on land. Therefore, it is evident that a naval blockade may not starve civilians on land as a method of warfare and must in any case comply with Article 70 by allowing relief operations in favour of civilians.[676]

3.101 **Development**

Starvation of civilians and the impediment of relief supplies for civilians by armed forces and groups have been all too common in recent conflicts.[677] In particular, aid convoys and relief supplies were attacked both in Somalia and the former Yugoslavia.[678] However, the elements of this offence have not as yet received detailed examination before the ICTY, although the *Milosevic* indictment charges obstruction of aid to the enclaves of Bihac, Gorazde, Srebrenica and Zepa as the crime against humanity of persecution.[679]

Nevertheless, the content of this provision in relation to naval blockades has been examined in the San Remo Manual, which states that a blockade would be unlawful under Article 54 if "it has the sole purpose of starving the civilian population or denying it other objects essential for its survival".[680] Furthermore, the Manual states that "[i]f the civilian population of the blockaded territory is inadequately provided with food and other objects essential for its survival, the blockading party must provide for free passage of such foodstuffs and other essential supplies".[681]

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[675] C. Allen, n.660 *supra*, p.66 and see G. Aldrich, n.27 *supra*, p.779 and M. Bothe, n.186 *supra*, p.402. However, such action would have to conform to the law relating to proportionality, see *supra*, paras.3.15-318.

[676] C. Shotwell, n.674 *supra*, p.365.

[677] See 'Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict', 8 September 1999, S/1999/957, para.19 and D. Buckingham, 'A Recipe for Change: Towards an Integrated Approach to Food under International Law', 6 Pace ILR (1994) 285-321, pp.299-300.

[678] SC Res.794, 3 December 1992, para.5, and SC Res.787 of 1992, para.7 condemned these actions.

[679] *Milosevic*, Bosnia Indictment, para.35(k).

[680] Article 102, 1994 San Remo Manual and *San Remo Manual: Explanation*, p.179.

[681] Article 103, 1994 San Remo Manual. This essentially implements Article 70 of API in relation to relief supplies.

3.102 **The Rome Statute**

The EOC for this offence, in addition to those in respect of the nature of the conflict require that the perpetrator "deprived civilians of objects indispensable to their survival" and "intended to starve civilians as a method of warfare".[682] Therefore, intention to starve civilians is necessary in order to fulfil the mental element of this offence, it is not sufficient that the perpetrator is reckless as to the starvation, or that the starvation is an unintended effect of his military strategy.[683]

According to Dörmann the delegates at the Preparatory Commission, when composing the EOC, were agreed that starvation "was meant to cover not only the more restrictive meaning of starving as killing by hunger or depriving of nourishment, but also the more general meaning of deprivation or insufficient supply of some essential commodity, or something necessary to live".[684] Therefore deprivation of "medicine or in certain circumstances blankets, could be covered by this crime, if, in the latter case, such blankets were indispensable for survival owing to the very low temperature in a region".[685] This is a sensible approach, in line with the spirit of Article 54 of API, the basis of this provision in the Rome Statute. Cottier's suggestion that the use of such starvation "with an aim to gain a military advantage", would amount to its use as a 'method of warfare', is a good explanation of this phrase.[686]

The *actus reus* of this offence is fulfilled by depriving civilians of objects indispensable to their survival.[687] This is a wide expression and the list given in Article 54(2) should be taken as a guide, in addition to medicine, and clothing, blankets and shelter, where climatic conditions make the latter necessary. Although this Article in the Rome Statute refers to the wilful impediment of relief supplies, this is not referred to in the Elements, presumably because it is only an example of depriving civilians of objects indispensable to their survival. However, if impediment of relief supplies for the civilian population, provided for by Articles 55 and 59 of the Fourth Geneva Convention and Article 70 of API, amounts to

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[682] EOC, p.144.
[683] See comments by C. Rottensteiner, 'The Denial of Humanitarian Assistance as a Crime under International Law', 835 IRRC (1999) 555-582, p.569.
[684] K. Dörmann, n.36 *supra*, p.475. This approach is supported in Cottier *et al*, 'Article 8', p.256.
[685] K. Dörmann, n.36 *supra*, p.475 and see Lee, *ICC: Elements*, p.204.
[686] Cottier *et al*, 'Article 8', p.259.
[687] See comments by J. Paust, n.356 *supra*, p.443.

deprivation of objects indispensable to civilian survival, then it could constitute the *actus reus* of this offence.[688] Finally, it must be noted that the Elements do not require that as a result of the perpetrator's actions one or more civilians died from starvation.[689]

Therefore, the *mens rea* of this offence requires that the perpetrator intended to starve civilians, an expression encompassing starvation by lack of nourishment or by an insufficient supply of another commodity essential for life, in order to gain a military advantage. The *actus reus* is fulfilled if the perpetrator deprives civilians of objects indispensable to their survival and such a deprivation could be caused by the intentional impediment of relief supplies, but it need not be shown that the actions or omissions actually resulted in any civilians dying of starvation. This offence could be committed by land forces, by a naval blockade or by air strikes which would affect civilians on land in the manner proscribed.

3.103 *(xxvi) Conscripting or Enlisting Children under the Age of Fifteen Years into the National Armed Forces or Using them to Participate Actively in Hostilities*

3.104 **Origins**

Children are often employed in armed conflicts as they make obedient and cheap soldiers, yet those who survive such employment "are often physically injured and psychologically scarred, having lost years of schooling and socialization".[690] The use of children in armed conflicts has not decreased in recent years, with an estimated 300,000 soldiers currently under 18, and furthermore, technological advances such as "automatic weapons and lightweight arms have increased the desirability and utility of child soldiers".[691] However, although the 1949 Geneva

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[688] See Cottier *et al*, 'Article 8', p.258.
[689] K. Dörmann, n.36 *supra*, p.476.
[690] 'Children and Armed Conflict: Report of the Secretary-General', 19 July 2000, A/55/163-S/2000/712, para.38.
[691] Estimate by Secretary General, *ibid.*, para.2 and see A. Abbott, 'Child Soldiers - The Use of Children as Instruments of War', 23 Suffolk Transnat'l.LR (2000) 499-573, pp.510-511 and p.516 on why some children enlist voluntarily.

Conventions provide extra protection for children under 15, they are silent as to the employment of children in warfare.[692]

The prohibition upon the use of soldiers under 15 years old which forms the basis for this provision of the Rome Statute is contained in both Article 72(2) of API and, in very similar wording, in Article 38 of the 1989 Convention on the Rights of the Child.[693] Article 72 of API has been censured as a weak provision in that it only requires the parties to a conflict to "take *all feasible measures* in order that children who have not attained the age of fifteen years do not take a *direct part* in hostilities".[694] Therefore it does not institute a completely unambiguous prohibition of the use of child soldiers and fails to prohibit the indirect participation of children in hostilities.[695]

3.105 **Development**

The use of child soldiers has been prohibited recently by three international instruments: the 1990 African Charter on the Rights and Welfare of the Child, which prohibits the use of children under 18 from taking "a direct part in hostilities";[696] the 1999 ILO Convention No.182 on Child Labour, which prohibits forced or compulsory recruitment of children under 18 for "use in armed conflict"[697] and the 2000 Optional Protocol to the Convention on the Rights of the Child which extends the original prohibition from children under 15 to those under 18.[698] Additionally, the Statute for the Special Court for Sierra Leone in Article 4(c) gives the Court jurisdiction over "[a]bduction and forced recruitment of children under the age of 15 years into armed forces or groups for the purpose of using them to participate actively in hostilities". In respect of the phrase "using them to participate actively in

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[692] G. van Bueren, 'The International Legal Protection of Children in Armed Conflicts', 43 ICLQ (1994) 809-826 and C. Hamilton and T. Abu El-Haj, 'Armed Conflict: The Protection of Children under International Law', 5 International Journal of Children's Rights (1997) 1-46.

[693] See M. Dutli, 'Captured Child Combatants', 278 IRRC (1990) 421-434, pp.425-426 and I. Cohn and G. Goodwin-Gill, *Child Soldiers, the Role of Children in Armed Conflict*, (1994, Clarendon, Oxford), pp.68-70 and J. Kuper, *International Law Concerning Child Civilians in Armed Conflict*, (1997, Clarendon, Oxford), pp.102-103.

[694] Emphasis added.

[695] See H. Mann, 'International Law and the Child Soldier', 36 ICLQ (1987) 32-57, pp.44-45 and A. Delissen, 'Legal Protection of Child-Combatants after the Protocols: Reaffirmation, Development or a Step Backwards?', pp.153-164, in Delissen and Tanja, *Humanitarian Law Challenges*, p.154.

[696] Articles 2 and 22.

[697] Articles 2 and 3(a).

[698] Articles 1 and 2, this Protocol is not yet in force.

hostilities" the Secretary-General comments that this element of the offence amounts to the "transformation of the child into, and its use as, among other degrading uses, a "child combatant"".[699]

The phrase "to participate actively in hostilities" used by this provision in the Rome Statute has recently been indirectly analysed by the ICTR.[700] The Trial Chamber in *Akayesu* found that the expression "active part in the hostilities" in Common Article 3 and "direct part in the hostilities" in Article 4 of APII were so similar that they may be treated as synonymous.[701] Furthermore, the Trial Chamber Judgement in *Rutaganda* stated that "[t]o take a "direct" part in hostilities means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces".[702]

3.106 **The Rome Statute**

The EOC for this offence, in addition to the Elements in relation to the nature of the conflict, require that the perpetrator "conscripted or enlisted one or more persons into the national armed forces or used one or more persons to participate actively in hostilities".[703] The persons, so conscripted, enlisted or used, must have been under the age of 15 years and it must be shown that the perpetrator "knew or should have known that such person or persons were under the age of 15 years".[704]

The expression "conscripted or enlisted" covers the administrative act of putting the name of a person on the armed forces list and therefore applies to both voluntary as well as forced enrolment into the armed forces.[705] The word "national" was inserted before "armed forces" to deal with the concerns of certain Arab states that wished to exclude from this provision young Palestinians joining the *intifadah*.[706] However, Cottier suggests that the basis for the interpretation of "national armed forces" should be that provided by Article 43(1) of API, "all

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[699] *Ibid.*, p.4.
[700] The ICTR considered these expressions in order to decide whether the individuals concerned were protected under Common Article 3 and APII.
[701] *Akayesu*, Trial Judgement, para.629.
[702] *Rutaganda*, Trial Judgement, para.100. See discussion *infra*, para.4.4.
[703] EOC, p.144.
[704] *Ibid.*
[705] H. von Hebel and D. Robinson, n.123 *supra*, p.118 and Cottier *et al*, 'Article 8', p.260.
[706] *Ibid.*, pp.118 and 261 respectively.

organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates".[707]

The expression "*used* such one or more persons to *participate* actively in hostilities"[708] was explained in a footnote to the text submitted to the Rome Conference by the Preparatory Committee and although the footnote did not survive the drafting process, its contents appear to reflect the general understanding of this phrase.[709] The footnote states that these words were "adopted in order to cover both direct participation in combat and also active participation in military activities linked to combat such as scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoints".[710] Furthermore "use of children in a direct support function such as acting as bearers to take supplies to the front line, or activities at the front line itself would be included within the terminology".[711]

The *mens rea* of this offence, in addition to intending to conscript, enlist or use the persons concerned, requires that the perpetrator "knew or should have known" that the individuals were under 15 years of age.[712] Therefore, the accused would have a defence to this crime if he did not know and was not negligent in his lack of knowledge that the persons concerned were under 15. Fenrick, albeit with respect to Article 28(a)(i) of the Rome Statute on command responsibility, suggests that an accused "should have known" where "he or she fails to obtain or wantonly disregards information of a general nature within his or her reasonable access".[713] Therefore, where an accused, who was recruiting, did not enquire into the age of a child despite an appearance close to the protected minimum age, he would have sufficient *mens rea* under the "should have known" standard.[714]

To conclude, the *actus reus* of this offence would be committed if the perpetrator enrolled, voluntarily or otherwise, a child under 15 years into the organised armed forces or into groups under the command of a Party to the conflict. Alternatively, the *actus reus* would be fulfilled if the perpetrator used such a child to

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[707] Cottier *et al*, 'Article 8', p.261.
[708] Emphasis added.
[709] Report of the Preparatory Committee on the Establishment of an ICC, 14 April 1998, A/CONF.183.2/Add.1, p.21, fn.12.
[710] *Ibid.*
[711] *Ibid.* See comments of Kittichaisaree, *International Criminal Law*, p.187 and Cottier *et al*, 'Article 8', pp.261-262.
[712] See criticism of this age limit in D. Momtaz, 'War Crimes in Non-International Armed Conflicts under the Statute of the International Criminal Court', 2 YIHL (1999) 177-192, p.184.
[713] W. Fenrick, n.384 *supra*, p.519.
[714] Cottier *et al*, 'Article 8', p.262.

participate in combat either directly, or indirectly, in a combat support function. The mental element of this crime requires that the perpetrator either knew, or was criminally negligent in his lack of knowledge, that the child concerned was under 15.[715]

[715] The age limit of under 15 for this offence, implies that individuals between 15 and 17 can legitimately take part in a conflict, although under Article 26, Rome Statute, the ICC only has jurisdiction over individuals of 18 and older.

4

WAR CRIMES: NON-INTERNATIONAL ARMED CONFLICTS

4.1 Introduction to Non-International Armed Conflicts

The extent of jurisdiction over war crimes committed in non-international armed conflicts in the ICC Statute was a controversial issue at the Diplomatic Conference in Rome.[1] International humanitarian law relating to internal conflicts is less well developed than that relating to international armed conflicts, although in 1949, Common Article 3 of the Geneva Conventions established basic rules with respect to those persons not taking part in the hostilities and this was developed in 1977 by APII.[2] From this limited start there has been an enormous expansion of the law applicable in non-international armed conflicts in recent years,[3] in particular, as a result of the jurisprudence of the ICTY and ICTR.[4]

These developments have both affirmed that the principle of individual criminal responsibility applies to breaches of international humanitarian law in non-international armed conflict and have expanded the substantive rules of international humanitarian law applicable to such conflicts.[5] Therefore, Article 8 of the Rome

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[1] M. Cottier, W. Fenrick, P. Viseur Sellers and A. Zimmermann, 'Article 8, War Crimes', pp.173-288 in Triffterer, *Commentary on the Rome Statute*, p.262 (hereinafter Cottier *et al*, 'Article 8').

[2] L. Moir, 'The Historical Development of the Application of Humanitarian Law in Non-International Armed Conflicts to 1949', 47 ICLQ (1998) 337-361; D. Forsythe, 'Legal Management of Internal War: The 1977 Protocol on Non-International Armed Conflicts', 72 AJIL (1978) 272-295; C. Lysaght, 'The Scope of Protocol II and its Relation to Common Article 3 of the Geneva Conventions of 1949 and Other Human Rights Instruments', 33 AULR (1983) 9-27 and D. Plattner, 'The Penal Repression of Violations of International Humanitarian Law Applicable in Non-International Armed Conflicts', 278 IRRC (1990) 409-420.

[3] Aldrich compares the expansion of law in this area to the "big bang", G. Aldrich, 'The Laws of War on Land', 94 AJIL (2000) 42-63, p.61.

[4] See generally: D. Turns, 'War Crimes without War? - The Applicability of International Humanitarian Law to Atrocities in Non-International Armed Conflicts', 7 RADIC (1995) 804-830; R. Müllerson, 'International Humanitarian Law in Internal Conflicts', 2 JACL (1997) 109-133; L. Lopez, 'Uncivil Wars: The Challenge of Applying International Humanitarian Law to Internal Armed Conflicts', 69 NYUR (1994) 916-962; I. Corey, 'The Fine Line Between Policy and Custom: Prosecutor v Tadic and the Customary International Law of Internal Armed Conflict', 166 Milit.LR (2000) 145-157, pp.152-155 and 'Declaration on the Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-International Armed Conflicts', (Council on the International Institute of Humanitarian Law, San Remo, 7 April 1990).

[5] *Tadic*, Interlocutory Appeal Decision, paras.96-127 on the extension of the substantive law applicable to non-international armed conflicts and paras.128-134 on individual criminal responsibility in non-international armed conflicts. See also T. Graditzky, 'Individual Criminal Responsibility for Violations of International Humanitarian Law Committed in Non-International

Statute is not limited to Common Article 3, but in paragraph 2(e) also contains provisions on other violations of the laws of war applicable in non-international armed conflicts, drawn from both APII and customary international law. Most of these articles will not be discussed in depth here, as they "exactly mirror provisions already contained in article 8 para. 2(b) dealing with international armed conflict".[6] Indeed, their substantive Elements are almost identical, demonstrating the view of the delegates that "there is no difference in substance between the elements of war crimes in an international armed conflict and those in a non-international armed conflict".[7] Therefore, only those Articles not already discussed, or raising special issues because of their application to non-international armed conflict, will be examined below.

4.2 The Threshold for the Application of Article 8(2)(c) and (e)

When dealing with internal hostilities it is necessary to set out the level of violence which will amount to an armed conflict and so trigger jurisdiction.[8] Paragraphs 2(d) and 2(f) of Article 8 set out the preconditions necessary for the application of paragraph 2(c), containing Common Article 3, and paragraph 2(e), containing other provisions applicable in non-international armed conflicts. Both paragraphs contain an identical first sentence, taken from Article 1(2) of APII, stating that the provisions apply "to armed conflicts not of an international character" and not to "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature". This is the sole guidance with respect to the threshold for the application of Article 8(2)(c).

Common Article 3 of the Geneva Conventions itself contains no reference as to a threshold for its applicability, which could assist in explaining when Article 8(2)(c) applies. Although it is difficult to differentiate between the internal

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Armed Conflicts', 322 IRRC (1998) 29-56; T. Meron, 'International Criminalization of Internal Atrocities', 89 AJIL (1995) 554-577 and C. Meindersma, 'Violations of Common Article 3 of the Geneva Conventions as Violations of the Laws or Customs of War under Article 3 of the Statute of the International Criminal Tribunal for the Former Yugoslavia', 42 NILR (1995) 375-397.

[6] Cottier *et al*, 'Article 8', p.263.

[7] K. Dörmann, 'Preparatory Commission for the International Criminal Court: The Element of War Crimes, Part II: Other Serious Violations of the Laws and Customs Applicable in International and Non-International Armed Conflicts', 842 IRRC (2001) 461-487, p.483.

[8] See P. Kooijmans, 'In the Shadowland between Civil War and Civil Strife: Some Reflections on the Standard-Setting Process', pp.225-247 in Delissen and Tanja, *Humanitarian Law Challenges* and T. Meron, 'Towards a Humanitarian Declaration on Internal Strife', 78 AJIL (1984) 859-868.

disturbances excluded by Article 8(2)(d) and a non-international armed conflict, the ICTR in the *Akayesu* case, stated that "an armed conflict is distinguished from internal disturbances by the level of intensity of the conflict and the degree of the organization of the parties to the conflict".[9]

Other criteria suggested by the commentary to the Geneva Conventions in order to assist an assessment of whether the level of violence has risen to that of an armed conflict include that "the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military" and that "the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace, or an act of aggression".[10] It is submitted that the ICC should consider these criteria in addition to the extent of organisation of non-governmental groups and the intensity of the conflict, to support their decision on whether the threshold for the applicability of Article 8(2)(c) has been reached in a particular case.

With respect to Article 8(2)(e), paragraph 8(2)(f) adds the further explanation that the section applies "to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups".[11] Although this definition bears some similarities to Article 1(1) of APII, nevertheless it is a broader threshold based upon the definition given by the ICTY Appeal Chamber in *Tadic*.[12]

Zimmermann comments that the expression 'protracted' in Article 8(2)(e) does not have the same meaning as 'sustained' in Article 1(1) of APII, as the word 'protracted' does not require that the military actions are continuous, merely that they

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[9] *Akayesu*, Trial Judgement, para.625. See also G. Draper, 'The Geneva Conventions of 1949', 114 Rec. Des Cours (1965) I, 59-165, p.89; M. Greenspan, *The Modern Law of Land Warfare*, (1959, University of California Press, Berkeley), pp.624-5; Pictet, *Commentary: IV Geneva Convention*, p. 35; F. Ni Aolain, 'The Relationship Between Situations of Emergency and Low-Intensity Armed Conflict; 28 Israel Yrbk.Hum.Rts (1998) 97-106, pp.102-105; W. Solf, 'The Status of Combatants in Non-International Armed Conflicts under Domestic Law and Transnational Practice', 33 AULR (1983) 53-65, p.64 and C. Meindersma, 'Applicability of Humanitarian Law in International and Internal Armed Conflict', 7 Hague Yrbk.Int'l.L (1994) 113-140, p.124.

[10] Pictet, *Commentary: IV Geneva Convention*, p. 35.

[11] See comments on this by T. Graditzky, 'War Crime Issues Before the Rome Diplomatic Conference on the Establishment of an International Criminal Court', 5 UC Davis J.Int'l.L&Pol'y (1999) 199-217, pp.209-210.

[12] *Tadic*, Interlocutory Appeal Decision, para.70. This has been consistently followed by subsequent Judgements of the ICTY and ICTR. See C. Kreß, 'War Crimes Committed in Non-International Armed Conflict and the Emerging System of International Criminal Justice', pp.103-177, in D. Fleck ed., *Humanitarian Protection in Non-International Armed Conflicts*, (2001, International Institute of Humanitarian Law, San Remo), pp.117-121.

take place over a prolonged period of time.[13] In addition, Zimmerman comments that the expression 'governmental authorities', used in this paragraph, is broad enough to include "units of national guards, the police forces, border police or other armed authorities of a similar nature" as well as the regular armed forces of a State.[14] It seems clear that the fighting does not necessarily have to take place between rebels and government forces in order to amount to a non-international armed conflict. Such a conflict can arise in the context of two opposed non-governmental parties.

The Appeal Chamber in *Tadic* also discussed the temporal and geographical limits of non-international armed conflicts. It stated that "[i]nternational humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory... under the control of a party, whether or not actual combat takes place there".[15] This approach, applicable irrespective of the type of conflict, has been consistently followed by other Judgements of the ICTY and ICTR and it is submitted that it should be applied by the ICC.[16]

4.3 Article 8(2)(c)

4.4 *The Chapeau to Article 8(2)(c) - Serious Violations of Common Article 3*

The *chapeau* to Article 8(2)(c) limits the jurisdiction of the ICC in respect to violations of Common Article 3 in two ways. First, only "serious" violations of this article will come within its jurisdiction.[17] The *Tadic* Interlocutory Appeal Decision defined the expression "serious" in a similar context as an action constituting "a breach of a rule protecting important values, and the breach must involve grave consequences for the victim".[18] Although it is difficult to imagine a breach of one of

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[13] Cottier *et al*, 'Article 8', p.285, Zimmermann also comments that given that this definition does not apply to 8(2)(c), there is no minimum duration of the conflict for the application of Common Article 3, *ibid*, p.270.
[14] *Ibid.*, p.286.
[15] *Tadic*, Interlocutory Appeal Decision, para.70.
[16] See *Furundzija*, Trial Judgement, para.59; *Blaskic*, Trial Judgement, para.63 and *Akayesu*, Trial Judgement, para.635.
[17] See *supra*, para.2.10.
[18] *Tadic*, Interlocutory Appeal Decision, para.93(iii).

the paragraphs of 8(2)(c) as anything other than serious,[19] this expression can be understood as reflecting the statement in Article 5 that the "jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole".[20]

Secondly, the *chapeau* defines those persons against whom the offences defined in paragraphs (i) to (iv) of 8(2)(c) may be committed. This definition is taken from Common Article 3 and protects "persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause".[21] According to the Trial Chamber in *Tadic* "[t]his protection embraces, at the least, all of those protected persons covered by the grave breaches regime applicable to conflicts of an international character: civilians, prisoners of war, wounded and sick members of the armed forces in the field and wounded sick and shipwrecked members of the armed forces at sea".[22] However, whether an individual was so protected would be a matter of fact for the court to decide in each case.[23]

The expression "active part in the hostilities" was analysed by the Trial Chamber in *Akayesu*. It stated that this was so similar to the expression "direct part in the hostilities" in Article 4 of APII that they may be treated as synonymous.[24] The Trial Chamber in *Rutaganda* stated that "[t]o take a "direct" part in hostilities means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces".[25] However, the Commentary to the Additional Protocols suggests that "preparations for combat and returning from combat" may also come within this phrase.[26]

4.5 *Elements of Crimes common to Article 8(2)(c)(i)-(iv)*

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[19] See J. Pejic, 'The International Criminal Court Statute: An Appraisal of the Rome Package', 34 Int.Law. (2000) 65-84, p.71.
[20] See also Article 17(d) on admissibility and M. Cottier *et al*, 'Article 8', p.270.
[21] Common Article 3(1), 1949 Geneva Conventions.
[22] *Tadic*, Trial Judgement, para.615 (this part of the Judgement was not challenged on appeal).
[23] *Ibid.*, paras.615-616.
[24] *Akayesu*, Trial Judgement, para.629.
[25] *Rutaganda*, Trial Judgement, para.100. See *supra*, para.3.105.
[26] Sandoz *et al*, *Commentary on the Additional Protocols*, p.1453, with respect to Article 13(3). See also, Cottier *et al*, 'Article 8', pp.271-272.

There are four Elements common to the offences laid out in the EOC for Article 8(2)(c). It must be shown that the conduct "took place in the context of and was associated with an armed conflict not of an international character" and that the perpetrator "was aware of factual circumstances that established the existence of an armed conflict".[27] Therefore, the offence must occur during an armed conflict, there must be a nexus between the conflict and the offence and the perpetrator must be aware that he is acting within the circumstances which objectively amount to an armed conflict.[28] These Elements are also common to the offences listed under 8(2)(e).[29]

The other Elements common to Article 8(2)(c) require that the "person or persons were either *hors de combat*, or were civilians, medical personnel or religious personnel taking no active part in the hostilities" and that the perpetrator was aware "of the factual circumstances that established this status".[30] Although the definition of protected persons in the EOC differs somewhat from the *chapeau*, Dörmann comments that this was done in order to avoid ambiguities and that "[i]t was the understanding of the drafters in informal consultations that the term *hors de combat* should not be narrowly interpreted".[31] In requiring awareness of the status of the victim, the Elements do not demand a legal evaluation upon the part of the perpetrator, but merely an awareness of the factual situation which objectively demonstrates the legal status of the victim.[32]

4.6 *(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture*

The EOC for these offences reflect almost exactly those of wilful killing, mutilation, inhuman treatment and torture in Article 8(2)(a)(i), (b)(x)-1, (a)(ii)-2 and

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[27] EOC, pp.144-148.
[28] See discussion *supra*, para.2.2.
[29] EOC, pp.148-155.
[30] *Ibid.*, pp.144-148.
[31] K. Dörmann, 'The First and Second Sessions of the Preparatory Commission for the International Criminal Court', 2 YIHL (1999) 283-306, p.299.
[32] Note also that the common EOC do not include a discriminatory intent, one of the grounds of the appeal of the *Aleksovski* Defence, rejected by the Appeal Chamber, *Aleksovski*, Appeal Judgement, para.17.

(a)(ii)-1 respectively.[33] This approach follows that taken by the ICTY which has held that there is no substantive difference between wilful killing and murder or inhuman treatment and cruel treatment or torture in international or non-international armed conflicts.[34] The only difference in the EOC is that the Elements of mutilation, unlike those in Article 8(2)(b)(x), do not require the victim to have been in the power of an adverse party, nor do they require that the conduct "caused death or seriously endangered the physical or mental health of such persons".[35]

The EOC do not deal with the issue of whether violence to life and person other than the specific acts listed could also constitute an offence under this paragraph. On a plain reading of the Statute, the expression "in particular" suggests that "murder... mutilation, cruel treatment and torture" are simply examples of violence to life and person. Therefore, it is arguable that the Prosecutor of the ICC could charge another form of violence to life and person, not expressly mentioned in Article 8(2)(c)(i), provided that it was of the same general nature as the acts specified.[36]

4.7 *(iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognised as indispensable*

4.8 **Origins**

The commentary to the Geneva Conventions states that "[a]ll civilized nations surround the administration of justice with safeguards aimed at eliminating the possibility of judicial errors. The Convention has rightly proclaimed that it is essential to do this even in time of war".[37] The offence is similar in origin to the

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[33] Compare EOC, pp.125, 136, and 126 respectively. See comments of K. Dörmann, 'Preparatory Commission for the International Criminal Court: the Elements of War Crimes', 839 IRRC (2000) 771-795, p.792.

[34] This approach was taken in *Celebici*, Trial Judgement, paras.422 and 437-439 in respect of wilful killing and murder; paras.551-552 in respect of inhuman and cruel treatment and para.443 in respect of torture. It was followed by *Kordic and Cerkez*, Trial Judgement, paras.233 and 265 in respect of wilful killing and murder and inhumane and cruel treatment. *Furundzija*, Trial Judgement, para.160, followed *Celebici* in respect of the consistent definition of torture.

[35] EOC, p.136, discussed *supra*, para.3.42.

[36] Following the *ejusdem generis* rule of statutory interpretation. Note that under Article 21(1)(a), Rome Statute, the Statute itself has priority over the EOC as applicable law for the ICC.

[37] Pictet, *Commentary: IV Geneva Convention*, p.39.

grave breach of depriving a protected person of the rights of a fair and regular trial requiring, in addition, that the victim has been executed or sentenced.[38]

4.9 Development

A similar offence was included in 1977 in Article 6 of APII, stating that "[n]o sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality".[39] The Article proceeded to list examples of these essential guarantees, which may act as a guideline as to which guarantees are indispensable under Common Article 3.[40] They include the right to be informed of the charges and to prepare a defence, the principle of non-retroactivity of criminal offences, the presumption of innocence, the right to silence and a prohibition against trials *in absentia*. Additional guidance on this may be drawn from Article 14 of the ICCPR, which also includes the right for a person accused of a criminal offence to be tried without undue delay, to examine witnesses against him, to call and examine witnesses on his behalf and the right to an interpreter if he cannot understand or speak the language used in court.[41]

4.10 The Rome Statute

The EOC for this offence, in addition to those relating to the nature of the conflict and status of the victim under Common Article 3, require that the perpetrator "passed sentence or executed one or more persons" and that "[t]here was no previous judgement pronounced by a court, or the court that rendered judgement was not "regularly constituted", that is, it did not afford the essential guarantees of independence and impartiality, or the court that rendered judgement did not afford all other judicial guarantees generally recognized as indispensable under international law".[42] Finally the Elements require that the perpetrator "was aware of the absence

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[38] See discussion *supra*, para.2.35.
[39] Article 6(2), APII.
[40] Zimmermann supports this proposition, see Cottier *et al*, 'Article 8', p.275.
[41] Article 14(3)(c), (e) and (f), ICCPR, and see Article 6, ECHR.
[42] EOC, p.147.

of a previous judgement or of the denial of relevant guarantees and the fact that they are essential or indispensable to a fair trial".[43]

The expression "sentence" is not defined and may feasibly range from a fine to imprisonment or corporal punishment. However, as the jurisdiction of the ICC is limited to serious breaches of Common Article 3, it is unlikely that a fine would be considered serious enough unless it was very high with serious consequences for the victim.[44] Sentencing or execution would amount to an offence under this paragraph, according to the EOC, if there were no previous court judgement. Therefore, if a commander ordered the execution or imprisonment of detainees alleged to have assisted the opposing party in a non-international armed conflict, without holding a trial, then the offence would be committed.

The offence may also be committed where the sentencing or execution follows a court judgement in two instances. First, where the court was not "regularly constituted". This is defined by the Elements as a court which "did not afford the essential guarantees of independence and impartiality".[45] Guidance on this may be taken from the General Comment of the Human Rights Committee on the right to a fair trial under Article 14 of the ICCPR.[46] The HRC commented on issues affecting the independence and impartiality of judges, such as their qualifications for office, the manner in which they are appointed, the duration of an appointment and the conditions governing the cessation of their functions and the "actual independence of the judiciary from the executive branch and the legislative".[47]

However, it must be taken into consideration that the HRC comment was aimed at States, whereas this offence applies during non-international armed conflicts. Clearly, the high level of independence and impartiality required of State appointed judges in peace-time cannot apply to a non-State group during a conflict. Therefore, providing that the party carrying out prosecutions establishes judges, which are as independent as possible in the circumstances, without attempting to assert undue influence over them and that the judges, in good faith, "decide without

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[43] *Ibid.*, and see K. Dörmann, n.31 *supra*, p.299.
[44] See *supra*, para.4.4.
[45] EOC, p.147.
[46] HRC General Comment 13, Article 14, ICCPR, UN Doc.HRI/GEN/1/Rev.1 at 14 (1994), available from: <http://www1.umn.edu/humanrts/gencomm/hrcom13.htm>.
[47] *Ibid.*

personal influence and objectively, only according to their best knowledge and conscience",[48] the court should be considered to be 'regularly constituted'.

Secondly, sentencing or execution following a judgement from a court not "affording all other judicial guarantees generally recognized as indispensable under international law" would breach this provision. A footnote to this Element comments that the ICC should consider whether "in the light of all relevant circumstances, the cumulative effect of factors with respect to guarantees deprived the person or persons of a fair trial".[49] Therefore, the deprivation of one particular judicial guarantee may not amount to an offence under this provision, provided that as a whole in the circumstances the trial could be considered as fair.

Kreß comments that this restrictive definition of indispensable judicial guarantees "is crucial in order not to exceed the justifiable level of international criminalization".[50] It is submitted that this is a practical approach, taking into account the application of this offence to rebels and States in non-international armed conflicts. Provided that the *indispensable* judicial guarantees are respected and that this results in a trial that is fair, when considered as a whole, in the circumstances, then the *actus reus* is not made out.

The mental element of this offence either requires that the perpetrator was aware of the lack of a previous judgement, or that he was aware "of the denial of relevant guarantees and the fact that they are essential or indispensable to a fair trial".[51] This is quite a high standard of *mens rea*, demanding proof of an understanding of fair trial standards on the part of the perpetrator. It seems likely that this may provide a loophole for defendants unless there was a severe lack of due process prior to sentencing or execution.[52]

4.11 Article 8(2)(e)

[48] ICRC working paper submitted to the Preparatory Commission on the Elements of Crimes of Article 8(2)(c), 28 May 1999, available at: <http://www.igc.apc.org/icc>, comments on Article 8(2)(c)(iv) at 2(b)(2).
[49] EOC, p.147, fn.59.
[50] C. Kreß, no.12 *supra*, p.137.
[51] EOC, p.147.
[52] See C. Byron and D. Turns, 'The Preparatory Commission for the International Criminal Court', 50 ICLQ (2001) 420-435, p.428.

4.12 *(ii) Intentionally Directing Attacks against Buildings, Material, Medical Units and Transport, and Personnel using the Distinctive Emblems of the Geneva Conventions in Conformity with International Law*

This offence reflects exactly, in wording and Elements, the equivalent offence relating to international armed conflicts under Article 8(2)(b)(xxiv).[53] However, it merits attention here because the rules for use of the emblems in conformity with international law are laid down primarily in the four Geneva Conventions and API, which do not apply in non-international armed conflicts. Therefore, the question of which law regulates the use of the distinctive emblems in non-international armed conflicts must be resolved before a prosecution under this provision may take place.

Common Article 3 does not address the use of the distinctive emblems of the Red Cross or Crescent, but Article 12 of APII states that under the direction of the competent authority the distinctive emblems "shall be displayed by medical and religious personnel and medical units, and on medical transports" and concludes that it shall "be respected in all circumstances... [and] shall not be used improperly". According to Slim this Article has codified customary international law and is therefore binding upon all States.[54] Therefore, the ICC could rely on Article 12 of APII when dealing with a defendant charged under this provision.

However, as Bouvier comments, this Article does not explicitly define protected medical personnel.[55] Relying upon the Official Records of the Diplomatic Conference on Humanitarian Law, he concludes that in addition to military medical services, local relief organisations, such as the national Red Cross or another voluntary aid society carrying on activities under the supervision of a party to the conflict, may also use the distinctive emblems in non-international armed conflicts.[56] However, when dealing with an attack upon a civilian using the distinctive emblem, a charge could alternatively be brought under Article 8(2)(e)(i) of attacking an individual civilian not taking a direct part in hostilities.

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[53] Discussed *supra*, paras.3.95-3.98.
[54] H. Slim, 'Protection of the Red Cross and Red Crescent Emblems and the Repression of Misuse', 272 IRRC (1989) 420-437, p.427.
[55] A. Bouvier, 'Special Aspects of the Use of the Red Cross or Red Crescent Emblem', 272 IRRC (1989) 438-458, p.454.
[56] *Ibid.*, p.455. In respect to supervision by a party to the conflict see Sandoz *et al*, *Commentary on the Additional Protocols*, p.1441 and A. Bouvier, n.55 *supra*, p.456.

4.13 *(viii) Ordering the Displacement of the Civilian Population for Reasons Related to the Conflict, unless the Security of the Civilians Involved or Imperative Military Reasons so Demand*

4.14 **Origins**

This prohibition is taken from Article 17 of APII and is not directly reflected by the international armed conflict offences of the Rome Statute, although it bears similarities to Article 8(2)(b)(viii). The Bothe commentary to APII states that this Article was intended to prevent counter insurgency operations of "drying up the sea in which guerrilla fish swim", where civilians are relocated to secure centres in order to deprive rebel groups of support, and to prevent "displacements of ethnic groups in order to facilitate the domination of the area involved by another more favoured group".[57]

It is clear that displacements for reasons not related to the conflict, such as natural disasters, are not prohibited by this Article. However, APII also allows for exceptions when displacement linked to the conflict may take place. First, such displacement may be allowed if it is in the interests of the security of civilians and the ICRC commentary states in this regard that "a displacement designed to prevent the population from being exposed to grave danger cannot be expressly prohibited".[58] Secondly, imperative military reasons may provide an exception to this prohibition, but the commentary warns that "[m]ilitary necessity as a ground for derogation from a rule always requires the most meticulous assessment of the circumstances" and that "the adjective 'imperative' reduces to a minimum cases in which displacement may be ordered".[59] However, as Bothe *et al* note, "there is nothing in Art. 17 which precludes voluntary movement of civilians".[60]

4.15 **Development**

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[57] Bothe *et al*, *New Rules*, p.691.
[58] Sandoz *et al*, *Commentary on the Additional Protocols*, p.1472.
[59] *Ibid.*, pp1472-1473.
[60] Bothe *et al*, *New Rules*, p.692.

Events in the Bosnian conflict demonstrate how the provisions of Article 17, relating to the security of civilians, could be exploited. It is possible to argue that Bosnian Muslims were displaced from certain areas for their own safety, the armed forces being unable to guarantee protection from local militia or other civilians.[61] Rogers also argues that in circumstances where regular armed forces oppose guerrillas in close combat in built up areas, such displacement could genuinely be in the interests of civilians, avoiding severe casualties amongst local inhabitants.[62] He suggests that the Russian provision of safe corridors for the civilian population to escape the fighting in Grozny in the Chechen conflict was an example of the most humanitarian course of action in such circumstances.[63]

Defendants charged with this offence may also exploit the fact that only the "ordering" of civilian displacement is criminalised.[64] Therefore, as Roch and Carey suggest, the 'voluntary' displacement of civilians because of human rights abuses committed against them by the armed forces, could not amount to this offence, although other offences would almost certainly be committed in such a situation.[65]

4.16 **The Rome Statute**

In addition to the EOC related to the nature of the conflict, the Elements of this crime require that the perpetrator "ordered a displacement of a civilian population", that the order "was not justified by the security of the civilians involved or by military necessity" and finally that the perpetrator "was in a position to effect such displacement by giving such order".[66] The expression "ordered", restricts this offence to a situation where an order to displace civilians has been given and would not include circumstances where the civilian population felt compelled to flee because of the dangers of the conflict or ethnic violence or moved on a genuinely voluntary basis.[67]

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[61] See M. Roch, 'Forced Displacement in the Former Yugoslavia: A Crime under International Law?', 14 Dick.J.Int'l.L (1995) 1-29, p.16.
[62] A. Rogers, 'Zero-Casualty Warfare', 837 IRRC (2000) 165-181, pp.167-168.
[63] *Ibid.*, p.168.
[64] This includes other criminal participation in the offence, such as aiding and abetting the giving of such an order.
[65] M. Roch, n.61 *supra*, pp.16-17 and C. Carey, 'Internal Displacement: Is Prevention Through Accountability Possible? A Kosovo Case Study', 49 Am.ULR (1999) 243-288, pp.287-288.
[66] EOC, p.153.
[67] See comments of A. Zimmermann in, Cottier *et al*, 'Article 8', p.281.

There must be a displacement of "a civilian population".[68] The word "displacement" is used in APII to describe movements of civilians within their territory, with an extra paragraph forbidding the movement of civilians outside of their territory.[69] However, it cannot be argued that simply displacing the civilians over an international frontier would circumvent this offence in the Rome Statute and therefore "displacement" must be understood in a wide sense as referring to any movement of civilians away from their place of residence either within or outside their State.[70] A dictionary definition of "population" is "the inhabitants of a place, country, etc. referred to collectively" or "any specified group within this (*the Irish population of Liverpool*)".[71] Therefore, the expression "civilian population" in the EOC suggests that the perpetrator must order, at least, the displacement of a significant number of a specified civilian group within a village, town or region, in order to commit this offence.[72]

The exceptions to the rule against displacing civilians are repeated in the EOC, with the difference that the Elements refer only to "military necessity" and not to "imperative military reasons" as is stated in the Rome Statute. This cannot be taken as enlarging the scope of this exception, as in the case of divergence between the EOC and the definitions in the Rome Statute, the latter prevails.[73] Finally, the EOC require that the perpetrator "was in a position to effect such displacement by giving such order".[74] Dörmann comments that this formulation refers to both *de jure* and *de facto* authority, thus encompassing the individual who "has effective control of a situation by sheer force".[75] Although the mental element for this offence is not defined in the EOC, under Article 30, it would appear to be an intention to order the displacement of a civilian population, with the knowledge that it was not justified by imperative military necessity or the security of the civilians.

4.17 *(ix) Killing or Wounding Treacherously a Combatant Adversary*

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[68] According to the Rome Statute this must be "for reasons related to the conflict".
[69] Article 17(2), APII.
[70] Cottier *et al*, 'Article 8', p.281.
[71] *Concise Oxford Dictionary*.
[72] See comments of K. Dörmann, n.7 *supra*, pp.484-485.
[73] See discussion *supra*, para.1.2.
[74] EOC, p.153.
[75] K. Dörmann, n.7 *supra*, p.485.

The wording of this offence is similar to that of 8(2)(b)(xi) relating to international armed conflicts, except that the term "combatant adversaries" is used, rather than "individuals belonging to the hostile nation or army". This reflects the fact that in non-international armed conflicts both parties to the conflict normally have the same nationality. However, the expression "combatant adversary" is more restrictive than the equivalent for international armed conflicts, as it only criminalises the treacherous killing or wounding of those adversaries participating in the fighting and not the civilians of the adverse party.[76]

4.18 *(xii) Destroying or Seizing the Property of an Adversary unless such Destruction or Seizure be Imperatively Demanded by the Necessities of the Conflict*

This offence is similar to that under Article 8(2)(b)(xiii) applicable in international armed conflicts. The differences again reflect the difference in nature of the conflict, with the phrases "the property of an adversary" and "the conflict" being used in this subsection of the Rome Statute, rather than "enemy's property" and "war". Similarly, the EOC refer to the property of "an adversary", rather than the property of "a hostile party" and state that the destruction or seizure must not be "required" by military necessity, rather than "justified".[77]

Although both Articles appear identical, except with respect to the nature of the conflict, the items which may be lawfully seized or destroyed during a non-international armed conflict cannot automatically be considered the same as those in an international armed conflict and must be decided with reference to APII and customary international law.[78] Kreß comments upon the confusion regarding the exact ambit of this Article, stating that it appears to introduce the war crime of attacking civilian objects, not included in the list in Article 8(2)(e), "through the back door of Article 8(2)(e)(xii), as the term 'adversary' used in this provision certainly extends to civilians".[79]

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[76] *Supra*, para.3.46.
[77] EOC, comparison between p.155 and pp.137-138.
[78] See comments of ICRC, ICRC working paper submitted to the Preparatory Commission on the Elements of Crimes of Article 8(2)(e), 29 June 1999, available at: <http://www.igc.apc.org/icc>, comments on Article 8(2)(e)(xii).
[79] C. Kreß, no.12 *supra*, p.139.

Under APII, objects particularly protected against destruction include dams, dykes and nuclear electrical generating stations,[80] historic monuments, works of art or places of worship,[81] medical facilities,[82] foodstuffs, agricultural areas, livestock and drinking water installations.[83] It is therefore suggested that the destruction and, in certain cases, seizure of such property on a sufficiently serious scale should, if not imperatively demanded by the necessities of the conflict, amount to an offence under this Article.

4.19 Article 8(3)

This Article states that the offences set out in paragraphs 8(2)(c) and (e) shall not "affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means" and it is based on Article 3(1) of APII. It was included in the Statute to assuage the fears of some States that the provisions on internal conflict might be used to justify interference in their domestic affairs.[84]

However, it is clear that an individual wishing to rely on this section would first have to show that he was acting on behalf of the government of a State and not an opposition movement.[85] Secondly, it would have to be shown that the actions were taken for the purposes enunciated and not for the "pursuance of illegitimate goals".[86] Finally, Article 8(3) is only satisfied if the means used are legitimate and therefore this Article cannot negate responsibility for war crimes committed in a non-international armed conflict.[87]

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[80] Article 15, APII.
[81] Article 16, APII.
[82] Article 11, APII.
[83] Article 14, APII.
[84] D. Robinson and H. von Hebel, 'War Crimes in Internal Conflicts: Article 8 of the ICC Statute', 2 YIHL (1999) 193-209, p.205.
[85] Cottier *et al*, 'Article 8', p.287.
[86] *Ibid.*, emphasis removed.
[87] *Ibid.*, pp.287-288 and D. Robinson and H. von Hebel, n.84 *supra*, p.205. See J. Pejic, no.19 *supra*, p.72.

5

CRIMES AGAINST HUMANITY

5.1 Introduction

The origins of crimes against humanity are less clear than those of war crimes, but the concept was first invoked in the early nineteenth century in order to condemn brutal treatment by a State of its own citizens.[1] The concept of crimes against humanity was also referred to in the preambular paragraphs of the 1868 St Petersburg Declaration and the 1907 Hague Convention, which alluded to limits imposed by the 'laws of humanity' during armed conflicts, but the notion remained undefined.[2]

WW1 lead to the concept of crimes against humanity being invoked again, first in a 1915 Declaration condemning the Turkish massacre of Armenians and then by the 1919 Commission on the Responsibility of the Authors of the War which recommended a tribunal to try those individuals suspected of acting "in breach of the laws and customs of war and the laws of humanity".[3] The Commission listed over thirty suggested charges including murder, torture, rape and deportation of civilians, but did not differentiate in that list between war crimes and crimes against humanity.[4] Ultimately the peace treaties with the defeated powers did not in any case contain any reference to the 'laws of humanity'.[5]

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[1] Rwanda Commission of Experts' Report, para.132 and L. Sunga, *Individual Responsibility in International Law for Serious Human Rights Violations*, (1992, Martinus Nijhoff, Dordrecht), p.41.

[2] 1868 St Petersberg Declaration and the Preamble to the 1907 Hague Convention IV, and see M. Boot, R. Dixon and C. Hall, 'Article 7, Crimes Against Humanity', pp.117-172 in Triffterer, *Commentary on the Rome Statute*, p.121 (hereafter Boot *et al*, 'Article 7').

[3] Declaration of Great Britain, France and Russia, 24 May 1915, cited in E. Schwelb, 'Crimes against Humanity', 23 BYIL (1946) 178-226, p.181 and Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties: Report Presented to the Preliminary Peace Conference, 29 March 1919, reprinted in 14 AJIL (1920) 95-126, p.122.

[4] Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, *ibid.*, pp.114-115.

[5] See Articles 227, 228 and 229, 1919 Treaty of Versailles, reprinted in 13 AJIL (Supp.1919) 151-385 and comments by L. Sadat Wexler, 'The Interpretation of the Nuremberg Principles by the French Court of Cassation: from Touvier to Barbie and Back Again', 32 Colum.J.Transnat'l.Law (1994) 289-380, pp.298-300. See also the 1920 Treaty of Sevres, reprinted in 15 AJIL (Supp. 1921) 179-295, which was eventually replaced by the 1923 Treaty of Lausanne, reprinted in 18 AJIL (Supp. 1925) 1-53.

The atrocities committed in WW2 acted as the catalyst for the fuller development of this new and previously undefined crime.[6] The 1945 London Agreement promulgated the Nuremberg Charter with jurisdiction, *inter alia*, over crimes against humanity.[7] The Charter defined these crimes for the first time in international law as "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated".[8] Similar definitions were included in the Tokyo Charter and CCL No.10.[9]

Crimes against humanity have been described as "an attack on all humanity",[10] indeed Orentlicher comments that the prosecution of such crimes is so important that "it justifies an exception to the bedrock principle of international law respect for national sovereignty".[11] Nevertheless, this category of crimes has never been authoritatively defined by an international convention[12] and suffers from a multiplicity of conflicting definitions.[13] Therefore, the inclusion of crimes against humanity in the Rome Statute, supported by the EOC, provides an invaluable opportunity to clarify these offences and provide a proper framework for their prosecution.

5.2 Article 7(1) Chapeau

5.3 *Nexus with Armed Conflict?*

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[6] W. Fenrick, 'Should Crimes against Humanity Replace War Crimes?', 37 Colum.J.Transnat'l.Law (1999) 767-785, pp.772-774 and see A. Cassese, 'Crimes against Humanity', pp.353-378, in Cassese *et al*, *ICC Commentary*, p.354.

[7] See M. Bassiouni, *Crimes against Humanity in International Criminal Law*, (1992, Martinus Nijhoff, Dordrecht), pp.5-6 and 17.

[8] Article 6(c), Nuremberg Charter.

[9] Article 5(c), Tokyo Charter and Article II(c), CCL No.10.

[10] D. Matas, 'Prosecution in Canada for Crimes against Humanity', 11 NYL Sch.J Int'l&Comp.L (1990) 347-355, p.350.

[11] D. Orentlicher, Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime', 100 Yale LJ (1991) 2537-2615, p.2593 and see M. Frulli, 'Are Crimes against Humanity More Serious than War Crimes?', 12 EJIL (2001) 329-350.

[12] M. Bassiouni, '"Crimes against Humanity": The Need for a Specialized Convention', 31 Colum.J.Transnat'l.Law (1994) 457-494.

The definition of crimes against humanity in the Nuremberg Charter only applied 'in execution of or in connection with' war crimes or crimes against peace.[14] Nevertheless, two of the defendants at Nuremberg were held liable solely on charges of crimes against humanity which only had a tenuous link to war crimes or crimes against peace.[15] This limitation was not repeated in CCL No.10, although the discrepancy lead to conflicting decisions over whether tribunals conducted pursuant to this ordinance were indeed bound by a conflict nexus.[16]

The Nuremberg Principles as formulated by the ILC did not include a conflict nexus, a position maintained in the ILC's Draft Code of Offences against the Peace and Security of Mankind.[17] This approach was also reflected in the Genocide Convention, which defined genocide, a specific type of crime against humanity,[18] as a crime under international law whether committed in time of peace or war,[19] and in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, which specifically allowed that crimes against humanity could be "committed in time of war or in time of peace".[20]

Therefore, the reinstatement of a conflict nexus for crimes against humanity by the ICTY Statute in 1993 appeared to be a retrograde step.[21] However, the

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[13] L. Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium*, (2002, Transnational, New York), p.148 and compare Article 5, ICTY Statute; Article 3, ICTR Statute and Article 18, ILC Draft Code.

[14] Article 6(c), Nuremberg Charter. See E. Schwelb, n.3 *supra*, p.188 and B. Van Schaack, 'The Definition of Crimes against Humanity: Resolving the Incoherence', 37 Colum.J.Transnat'l.Law (1999) 787-850, p.801.

[15] Judgement of Streicher and Von Schirach, 22 Trial of German Major War Criminals (1950, HMSO, London), (hereinafter *IMT Judgement*) pp.502 and 514; comments by B. Van Schaack, n.14 *supra*, para.576.

[16] Contrast the *The Flick Trial*, 9 LRTWC 1, pp.25-26 and 44-48 with *In re Ohlendorf*, 15 AD (1948) 656, p.664 and see M. Lippman, 'Crimes against Humanity', 17 BC Third World LJ (1997) 171-273, pp.219-220; P. Hwang, 'Defining Crimes against Humanity in the Rome Statute of the International Criminal Court', 22 Fordham Int'l.LJ (1998) 457-504, pp.460-451 and Ratner and Abrams, *Accountability for Human Rights Atrocities*, pp.51-52.

[17] See D. Johnson, 'The Draft Code of Offences against the Peace and Security of Mankind', 4 ICLQ (1955) 445-468, pp.449-450 and 465-468; Article 2(11), 1954 ILC Draft Code; Article 21, 1991 ILC Draft Code and Article 18, 1996 ILC Draft Code.

[18] B. Whitaker, 'Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide', UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, 2 July 1985 (E/CN.4/Sub.2/1985/6), p.11; ECOSOC, 'Report of the *Ad Hoc* Committee on Genocide', 24 May 1948, E/794, p.7 and 1996 ILC Draft Code Commentary, para.2 on Article 17, and see *The Justice Trial*, 6 LRTWC 1, pp.32 and 48 and *Kayishema and Ruzindana*, Trial Judgement, para.89.

[19] Article 1, Genocide Convention.

[20] Article 1(b), 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.

[21] Article 5, ICTY Statute, but see Article 3, ICTR Statute and Article 2, Statute of the Special Court for Sierra Leone.

Appeal Chamber in *Tadic* emphasised that the nexus was reintroduced solely for the purposes of the ICTY, "[s]ince customary international law no longer requires any nexus between crimes against humanity and armed conflict".[22] This approach was confirmed in *Nikolic* where the Trial Chamber stated that since the Judgement at Nuremberg the concept of crimes against humanity "has taken on a certain autonomy as there is no longer any need to determine a link with a crime against the peace or a war crime".[23]

Although this issue caused vigorous debate in the Preparatory Committee, the majority of delegates shared the view of the US delegate who declared that there was "no sound reason in theory or precedent" to require a conflict nexus.[24] Therefore, the ICC will have jurisdiction over crimes against humanity whether committed in time of peace or conflict and this is confirmed by the introduction to these crimes in the EOC which states that there need not be a military attack.[25]

5.4 *Widespread or Systematic*

The requirement that crimes against humanity must be widespread or systematic was not present in the Nuremberg or Tokyo Charters, nor was it a requirement of CCL No.10.[26] However, those tribunals were established to deal with offences committed during or in connection with WW2, and so necessarily related to situations where both widespread and systematic atrocities had taken place.[27]

The 1996 ILC Draft Code of Crimes' definition of crimes against humanity states that such crimes must have been committed 'in a systematic manner or on a large scale'.[28] The commentary to the Draft Code defines 'large scale' as meaning that the acts are directed against a multiplicity of victims "as a result of the cumulative effect of a series of inhumane acts or the singular effect of an inhumane

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[22] *Tadic*, Interlocutory Appeal Decision, para.78, but see *ibid.*, para.141, in which the Tribunal was more tentative with respect to the necessity of a conflict nexus.
[23] *Nikolic* Rule 61 Review, para.26.
[24] H. von Hebel and D. Robinson, 'Crimes within the Jurisdiction of the Court', pp.79-126 in Lee, *The Making of the Rome Statute*, pp.92-93 and C. Hall, 'The First Two Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court', 91 AJIL (1997) 177-187, p.180.
[25] EOC, p.116.
[26] Article 6(c), Nuremberg Charter; Article 5(c), Tokyo Charter and Article II(c), CCL No.10.
[27] See *In re Albrecht* (No.2), 16 AD (1949) 396, p.398.
[28] Article 18, 1996 ILC Draft Code.

act of extraordinary magnitude" and states that 'systematic' means pursuant to a preconceived plan or policy, excluding random acts.[29]

The expression 'widespread or systematic' is part of the definition of crimes against humanity in both the Statute of the ICTR and the Statute of the Special Court for Sierra Leone.[30] Conversely, the ICTY Statute omits any mention of this element, but both the report of the Yugoslavia Commission of Experts and the report of the Secretary-General on the establishment of the ICTY confirm that the attacks must be carried out in a widespread or systematic manner.[31]

In *Akayesu* the ICTR Trial Chamber stated that "widespread may be defined as massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims" and defined 'systematic' as "thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources".[32] The Trial Chamber in *Rutaganda* concurred with this definition and noted that "customary international law requires that the attack be either of a widespread *or* systematic nature and need not be both", thus confirming a disjunctive approach to this element.[33]

In the ICTY the Trial Chamber in *Blaskic* explained that the widespread characteristic "refers to the scale of the acts perpetrated and to the number of victims" and, relying upon the ILC Draft Code, stated that a single inhumane act "of extraordinary magnitude" could satisfy the 'widespread' requirement.[34] With respect to the systematic nature of crimes against humanity, the Trial Chamber in *Jelesic* suggested that the "repeated, unchanging and continuous nature of the violence committed" would be a factor demonstrating this.[35] The *Foca* Judgement held that the expression 'systematic' "signifies the organised nature of the acts of violence and the improbability of their random occurrence" and that "[p]atterns of crimes - that is the non-accidental repetition of similar criminal conduct on a regular basis - are a common expression of such systematic occurrence".[36]

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[29] 1996 ILC Draft Code Commentary, para.4 on Article 18.
[30] Article 3, ICTR Statute and Article 2, Statute of the Special Court for Sierra Leone.
[31] Yugoslavia Commission of Experts' Report, para.84 and Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993) S/25704, para.48.
[32] *Akayesu*, Trial Judgement, para.580, but K. Ambos and S. Wirth, criticise the reference to substantial resources in 'The Current Law of Crimes against Humanity, An Analysis of UNTAET Regulation 15/2000', 13 Crim.LF (2002) 1-90, pp.18-19.
[33] *Rutaganda*, Trial Judgement, paras.68-70, original emphasis.
[34] *Blaskic*, Trial Judgement, para.206 and see *Kordic and Cerkez*, Trial Judgement, para.179.
[35] *Jelesic*, Trial Judgement, para.53.
[36] *Foca*, Trial Judgement, para.429, approved in *Foca*, Appeal Judgement, para.94.

The ICTY, the ICTR and the ILC appear to take a similar approach to the definition of the phrase "widespread or systematic", which is also used in a disjunctive manner in Article 7(1) of the Rome Statute. On the whole, the cases treat 'widespread' as interchangeable with 'large scale' and interpret it as referring to the number of victims affected, rather than simply to the extent of the geographical area in which victims are situated.[37] If the ICC adopted this interpretation it could treat a single attack, such as the terrorist attack on the World Trade Centre on 11 September 2001, as coming within the definition of widespread.[38] The cases do not suggest a minimum number of victims to constitute a widespread attack, but it is submitted that for the ICC to take jurisdiction they would have to be in the high hundreds or thousands.[39]

A dictionary definition of 'systematic' is "methodical; done or conceived according to a plan or system".[40] This is similar to the concept of systematic as entailing crimes which are thoroughly organised and following a regular pattern of similar criminal conduct, which arises from the ICTY and ICTR jurisprudence. Von Hebel and Robinson comment that at the ICC Preparatory Commission the expression 'systematic' was considered to be a stringent requirement which involved "a highly organized and orchestrated execution... in accordance with a developed plan".[41]

5.5 *Part of the Attack, with Knowledge of the Attack*

The *Foca* Trial Chamber defined 'attack' as a "course of conduct involving the commission of acts of violence" and further noted that this expression held a different meaning in the context of a crime against humanity than in the laws of

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[37] Although a dictionary definition of 'widespread' is 'widely distributed', *Concise Oxford Dictionary*.
[38] See R. Lee, 'An Assessment of the ICC Statute', 25 Fordham Int'l.LJ (2001) 750-766, p.756 and S. Chesterman, 'An Altogether Different Order: Defining the Elements of Crimes against Humanity', 10 Duke J.Comp.&Int'l.L (2000) 307-343, p.316. See also discussions of September 11 on websites: 'Terrorism and the Laws of War', at <www.crimesofwar.org/expert/attack-intro.html> and 'Terrorist Attacks on the World Trade Centre and the Pentagon' at <www.asil.org/insights/insigh77.htm>.
[39] Based on the *Akayesu* requirement for large scale serious action, Trial Judgement, para.580 and the *Blaskic* comment that a single act would have to be of 'extraordinary magnitude', Trial Judgement, para.206. See also the threshold for seriousness for crimes against humanity in para.1 of the Introduction to Crimes against Humanity, EOC, p.116 and Article 17(1)(d) of the Rome Statute and see P. Akhavan, 'Contributions of the International Criminal Tribunals for the Former Yugoslavia and Rwanda to Development of Definitions of Crimes against Humanity and Genocide', 94 ASIL Proceedings (2000) 279-284, p.280.
[40] *Concise Oxford Dictionary*.

war.[42] The Appeal Chamber further explained that an attack in this context "is not limited to the use of armed force; it encompasses any mistreatment of the civilian population".[43] This approach was also taken by the Trial Chamber in *Akayesu*, which stated that an 'attack' may be "non violent in nature, like imposing a system of apartheid... or exerting pressure on the population to act in a particular manner... if orchestrated on a massive scale or in a systematic manner".[44]

The Rome Statute defines 'attack directed against any civilian population' in Article 7(2)(a) as "a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack".[45] This wording is repeated in the introduction to crimes against humanity in the EOC, which also emphasises that the acts "need not constitute a military attack".[46] Askin comments that the expression 'multiple' in Article 7(2)(a) "implies that more than one attack, or at least a prolonged attack, is necessary".[47] However, Hwang alludes to the literal interpretation of 'multiple' taken by an Indian delegate at the Preparatory Commission, that "anything more than one could be multiple".[48]

Therefore, the requirement for an 'attack' to consist of a multiple commission of acts listed in Article 7 will not normally amount to an onerous burden on the prosecution. It is arguable that this definition would exclude from crimes against humanity a single act which has serious consequences for many civilians, such as the detonation of a 'dirty bomb' in the middle of a city.[49] However, while an incident such as the attack on the World Trade Centre could result from one course of conduct, nevertheless, that attack would result in many of the acts or crimes referred to in Article 7, such as several murders, and thus satisfy the 'multiple' requirement.[50]

The *mens rea*, and additional objective elements of crimes against humanity, are summed up in the condition that the perpetrator's crime must form 'part' of the widespread or systematic attack against a civilian population, and that he must have

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[41] H. von Hebel and D. Robinson, n.24 *supra*, p.97, fn.52.
[42] *Foca*, Trial Judgement, paras.415-416.
[43] *Foca*, Appeal Judgement, para.86.
[44] *Akayesu*, Trial Judgement, para.581, followed by *Rutaganda*, Trial Judgement, para.70.
[45] The concept of a state or organisational policy will be discussed *infra*, para.5.7.
[46] EOC, Introduction to Crimes against Humanity, para.3, p.116.
[47] K. Askin, 'Crimes within the Jurisdiction of the International Criminal Court', 10 Crim.LF (1999) 33-59, p.40.
[48] P. Hwang, n.16 *supra*, p.502.
[49] A conventional explosive device that spreads nuclear contamination.
[50] See K. Ambos and S. Wirth, n.32 *supra*, p.17 and S. Chesterman, n.38 *supra*, p.316.

had 'knowledge of the attack'. These requirements have been discussed in the Judgements of the ICTY and ICTR as, although their Statutes exclude the phrase 'with knowledge of the attack', their case law has effectively inserted this requirement into their definitions of crimes against humanity.[51]

On an objective basis, it is only necessary to prove that the perpetrator's crime was "by its nature or consequences" part of the attack.[52] Therefore, there is no need to prove the commission of more than one offence by the accused, as it is the overall attack rather than his part in it, which must have been widespread or systematic.[53] Moreover, although there has to be a nexus between the acts of the accused and the attack, the Trial Chamber in *Krnojelac* stated that "[a] crime committed several months after, or several kilometres away from, the main attack against the civilian population could still, if sufficiently connected, be part of that attack".[54]

With respect to the mental element for crimes against humanity, the ICTY and ICTR cases all require that, in addition to the *mens rea* for the crime committed, the accused knew of the widespread or systematic attack[55] and was aware that it was directed against a civilian population.[56] However, proof that the perpetrator had knowledge of all the details of the attack is not required.[57] Moreover, the case law shows that knowledge of the overall attack can be inferred and that wilful blindness will not be a defence.[58]

The Trial Chamber in *Foca* also required that "as a minimum the perpetrator must have known or considered the possibility that the victim of his crime was a

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[51] Article 5, ICTY Statute (the Statute also omits the words 'as part of', but these have been inserted by case law), Article 3, ICTR Statute.
[52] *Foca*, Trial Judgement, para.418.
[53] *Mrksic*, Rule 61 Review, para.30 and *Foca*, Trial Judgement, para.431.
[54] *Krnojelac*, Trial Judgement, para.55 and *Foca*, Appeal Judgement, para.100. For suggested indicia of the nexus between the accused's acts and the attack, see Boot *et al*, 'Article 7', pp.125-126.
[55] *Tadic*, Trial Judgement, para.656; *Tadic*, Appeal Judgement, para.248; *Jelisic*, Trial Judgement, para.56; *Blaskic*, Trial Judgement, para.247; *Kupreskic*, Trial Judgement, para.556; *Kordic and Cerkez*, Trial Judgement, para.185; *Kayishema and Ruzindana*, Trial Judgement, paras.133-134; *Bagilishema*, Trial Judgement, para.94 and see *R v Finta*, Supreme Court, Canada, 104 ILR 285, p.362.
[56] *Tadic*, Appeal Judgement, para.248 and 271; *Kupreskic*, Trial Judgement, para.557; *Kordic and Cerkez*, Trial Judgement, para.185; *Krnojelac*, Trial Judgement, para.59 and *Kayishema and Ruzindana*, Trial Judgement, para.134.
[57] *Foca*, Trial Judgement, para.434; *Krnojelac*, Trial Judgement, para.59 and *Foca*, Appeal Judgement, para.102.
[58] *R v Finta*, 104 ILR 285, p.363; *Tadic*, Trial Judgement, para.657 and *Kayishema and Ruzindana*, Trial Judgement, para.134. The latter was supported in *Blaskic*, Trial Judgement, para.249; *Kupreskic*, Trial Judgement, para.557 and *Kordic and Cerkez*, Trial Judgement, para.185. See Kittichaisaree, *International Criminal Law*, pp.91-92.

civilian".[59] This requirement is debatable, as it is the overall attack which must be directed against a civilian population and it only has to be shown that the defendant's crime formed part of that attack. For example, the murder of a soldier, who was trying to protect some civilian political opponents of the government from a mob taking part in a widespread attack aimed at such opponents, could arguably constitute murder as a crime against humanity if carried out to remove an obstacle to further crimes against that civilian population.[60]

The issue of whether personal motives of the defendant are relevant to a crime against humanity and whether a crime can truly be said to be part of the overall attack if it is carried out for purely personal reasons was discussed by the ICTY in *Tadic*. The Appeal Chamber, relying upon a series of German national WW2 cases[61] and the general irrelevance of motive in criminal law,[62] reversed the decision of the Trial Chamber on this issue.[63] The Appeal Judgement held that provided the perpetrator's offence was committed in the context of widespread or systematic crimes directed against a civilian population and that the accused knew that his acts "fitted into such a pattern", then a crime against humanity could be committed for purely personal reasons.[64]

Subsequent ICTY Judgements have followed the *Tadic* Appeal Judgement and shed more light upon this approach to personal motives. The Trial Chamber in *Blaskic* stated that "[t]he accused need not have sought all the elements of the context in which his acts were perpetrated; it suffices that... he knowingly took the risk of participating in the implementation of that context".[65] This interpretation was adopted by the *Foca* and *Krnojelac* cases[66] and expanded upon in *Kordic and Cerkez*, where the Trial Chamber commented that there is no requirement for the

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[59] *Foca*, Trial Judgement, para.435.
[60] This could be supported by the *Foca*, Appeal Judgement, para.103 comment that "It is the attack, not the acts of the accused, which must be directed against the target population", albeit that it was said in the context of irrelevance of personal motive. However, if the attack was truly against a civilian population, the vast majority of victims would be civilian.
[61] *Tadic*, Appeal Judgement, paras.257-262 and fns.318-325.
[62] *Tadic*, Appeal Judgement, paras.268-269 and see *Bagilishema*, Trial Judgement, para.95.
[63] *Tadic*, Appeal Judgement, paras.255 and 270, reversing *Tadic*, Trial Judgement, paras.656-659.
[64] *Tadic*, Appeal Judgement, para.255, but see the Dissenting Opinion of Judge Shahabuddeen, *ibid.*, para.35 and in support of the Dissenting Opinion, M. Sassòli and L. Olson, 'The Judgment of the ICTY Appeals Chamber on the Merits in the Tadic Case', 839 IRRC (2000) 733-769, pp.757-758.
[65] *Blaskic*, Trial Judgement, para.251 and see *Marques, Da Costa et al*, Trial Judgement Dili District Court, Special Panel for Serious Crimes, para.641.
[66] *Foca*, Trial Judgement, para.434 and *Krnojelac*, Trial Judgement, para.59.

perpetrator to "approve of the context in which his acts occur, as well as have knowledge of it".[67]

It is submitted that the ICC should follow this approach.[68] The EOC do not require proof of motive in respect to crimes against humanity,[69] so the question becomes whether the defendant's crime is 'part' of the overall attack, irrespective of his motives. For example, in the *Foca* case, the Trial Chamber stated that the accused, who raped and enslaved Muslim women, knew about the attack against the Muslim population and "committed the offences charged by directly taking advantage of the situation created".[70] Therefore, an argument that the defendants acted from purely sexual motives rather than intending their acts to be part of the overall attack would have been unsuccessful.[71]

5.6 *Directed against any Civilian Population*

From the Nuremberg Charter onwards the majority of definitions of crimes against humanity have included the provision that the attack must be committed or directed 'against any civilian population'.[72] However, although CCL No.10 included this provision, charges of crimes against humanity were upheld in two cases relating to the treatment of captured members of the Allied armed forces.[73] This flexible approach to the expression 'civilians' was also shown in the trial of *Barbie*, a case under French national legislation, where the Court of Cassation stated that "[n]either the driving force which motivated the victims, nor their possible membership of the Resistance" could exclude the possibility that Barbie committed crimes against humanity.[74]

The ICTY and ICTR jurisprudence examines the definition of 'against any civilian population' in depth with largely similar conclusions. The Judgements stress

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[67] *Kordic and Cerkez*, Trial Judgement, para.185.
[68] See K. Ambos and S. Wirth, n.32 *supra*, pp.37-40.
[69] See common Elements to crimes against humanity, EOC, 7(1)(a) paras.2-3, p.116.
[70] *Foca*, Trial Judgement, para.592.
[71] *Foca*, Appeal Judgement, para.137, this argument was unsuccessfully put forward as a defence to the charge of torture.
[72] But see Article 5(c), Tokyo Charter, as amended on 26 April 1946, and K. Askin, n.47 *supra*, p.40 and a recent exception in Article 18, 1996 ILC Draft Code.
[73] *In re Rohde and Others*, 13 AD (1948) 294, p.295, and *Trial of Altstötter and Others*, 6 LRTWC 1, p.81.
[74] *Fédération Nationale des Déportés et Internés Résistants et Patriotes and Others v Barbie*, 78 ILR 136, p.140 and see p.137.

that while the civilian population must be the primary object of the attack,[75] the presence of some non-civilians does not change the character of the population provided that it is "predominantly civilian in nature".[76] The ICTY Judgements, in their analysis of 'civilian', reflect the fact that the ICTY Statute links crimes against humanity with armed conflict and primarily contrast civilians with members of the armed forces or combatants.[77] Therefore, their definition of 'civilian' relies on an analysis of this word in the Geneva Conventions and Additional Protocols.[78]

However, this does not mean that the definition is narrowly drawn.[79] Indeed, the ICTY Judgements clearly follow *Barbie* in their inclusion of resistance fighters in the definition of 'civilian'.[80] The Trial Chamber in *Blaskic* went even further and stated that crimes against humanity could be committed against "those who were members of a resistance movement and former combatants - regardless of whether they wore 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".[81] Only the ICTR in *Kayishema and Ruzindana* specifically considered the definition of a 'civilian population' during peace-time.[82] The Trial Chamber stated that 'civilian population' must be read widely and includes "all persons except those who have the duty to maintain public order and have the legitimate means to exercise force".[83]

The ICTY also considered the relevance of the expression 'any civilian population' and held that the word 'any' makes it clear that there is no necessity to link civilians to one side of a conflict (if one exists) and that crimes against humanity

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[75] *Foca*, Trial Judgement, para.421 and *Foca*, Appeal Judgements, para.91.
[76] *Tadic*, Trial Judgement, para.638 and see *Kupreskic*, Trial Judgement, para.549; *Blaskic*, Trial Judgement, para.214; *Kordic and Cerkez*, Trial Judgement, para.180; *Foca*, Trial Judgement, para.425; *Krnojelac*, Trial Judgement, para.56 and ICTR Judgements - *Kayishema and Ruzindana*, Trial Judgement, para.128 and *Bagilishema*, Trial Judgement, para.79.
[77] See S. Chesterman, n.38 *supra*, pp.322-325.
[78] *Tadic*, Trial Judgement, para.639; *Blaskic*, Trial Judgement, para.209 and *Foca*, Trial Judgement, para.425. The Yugoslavia Commission of Experts' Report, paras.77-78, also took this approach.
[79] See comments in *Kupreskic*, Trial Judgement, para.547.
[80] *Mrksic*, Rule 61 Review, para.29; *Tadic*, Trial Judgement, para.643; *Kordic and Cerkez*, Trial Judgement, para.180; *Kupreskic*, Trial Judgement, para.549 and *Krnojelac*, Trial Judgement, para.56.
[81] *Blaskic*, Trial Judgement, para.214, followed by *Kordic and Cerkez* Trial Judgement, para.180. The same approach was taken in *Akayesu*, Trial Judgement, para.582 and *Bagilshema*, Trial Judgement, para.79.
[82] *Kayishema and Ruzindana*, Trial Judgement, para.127.
[83] *Ibid.*

can be committed against persons of the same nationality.[84] The jurisprudence also shows that the word 'population' does not mean that the entire population of a particular geographical area must be attacked.[85] *Tadic* and *Foca* suggest that the expression 'population' was included to prevent isolated or random acts from being characterised as a crime against humanity.[86] This interpretation, however, was necessary in order to 'read in' a widespread or systematic requirement into the ICTY Statute.[87]

The approach that the ICC will take to the expression 'any civilian population' is unclear and not addressed in the EOC. Robinson states that the Preparatory Commission felt that this complex and still evolving notion was better left to resolution in case law, but agreed that it was a "flexible test".[88] It is submitted that the ICC should use the same definition of 'civilian' in peace-time as in war-time, to maintain consistency in an offence which can be committed irrespective of the existence of a conflict.[89] The negative test propounded by the ICTR in *Kayishema and Ruzindana*, which excludes from the definition of 'civilian' those who have a "duty to maintain public order and have the legitimate means to exercise force",[90] could be workable. This would have the effect of classifying the police force and the armed forces as non-civilian, at least when using the force to maintain public order or during a conflict, but would not exclude from the definition of 'civilian' those resistance fighters which would not be considered legitimate combatants with POW status under the Geneva Conventions or Additional Protocols.[91]

The approach the ICC should take to the expression 'any population' is more complex. Certainly, the word 'any' should be read in line with the ICTY jurisprudence as confirming that the victims of crimes against humanity can hold the same nationality, or be on the same side in a conflict, as the perpetrators.[92] However, the expression 'population', if read solely as a requirement that the acts be more than isolated and random, would appear to be otiose in the ICC Statute in light of the

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[84] *Tadic*, Trial Judgement, para.635 and *Foca*, Trial Judgement, para.423.
[85] *Tadic*, Trial Judgement, para.644; *Foca*, Trial Judgement, para.424 and *Foca*, Appeal Judgement, para.90.
[86] *Ibid.*, paras.644, 422 and 90 respectively.
[87] See P. Hwang, n.16 *supra*, pp.482-484.
[88] Lee, *ICC: Elements*, p.78 and see H. von Hebel and D. Robinson, n.24 *supra*, p.97, fn.54.
[89] But see K. Ambos and S. Wirth, n.32 *supra*, pp.24-26.
[90] *Kayishema and Ruzindana*, Trial Judgement, para.127.
[91] See definition of civilians *supra*, para.3.4, but see L. Sadat, n.13 *supra*, p.153.
[92] *Tadic*, Trial Judgement, para.635 and *Foca*, Trial Judgement, para.423.

'widespread or systematic' requirement.[93] Mettraux suggests that a 'population' must "form a self-contained group of individuals, either geographically or as a result of other common features" and therefore excludes from this "[a] group of individuals randomly or fortuitously assembled - such as a crowd at a football game".[94]

Nevertheless, the ICC must be careful not to allow the interpretation of 'population' to re-introduce the requirement that all crimes against humanity must be based on discrimination. First, it is debatable whether discrimination was, in fact, needed for all crimes against humanity in the Nuremberg Charter.[95] Secondly, whilst the ICTR definition of crimes against humanity expressly included a discrimination requirement, the ICTY definition did not and indeed the *Tadic* Appeal Chamber held that discrimination is only a condition for the specific crime of persecution.[96] Thirdly, Robinson confirms that "[t]he negotiations in Rome produced agreement that a discriminatory motive is not an element required for all crimes against humanity".[97]

Therefore, the approach taken by Chesterman of using the word 'population' loosely has merit.[98] He suggests that this expression confirms that, as in humanitarian law, the civilian population comprises all those who are civilians and that "the presence of individuals who do not come within the definition of "civilians" does not deprive a population of its civilian character".[99] This reflects the findings of the ICTY that the attack need only be directed against a population which is *predominantly* civilian in nature.[100] However, an interpretation of 'population' as requiring merely a loose objective link between the civilians attacked, rather than as discriminatory *mens rea* of the part of any individual perpetrator, could have the benefit of making the 'widespread or systematic' element easier to prove.[101] For example, if the attack was only against civilians of a particular religion, it would only

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[93] See K. Ambos and S. Wirth, n.32 *supra*, pp.21-22.
[94] G. Mettraux, 'Crimes against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda', 43 Harv.ILJ (2002) 237-316, p.255 and see *R v Finta*, 104 ILR 285, pp.358-359, which required an "identifiable group of people".
[95] Compare the *Trial of Altstötter and Others*, 6 LRTWC 1, p.40 with *Attorney-General v Enigster*, 18 ILR 540, p.541 and see D. Robinson, 'Defining "Crimes against Humanity" at the Rome Conference', 93 AJIL (1999) 43-57, p.46, fn.17.
[96] *Tadic*, Appeal Judgement, para.305, followed by *Kordic and Cerkez*, Trial Judgement, para.186.
[97] D. Robinson, n.95 *supra*, p.46 and see H. von Hebel and D. Robinson, n.24 *supra*, pp.93-94.
[98] S. Chesterman, n.38 *supra*, pp.325-326.
[99] *Ibid.*, and Article 50, AP1.
[100] *Tadic*, Trial Judgement, para.638.
[101] G. Mettraux, n.94 *supra*, pp.255-256.

have to be shown that the attack was widespread or systematic in the context of that civilian population, not in the context of the civilian population as a whole.[102]

5.7 *Pursuant to or in Furtherance of a State or Organisational Policy to Commit such Attack*

The explicit requirement of a State or organisational policy underlying the overall attack was not included in the Nuremberg Charter, the Tokyo Charter, CCL No.10, or the ICTY or ICTR Statutes.[103] Indeed, whether or not an underlying policy is a necessary part of crimes against humanity has been strongly contested.[104] The Nuremberg Judgement is of limited assistance because, whilst it describes the Nazi policy of terror and persecution, it is unclear whether this was raised as the factual circumstance in which the crimes took place, or whether it was a necessary element of crimes against humanity.[105]

Nevertheless, some WW2 tribunals referred to State involvement in crimes against humanity as an element of the offence, including the *Trial of Altstötter*, which stated that crimes against humanity must have been "conducted by or with the approval of government".[106] More recent cases taking this approach include the French Judgements in the cases of *Barbie* and *Touvier* which both held that an essential element of crimes against humanity was that "the acts charged were performed in a systematic manner in the name of a State practising by those means a policy of ideological supremacy".[107]

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[102] G. Mettraux, n.94 *supra*, p.256. If this interpretation were applied, the civilians in the World Trade Centre would have to be considered as part of the civilian population of Manhattan in order to be victims of crimes against humanity.

[103] Article 6(c), Nuremberg Charter; Article 5(c), Tokyo Charter; Article II(c), CCL No.10; Article 5, ICTY Statute and Article 3, ICTR Statute.

[104] Contrast the approach of D. Robinson, n.95 *supra*, pp.48-51, with that of G. Mettraux, n.94 *supra*, pp.270-282.

[105] *IMT Judgement*, p.468, although it is possible that this issue of policy was raised in connection with planning an aggressive war, rather than in connection with crimes against humanity, p.79.

[106] *Trial of Altstötter and Others*, 6 LRTWC 1, p.40 and see *In re Ahlbrecht (No.2)*, 16 ILR 396, p.397 and *In re Ohlendorf and Others*, 15 AD (1948) 656, p.664.

[107] *Barbie*, 100 ILR 330, p.336 and *Touvier*, 100 ILR 337, p.352. See also *Public Prosecutor v Menten*, 75 ILR 331, p.363 and *R v Finta*, 104 ILR 285, p.359. For a critical discussion of the French cases see: L. Sadat, 'Prosecutions for Crimes against Humanity in French Municipal Law: International Implications', 91 ASIL Proceedings (1997) 270-274, pp.271-272; L. Sadat Wexler, n.5 *supra*, pp.341-344 and 353-355; M. Tigar, S. Casey, I. Giordani and S. Mardemootoo, 'Paul Touvier and the Crime against Humanity', 30 Texas Int'l.LJ (1995) 285-310; J. Viout, 'The Klaus Barbie Trial and Crimes against Humanity', 3 Hof.LPS (1999) 155-166 and N. Doman, 'Aftermath of Nuremberg: The Trial of Klaus Barbie', 60 U.Col.LR (1989) 449-469.

A similar requirement was included in the 1996 ILC Draft Code of Crimes which stated that crimes against humanity must have been "instigated or directed by a Government or by any organization or group".[108] The commentary to the Draft Code explains that such instigation or direction "gives the act its great dimension" and excludes inhumane acts of an individual "acting on his own initiative pursuant to his own criminal plan in the absence of any encouragement or direction from either a Government or a group or organization".[109] Ambos and Wirth suggest that the link to "an authority or power" has been necessary to transform a criminal act into an act of international concern, since the abandonment of the war nexus which previously internationalised such acts.[110]

Certain ICTY and ICTR Judgements have quoted the ILC definition and explanation of the policy element of crimes against humanity with approval.[111] However, some of the more recent Judgements question whether a policy element is really a requirement of crimes against humanity, or is included simply as part of the 'systematic' as opposed to the 'widespread' element.[112] Nevertheless, those Judgements which include a policy component accept that this requirement is not limited to a State policy,[113] and indeed the *Tadic* Trial Chamber accepts that this requirement could be satisfied by an entity exercising *de facto* control over a particular territory or even by a terrorist group.[114]

The policy requirement is inserted into the definition of crimes against humanity in the Rome Statute through the expression 'attack directed against any civilian population', which is defined in Article 7(2)(a) as 'a course of conduct... pursuant to or in furtherance of a State or organizational policy to commit such attack'. This expression is expanded upon by the introduction to crimes against humanity in the EOC, which state that a 'policy to commit such attack' "requires that

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[108] Article 18, 1996 ILC Draft Code.
[109] 1996 ILC Draft Code Commentary, para.5 to Article 18, and see D. Johnson, n.17 *supra*, p.465.
[110] K. Ambos and S. Wirth, n.32 *supra*, p.12.
[111] *Tadic*, Trial Judgement, para.655; *Blaskic*, Trial Judgement, para.205 and *Kayishema and Ruzindana*, Trial Judgement, para.125.
[112] *Kupreskic*, Trial Judgement, paras.551-552; *Kordic and Cerkez*, Trial Judgement, para.182; *Foca*, Appeal Judgement, para.98 and *Krnojelac*, Trial Judgement, para.58. The Yugoslavia Commission of Experts's Report, para.84 and *Akayesu*, Trial Judgement, para.580 do not comment upon whether a policy is generally required but treat it as part of the 'systematic' requirement.
[113] *Nikolic*, Rule 61 Review, para.26 and *Kupreskic*, Trial Judgement, paras.551-552, although in para.555 the Trial Chamber is more tentative. *Blaskic*, Trial Judgement, para.205; *Kayishema and Ruzindana*, Trial Judgement, paras.125-126 and *Bagilishema*, Trial Judgement, para.78 are more definite.
[114] *Tadic*, Trial Judgement, para.654.

the State or organization actively promote or encourage such attack against a civilian population".[115] A footnote to this paragraph explains that the attack would be implemented by the State or organisational action and that "[s]uch a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack", although "[t]he existence of such a policy cannot be inferred solely from the absence of governmental or organizational action".[116]

The complexity of this definition, when the supplementing and somewhat contradictory introduction and footnotes in the EOC are taken into account, demonstrates the controversial nature of this provision.[117] Furthermore, it raises several questions. First, although the concept of a State policy is relatively clear, what is an organisational policy and does the exclusion of the 'group' policy, referred to by the ILC, curtail the breadth of this definition? A comparison between the dictionary definitions of 'group' and 'organisation' suggest that the latter must have a more orderly structure.[118] An organisational policy would clearly include the policy of "an entity holding *de facto* authority over a territory", referred to in *Kupreskic*,[119] but could a terrorist 'group' also amount to an organisation?[120] It is submitted that a well-established and organised terrorist group could in certain circumstances amount to an 'organisation' and therefore could form the policy behind an attack against a civilian population.[121]

A second question is: what amounts to 'active promotion or encouragement' of the policy? Robinson explains that at the Preparatory Commission, this expression was understood as encompassing the direction or instigation of policy referred to in the ILC Draft Code, in addition to "passive, deliberate

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[115] EOC, Introduction to Crimes against Humanity, p.116, para.3.
[116] EOC, fn.6, p.116.
[117] H. von Hebel and D. Robinson, n.24 *supra*, p.96; C. Hall, 'The First Five Sessions of the UN Preparatory Commission for the International Criminal Court', 94 AJIL (2000) 773-789, p.780 and Lee, *ICC: Elements*, pp.75-76.
[118] *Concise Oxford Dictionary* and see P. Hwang, n.16 *supra*, p.504.
[119] *Kupreskic*, Trial Judgement, para.552.
[120] *Tadic*, Trial Judgement, para.654 refers to a "terrorist group or organization".
[121] See comments of Ratner and Abrams, *Accountability for Human Rights Atrocities*, p.69, F. Lattanzi, 'Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and Rwanda', pp.473-504, in H. Fischer, C. Kreß, S. Lüder eds., *International and National Prosecution of Crimes under International Law, Current Developments*, (2001, Berlin Verlag, Berlin), p.485 and G. Robertson, *Crimes against Humanity: The Struggle for Global Justice*, (2000, The New Press, New York), pp.335-336 who specifically mentions Bin Laden, but K. Ambos and S. Wirth disagree, n.32 *supra*, p.27.

encouragement".[122] Furthermore, the explanatory footnote in the Elements confirms that included within an active promotion or encouragement of a policy is a "deliberate failure to take action", provided it is "consciously aimed at encouraging such attack".[123] Although a policy cannot be inferred solely from the absence of action, such an inference would clearly be appropriate if the State or organisation knew of the crimes and had the ability to prevent or punish them but failed to do so.[124] Nevertheless, the restriction of this category of offences to those actively encouraging an attack against civilians, as opposed to simply tolerating or condoning it, has been strongly criticised by Cassese and Politi.[125]

Thirdly, how formal is the policy required to be and does this policy requirement effectively amount to imposing a mandatory 'systematic' requirement? Von Hebel and Robinson comment that the delegates at the Preparatory Commission understood the policy element as a "flexible test" and emphasised that the policy need not be formal,[126] an approach taken by the ICTY in *Kupreskic*.[127] Moreover, Robinson stresses that the policy test does not require the high degree of organisation or orchestration required by the term 'systematic'.[128] He describes the definition of attack in Article 7 of the Rome Statute as resulting in "a high-threshold but disjunctive test (widespread or systematic) coupled with a low-threshold but conjunctive test (multiple and policy)".[129] It should also be noted that the policy required is merely 'to commit such an attack' and not to impose a particular political ideology, to discriminate or to commit specific acts.[130]

Finally, it is unclear whether the mental element 'with knowledge of the attack', necessarily requires knowledge of the policy to which the attack is pursuant. It is clear, however, that neither knowledge of all the details of the policy, nor participation in the formulation of the policy is a necessary element of crimes against

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[122] Lee, *ICC: Elements*, p.77.
[123] EOC, p.116.
[124] Lee, *ICC: Elements*, p.76 and see P. Hwang, n.16 *supra*, p.503 and Women's Caucus for Gender Justice, 'Recommendations and Commentary for the Elements of Crimes and Rules of Procedure and Evidence', submitted to the Preparatory Commission for the ICC, 12-30 June 2000, on the chapeau to crimes against humanity.
[125] A. Cassese, 'Crimes against Humanity', pp.353-378 and M. Politi, 'Elements of Crimes', pp.443-473, in Cassese *et al*, *ICC Commentary*, pp.375-376 and 465-466 respectively.
[126] H. von Hebel and D. Robinson, n.24 *supra*, p.97 and fn.51.
[127] *Kupreskic*, Trial Judgement, para.551 and see *Akayesu*, Trial Judgement, para.580.
[128] D. Robinson, n.95 *supra*, pp.50-51.
[129] D. Robinson, in Lee, *ICC: Elements*, p.63.
[130] P. Hwang, n.16 *supra*, p.504.

humanity.[131] It is submitted that while the policy element must be proven materially, the perpetrator need only be aware of the basic factual outline of the widespread or systematic attack against a civilian population. Otherwise, a loophole would be created in which defendants could escape liability by claiming that they did not know that there was a State or organisational policy to commit the attack.[132]

5.8 Article 7(1) Offences

5.9 *Elements of Crimes Common to Article 7(1) Offences*

The Elements common to crimes against humanity require that the conduct of the perpetrator "was committed as part of a widespread or systematic attack directed against a civilian population" and that the perpetrator "knew that the conduct was part of or intended the conduct to be part of" such an attack.[133] These Elements basically repeat the provisions of the chapeau discussed above. However, the expression "intended the conduct to be part" of the attack was included in order to deal with a perpetrator committing his offence in an emerging crime against humanity.[134] This issue is clarified in the introduction to crimes against humanity in the EOC, which states that "[i]n the case of an emerging widespread or systematic attack against a civilian population, the intent clause of the last element indicates that this mental element is satisfied if the perpetrator intended to further such an attack".[135]

5.10 *7(1)(a) Murder*

The crime of murder has been discussed in the context of war crimes. The *actus reus* was defined as being a substantial cause of the death of the victim and the mental element was defined as an intention to kill or cause serious injury, reckless as

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[131] See discussion of knowledge of details of the attack, *supra*, para.5.5 and H. von Hebel and D. Robinson, n.24 *supra*, p.97 and fn.51.
[132] See M. McAuliffe deGuzman, 'The Road from Rome: The Developing Law of Crimes against Humanity', 22 HRQ (2000) 335-403, pp.380-381 and J. Pejic, 'The International Criminal Court Statute: An Appraisal of the Rome Package', 34 Int.Law. (2000) 65-84, p.74.
[133] EOC, pp.116-124.
[134] Lee, *ICC: Elements*, p.73.
[135] EOC, Introduction to Crimes against Humanity, p.116, para.2.

to the probability of death.[136] This definition has also been used by the ICTR in *Akayesu*, *Rutaganda* and *Musema* in respect of murder as a crime against humanity.[137] Confusion was caused by the French term 'assassinat' used in the ICTR Statute for murder as a crime against humanity, as opposed to 'meutre', which was used for murder contrary to Common Article 3, but the Judgements only differ in substance over whether the intention to kill or cause really serious harm, reckless as to the probability of death, must be premeditated or not.[138]

However, the ICTY Judgements have confirmed that the basic elements of murder, whether as a war crime or crime against humanity, remain the same.[139] The identical EOC for murder as a crime against humanity, wilful killing in an international armed conflict and murder in an internal conflict,[140] suggest that the basic *actus reus* and mental element of the crime of murder should be interpreted similarly in all three cases before the ICC. Whilst the Elements do not entirely clarify the *mens rea* for this offence they clearly do not require premeditation for this offence.

5.11 *7(1)(b) Extermination*

5.12 **Origins**

Extermination has been listed in all instruments concerning crimes against humanity since WW2.[141] Nevertheless, the post WW2 tribunals did not assist in defining this offence.[142] However, Schwelb in his analysis of Article 6(c) of the Nuremberg Charter commented that the inclusion of 'extermination' within the Charter was intended to ensure that "steps which are too remote from an individual act of homicide to constitute complicity in that act may be punishable as complicity

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[136] *Supra*, paras.2.16-2.17, but see *Marques, Da Costa et al*, Trial Judgement Dili District Court, Special Panel for Serious Crimes, paras.643-649.
[137] *Akayesu*, Trial Judgement, para.589; *Rutaganda*, Trial Judgement, para.80 and *Musema*, Trial Judgement, para.215.
[138] *Kayishema and Ruzindana*, Trial Judgement, paras.139-140 and *Bagilishema*, Trial Judgement, paras.83-84.
[139] *Kordic and Cerkez*, Trial Judgement, para.236; *Krnojelac*, Trial Judgement, para.323; *Kvoca et al*, Trial Judgement, para.132 and *Milosevic*, Prosecution's Second Pre-Trial Brief, para.1054.
[140] EOC, compare the Element for murder in pp.116, 125 and 144.
[141] Boot *et al*, 'Article 7', p.131. See Article 6(c), Nuremberg Charter; Article 5(c), Tokyo Charter; Article II(c), CCL No.10; Article 5, ICTY Statute; Article 3, ICTR Statute; Article 18, 1996 ILC Draft Code and Article 2, Statute of the Special Court for Sierra Leone.

in the crime of extermination".[143] Another interpretation of this offence in the commentary to the Fourth Geneva Convention describes extermination as a denial of the right of whole groups of human beings to exist and states that "it is a collective crime consisting of a number of individual murders".[144]

5.13 **Development**

The ILC commentary to the 1996 Draft Code also depicts extermination as "a crime which by its very nature is directed against a group of individuals" and states that it involves "an element of mass destruction which is not required for murder".[145] However, unlike the commentary to the Geneva Convention above, the ILC distinguishes extermination from genocide by explaining that "[e]xtermination covers situations in which a group of individuals who do not share any common characteristics are killed" and that "[i]t also applies to situations in which some members of a group are killed while others are spared".[146]

The ICTR in *Kayishema and Ruzindana* considered the elements of extermination in depth.[147] The Trial Chamber defined the *actus reus* of this crime as the killing of at least one person by action or omission through the participation in a mass killing of others or the creation of conditions which lead to the mass killing of others.[148] The Judgement defined 'mass' as 'large scale' and stated that it "does not command a numerical imperative" but should be defined on a case-by-case basis.[149] The mental element was defined as intention, recklessness or gross negligence as to whether the killing would result and awareness on the part of the actor that his actions or omissions formed part of the "mass killing event" (mass killings with close proximity in time and place).[150] The Trial Chamber also confirmed that the perpetrator need not act with a specific individual in mind.[151] This definition was followed by the Trial Chamber in *Bagilishema*.[152]

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[142] See the analysis of post WW2 trials in *Krstic*, Trial Judgement, para.492, fn.1132.
[143] E. Schwelb, n.3 *supra*, p.192.
[144] J. Pictet ed., *Commentary: IV Geneva Convention*, p.223.
[145] 1996 ILC Draft Code Commentary, para.8 to Article 18.
[146] *Ibid.* This was essentially the definition used in *Akayesu*, Trial Judgement, para.591.
[147] *Kayishema and Ruzindana*, Trial Judgement, paras.144-147.
[148] *Ibid.*, paras.144 and 147.
[149] *Ibid.*, para.145.
[150] *Ibid.*, paras.144, 146-147.
[151] *Ibid.*, para.145 and see M. Bassiouni, n.7 *supra*, p.291.
[152] *Bagilishema*, Trial Judgement, paras.87-90.

The ICTY in the case of *Krstic* also interpreted the *actus reus* of extermination as including both direct and indirect killing, such as "by creating conditions provoking the victim's death".[153] However, the Trial Chamber restricted the definition by stating that a numerically significant part of a particular population must have been targeted for destruction.[154] The Judgement also omitted the concept of gross negligence from the ambit of the *mens rea* of extermination and instead used the same mental element as that for murder.[155]

5.14 **Rome Statute**

An elaboration of the crime of extermination is included in Article 7(2)(b) of the Rome Statute which states that this offence "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". This is incorporated into the Elements, which require that the perpetrator "killed one or more persons, including by inflicting conditions of life calculated to bring about the destruction of part of a population".[156] Footnotes to the Elements emphasise that the killing can be committed indirectly, including by deprivation of food or medicine.[157] However, according to the Rome Statute and the first Element, if 'conditions of life' are imposed they must be "calculated to bring about the destruction of a part of the population".[158] This expression was interpreted by the *Krstic* Trial Chamber as meaning that a numerically significant part of a specific population must have been targeted.[159]

The second Element describes the surrounding circumstances of the perpetrator's killing and requires that the "conduct constituted, or took place as part of, a mass killing of members of a civilian population".[160] Mass killing suggests large-scale murder,[161] and this Element makes it clear that if the perpetrator's actions of themselves amount to a mass killing, there is no need to prove further killing on

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[153] *Krstic*, Trial Judgement, para.498.
[154] *Ibid.*, paras.502-503 and see *Milosevic*, Prosecution's Second Pre-Trial Brief, para.1053.
[155] *Krstic*, Trial Judgement, para.495.
[156] EOC, p.117.
[157] *Ibid.*, fns.8 and 9.
[158] Article 7(2)(b), Rome Statute and EOC, p.117.
[159] *Krstic*, Trial Judgement, para.502-503.
[160] EOC, p.117.
[161] Boot *et al*, 'Article 7', p.132.

the part of others. Alternatively, the perpetrator would still be liable if his or her conduct was part of a mass killing and a footnote explains that the term "as part of" would include "the initial conduct in a mass killing".[162]

The expressions "part of a population" and "a civilian population" remain undefined. It is submitted that if these expressions are interpreted too strictly they would raise the threshold of this offence to an unacceptably high level.[163] Neither the ILC Draft Code, nor the ICTR in *Kayishema and Ruzindana* required that those individuals targeted for extermination should share specific characteristics.[164] The word 'population' should be interpreted as loosely as possible and include not only "political, social, linguistic groups and groups based on their sexual orientation" but groups existing only in the mind of the perpetrator, such as "all persons believed to be traitors to the State or "subversives"".[165] Furthermore, the expression "part of a population" should not be interpreted as entailing a higher numerical significance than is necessarily inherent in the expression 'mass killing'.

Finally, the *mens rea* of the crime of extermination is not defined in the Elements and so, applying the default mental element in Article 30, the perpetrator must intend to kill at least one person either directly or indirectly. Furthermore, the perpetrator must have been aware of the factual circumstances which made his act a mass killing, for example that his denial of food supplies to a particular area would result in many deaths from starvation, or be aware of the surrounding mass killings of which his actions formed part.

5.15 *7(1)(c) Enslavement*

5.16 **Origins**

Slavery has existed since ancient times and the African slave trade was an established institution by the 16th century.[166] Nevertheless, between 1815 and 1957

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[162] EOC, p.117, fn.10 and see Lee, *ICC: Elements*, p.83.
[163] See G. Mettraux, n.94 *supra*, pp.285-286.
[164] See discussion *supra*, para.5.13 and comments by W. Rückert and G. Witschel, 'Genocide and Crimes against Humanity in the Elements of Crimes', pp.59-93, in H. Fischer, C. Kreß, S. Lüder eds., *International and National Prosecution of Crimes under International Law, Current Developments*, (2001, Berlin Verlag, Berlin), p.75.
[165] Boot *et al*, 'Article 7', p.132.
[166] R. Redman, 'The League of Nations and the Right to be Free from Enslavement: The First Human Right to be Recognized as Customary International Law', 70 Chi-Kent LR (1994) 759-800, p.765.

approximately 300 international agreements attempted to suppress this abhorrent practice.[167] The exact point at which enslavement became prohibited under customary international law is difficult to judge,[168] but the 1926 Slavery Convention, which bound States parties to prevent and suppress slavery and the slave trade, was a significant development. This convention also produced an enduring definition of slavery as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised".[169]

Despite the international agreements prohibiting slavery, slave labour was used in WW1 and WW2 saw slave labour in atrocious conditions on a massive scale.[170] The definition of crimes against humanity in the Nuremberg Charter included both enslavement and deportation to slave labour,[171] but the Nuremberg Judgement neither defined these concepts nor drew "a systematic distinction" between them.[172] Nevertheless, two CCL No.10 cases explained slavery in more depth. In the case of *Pohl*, the US Military Tribunal explained that slavery may exist even though the slaves are treated humanely, that "the admitted fact of slavery - compulsory uncompensated labour - would still remain".[173] In the *Milch* case the tribunal questioned whether anyone believed "that the vast hordes of Slavic Jews who laboured in Germany's war industries were accorded the rights of contracting parties" before holding that "[t]hey were slaves, nothing less - kidnapped, regimented, herded under armed guards, and worked until they died from disease, hunger, exhaustion".[174]

The cases discussed above dealt with concepts of forced labour and slavery without really defining the difference between the two, although forced labour has

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[167] D. Weissbrodt and Anti-Slavery International, 'Contemporary Forms of Slavery: Updated Review of the Implementation and Follow-up to the Conventions on Slavery', Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, E/CN.4/Sub.2/2000/3, 26 May 2000, para.3. See also, M. Bassiouni, 'Enslavement as an International Crime', 23 NYUJ Int.L&Pol. (1991) 445-517, pp.459-517 and H. Fisher, 'The Suppression of Slavery in International Law', 3 ILQ (1950) 28-51, 503-522.

[168] G. Robertson, n.121 *supra*, p.209.

[169] Article 1, 1926 Slavery Convention and see comments in D. Weissbrodt and Anti-Slavery International, n.167 *supra*, para.16.

[170] M. Bassiouni, n.7 *supra*, p.296; D. Christopher, 'Jus Cogens, Reparation Agreements, and Holocaust Slave Labor Litigation', 31 L&Pol.Int.Bus. (2000) 1227-1253, p.1228 and J. Roy, 'Strengthening Human Rights Protection: Why the Holocaust Slave Labor Claims Should be Litigated', 1 Scholar: St. Mary's LR.Min.Issues (1999) 153-205, pp.169-176.

[171] Article 6(c), Nuremberg Charter.

[172] *Foca*, Trial Judgement, para.523, and see *IMT Judgement*, pp.460-463.

[173] *In re Pohl and Others*, 14 AD (1947) 290, pp.291-292.

[174] *Trial of Milch*, 7 LRTWC 27, pp.38-39.

been described as a practice "similar to, but distinct from slavery".[175] Forced labour was condemned in an ILO convention prior to WW2 and defined as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily".[176] However, various forms of work including compulsory military service and work exacted as a consequence of conviction in a court of law, were exempted from this definition.[177] The Third Geneva Convention also allows the compulsory labour of prisoners of war, but places limitations upon the type and conditions of work, which should be performed in similar conditions to the nationals of the detaining power.[178] Further, under the Fourth Geneva Convention, the occupying power may only compel work from persons in occupied territory for very limited purposes and must pay a fair wage.[179]

APII deals with the issues of forced labour and slavery in non-international armed conflicts. Article 5 provides that those persons whose liberty has been restricted shall "if made to work, have the benefit of working conditions and safeguards similar to those enjoyed by the local civilian population".[180] Nevertheless, such persons also have the protection of Article 4, which expressly forbids "slavery and the slave trade in all their forms".[181] This implies that enforced labour during armed conflicts, if used strictly in accordance with the Geneva Conventions and Protocols, does not amount to slavery. However, the 1956 Supplementary Slavery Convention prohibited slavery-like practices which impose a servile status, such as debt bondage, serfdom, compulsory marriage or transfer of women and the delivery of children for the exploitation of their labour, which suggests that in certain circumstances forced labour would be prohibited as a slavery-like practice.[182]

Alongside the treaties defining and outlawing slavery were instruments dealing with the associated problem of trafficking. Both the 1926 Slavery Convention and APII outlawed the 'slave trade' in addition to slavery, but from 1904

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[175] D. Weissbrodt and Anti-Slavery International, n.167 *supra*, para.30.
[176] Article 2(1), 1930 ILO Convention No.29 and see Article 1, 1957 ILO Convention No.105.
[177] Article 2(2), 1930 ILO Convention No.29.
[178] Articles 49-57 and 62, Geneva Convention III.
[179] Article 51, Geneva Convention IV.
[180] Article 5(1)(e), APII.
[181] Article 4(2)(f), APII.
[182] Article 1, 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery.

to 1933 there was a series of conventions primarily aimed at prohibiting the trafficking of women.[183] These were consolidated by the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, although this treaty has been criticised as only focusing upon the issue of trafficking for the purposes of prostitution.[184] Nevertheless, it is important to note that the 1949 Convention does not require an international border crossing as an element of trafficking, nor does it allow consent as a defence to trafficking.[185]

5.17 **Development**

An explanation of enslavement as a crime against humanity is contained in the commentary to the ILC's Draft Code of Crimes. The ILC defines enslavement broadly as "establishing or maintaining over persons a status of slavery, servitude or forced labour contrary to well-established and widely recognized standards of international law".[186] An extensive definition of enslavement is also favoured by Rassam, who comments that bonded labour is essentially slavery as "the debt is rarely, if ever, paid off due to high interest rates charged by the 'lender'" and because such servitude can be passed on from one generation to the next within the same family.[187] She also suggests that forced labour often amounts to slavery "[d]ue to the common element of coercive "ownership" of the labor and/or the body of a human being and the inability of many of these victims to seek any judicial or administrative recourse".[188]

The ICTY in the *Foca* case considered enslavement in some depth. The Trial Chamber defined the *actus reus* of enslavement as "the exercise of any or all of the powers attaching to the right of ownership over a person" and the *mens rea* as "the

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[183] R. Coomaraswamy, Special Rapporteur, 'Report on Trafficking in Women, Women's Migration and Violence against Women in Accordance with Commission on Human Rights Resolution 1997/44', Commission on Human Rights, E/CN.4/2000/68, 29 February 2000, paras.18-19 and S. Toepfer and B. Wells, 'The Worldwide Market for Sex: A Review of International and Regional Legal Prohibitions Regarding Trafficking in Women', 2 Mich.J.Gender&L (1994) 83-128, pp.97-98.

[184] Article 1, 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (approved by GA Res.317 (IV), 2 December 1949, but not opened for signature until 21 March 1950) and see R. Coomaraswamy, n.183 *supra*, para.22.

[185] S. Inglis, 'Expanding International and National Protections against Trafficking for Forced Labor using a Human Rights Framework', 7 Buff.Hum.Rts.LR (2001) 55-104, pp.63-64 and 67.

[186] 1996 ILC Draft Code Commentary, para.10 to Article 18.

[187] A. Rassam, 'Contemporary Forms of Slavery and the Evolution of the Prohibition of Slavery and the Slave Trade under Customary International Law', 39 Va.JIL (1999) 303-352, pp.326-329 and M. Bassiouni, n.12 *supra*, pp.457-458.

intentional exercise of such powers".[189] This broad definition of enslavement was supported by the *Foca* Appeal Chamber, which accepted that the traditional concept of slavery, "often referred to as "chattel slavery", has evolved to encompass various contemporary forms of slavery" where the victim "is not subject to the exercise of the more extreme rights of ownership... but in all cases... there is some destruction of the juridical personality".[190]

The Trial Chamber in *Foca* stated that indicia of enslavement included "control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour".[191] The Appeals Chamber approved these factors, but emphasised that "it is not possible exhaustively to enumerate all of the contemporary forms of slavery which are comprehended in the expansion of the original idea".[192] Additionally, the Trial Chamber held that ""[a]quisition" or "disposal" of someone for monetary or other compensation, is *not* a requirement for enslavement"[193] and that duration of the exercise of powers attaching to ownership is a factor to be considered when deciding if enslavement has taken place, but not an overriding one.[194]

The *Foca* Trial Chamber stated that in a case of enslavement the victim's consent is either absent, or negated through "the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim's position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions".[195] However, the Appeal Chamber clarified the fact that lack of consent is not an element of enslavement, but is relevant only as evidence to show that the accused has exercised powers attaching to the right of ownership.[196]

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[188] A. Rassam, n.187 *supra*, p.329.
[189] *Foca*, Trial Judgement, para.540.
[190] *Foca*, Appeal Judgement, para.117.
[191] *Foca*, Trial Judgement, para.543.
[192] *Foca*, Appeal Judgement, para.119.
[193] See also G. McDougall, Special Rapporteur, 'Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-Like Practices During Armed Conflict', Update to Final Report, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, E/CN.4/Sub.2/2000/21, 6 June 2000, para.8.
[194] *Foca*, Trial Judgement, para.542, emphasis added and see *Foca* Appeal Judgement, para.121.
[195] *Foca*, Trial Judgement, para.542.
[196] *Foca*, Appeal Judgement, para.120.

The specific issue of whether forced labour amounts to slavery was discussed in the Trial Chamber Judgement of *Krnojelac*. The Judgement suggested that an important issue is whether the labour is involuntary, a factual question to be determined on a case by case basis and that it is important to establish whether the persons in question "had no real choice as to whether they would work".[197] It is submitted that the consent of a person to enslavement through forced labour should not operate as a defence, if a refusal by that person would either not have been successful in preventing the labour or would have caused them serious detriment. The *Krnojelac* Judgement also reviewed the provisions relating to labour in APII and held that the violation of the Protocol's guarantees would allow the performance of labour to be treated as an indication of enslavement.[198] The Tribunal further held that where payment is not specified in the Geneva Conventions and Protocols, such as in APII, the court should "determine on a case by case basis whether labour performed should have been compensated in some way".[199]

Although neither the ILC nor the ICTY have defined trafficking, alongside enslavement, it is a major contemporary problem.[200] The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children provides a modern definition of trafficking.[201] Article 3 defines trafficking as "the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or the other forms of sexual

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[197] *Krnojelac*, Trial Judgement, para.359.
[198] *Ibid.*, para.360.
[199] *Ibid.*
[200] L. Malone, 'Economic Hardship as Coercion under the Protocol on International Trafficking in Persons by Organized Crime Elements', 25 Fordham Int'l.LJ (2001) 54-94, pp.54-55; S. Tiefenbrun, 'Sex Sells but Drugs Don't Talk: Trafficking of Women Sex Workers', 23 Thomas Jefferson LR (2001) 199-226, p.199 and K. Hyland, 'The Impact of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children', 8 HR Brief (2001) 30-32, p.30. See also Article 6, 1979 Convention on the Elimination of all Forms of Discrimination against Women and Article 35, 1989 Convention on the Rights of the Child. On the prevalence of women and child victims see IOM, Quarterly Bulletin, 'Trafficking in Migrants', Vol.23, April 2001, available at: <http://www.iom.int>.
[201] This supplements the 2000 United Nations Convention against Transnational Organised Crime. Neither Convention nor Protocol is yet in force. See K. Hyland, n.200 *supra*, p.31 and see GAATW (Global Alliance Against Trafficking in Women), 'Human Rights Standards for the Treatment of Trafficked Persons', (1999), pp.2-4, available at: <http://www.inet.co.th/org/gaatw>

exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs". The Article further states that consent is irrelevant if coercion or other methods mentioned have been used.

This definition is important as it demonstrates that lack of consent is not an element of trafficking and so refocuses the legal inquiry "away from the victim and onto the actions of the trafficker/exploiter reflecting a recognition that deception or coercion nullifies any meaningful, fully informed consent".[202] The issue of pressure which renders consent irrelevant is discussed in the *travaux préparatoires* to the Protocol, which clarify that the reference to abuse of a position of vulnerability "is understood to refer to any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved".[203] Further, Article 3(c) and (d) protects children under 18 by establishing an irrebuttable presumption that children cannot consent to trafficking for the purpose of exploitation, irrespective of coercion or deception.[204]

5.18 **Rome Statute**

The definition of enslavement for the purposes of crimes against humanity is given in Article 7(2)(c) as "the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children". This definition is amplified in the Elements which require that the perpetrator "exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty".[205] A footnote confirms that this conduct could include trafficking in persons.[206]

This definition was drawn from the war crime of sexual slavery and is similar to the definition of slavery given by the ICTY in *Foca*.[207] The examples of the exercise of powers of ownership given in the EOC were controversial and despite the

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[202] S. Inglis, n.185 *supra*, p.67.
[203] *Travaux préparatoires* of the Negotiations for the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, UN Doc.A/55/383/Add.1, p.12.
[204] See also Article 2, 1994 Inter-American Convention on International Traffic in Minors.
[205] EOC, p.117.
[206] *Ibid.*, fn.11.
[207] Lee, *ICC: Elements*, p.85 and *Foca* Trial Judgement, para.540.

commercial character of the terms "purchasing, selling, lending or bartering", Robinson states that the Preparatory Commission did not intend the expression "imposing on them a similar deprivation of liberty" to be understood as implying that "some sort of commercial or pecuniary exchange was required".[208] This expansive interpretation of enslavement is confirmed by a footnote which states that "such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956".[209]

The significance of the victim's consent is not mentioned in the EOC. It is submitted that a person cannot consent to enslavement and that, in line with the *Foca* Appeal Judgement, consent is relevant only as evidence that the perpetrator did indeed exercise powers of ownership over the victim.[210] Other evidence of such powers include the indicia suggested by the ICTY in *Foca* and could also include the use of force, coercion and abuse of a position of vulnerability as defined in the Trafficking Protocol.[211] Further, when deciding whether powers of ownership have been exercised in the course of trafficking, the ICC could draw upon Article 3 of the Trafficking Protocol and define trafficking as "the recruitment, transportation, transfer, harbouring or receipt of persons".[212] The gender or age of the trafficked person does not need to be proven as a part of the offence.

The *mens rea* of this offence is not defined in the EOC and so the default mental element of Article 30, intention to exercise any or all of the powers attaching to the right of ownership and knowledge of the surrounding circumstances would have to be shown. Knowledge of surrounding circumstances would be particularly relevant in the case of a person accused of enslavement through trafficking, to demonstrate that the accused was aware he was not dealing with voluntary migrants.

5.19 *7(1)(d) Deportation or Forcible Transfer of Population*

5.20 **Origins**

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[208] Lee, *ICC: Elements*, p.85.
[209] EOC, p.117, fn.11 and see Boot *et al*, 'Article 7', p.134.
[210] *Foca*, Appeal Judgement, para.120.
[211] *Foca*, Trial Judgement, para.543 and Article 3, 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.

The background to deportation and forcible transfer is discussed in the context of the grave breach of unlawful deportation or transfer.[213] In this respect, the Trial Chamber in *Krnojelac* commented that the content of the underlying offence "does not differ whether perpetrated as a war crime or as a crime against humanity".[214]

5.21 **Development**

The commentary to the ILC Draft Code on the crime of 'arbitrary deportation or forcible transfer', states that whilst "deportation implies expulsion from the national territory", the "forcible transfer of population could occur wholly within the frontiers of one and the same State".[215] This approach was adopted by ICTY Judgements,[216] which were also greatly influenced by the definition of deportation or forcible transfer in Article 7(2)(d) of the Rome Statute.[217]

The *Krstic* and *Krnojelac* Trial Chambers emphasised that only forcible or involuntary displacements of populations breach this provision and used a definition of 'forcibly' drawn from the EOC.[218] The *Krstic* Trial Chamber, whilst acknowledging that departures motivated by discrimination may not amount to forceful transfer, stated that the Bosnian Muslims who fled after the fall of Srebrenica, "were not exercising a genuine choice to go, but reacted reflexively to a certainty that their survival depended on their flight".[219] The Judgement stated, however, that displacement necessary for "the security of the population or imperative military reasons" could legitimate a forced transfer.[220] Additional legitimate reasons for displacement contemplated by the ILC commentary included those essential for "public health or well being, in a manner consistent with international law".[221]

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[212] Article 3, *ibid.*
[213] *Supra*, para.2.39.
[214] *Krnojelac*, Trial Judgement, para.473.
[215] Article 18(g), 1996 ILC Draft Code.
[216] *Krstic*, Trial Judgement, para.521 and *Krnojelac*, Trial Judgement, para.474.
[217] See particularly *Blaskic*, Trial Judgement, para.234 and *Krnojelac*, Trial Judgement, para.474.
[218] *Krstic*, Trial Judgement, paras.521 and 529 and *Krnojelac*, Trial Judgement, para.475. See discussion of EOC, *infra*, para.5.22.
[219] *Krstic*, Trial Judgement, paras.528-530.
[220] *Krstic*, Trial Judgement, para.524.
[221] 1996 ILC Draft Code Commentary, para.13 to Article 18.

5.22 **Rome Statute**

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". This definition is amplified by the EOC which state that 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", that the persons "were lawfully present" in that area and that the perpetrator "was aware of the factual circumstances that established the lawfulness of such presence".[222]

This offence is very similar to the grave breach of unlawful deportation or transfer under Article 8(2)(a)(vii) of the Statute, but under that provision, the offence could be committed upon the transfer of one protected person.[223] However, Article 7(1)(d) prohibits the 'deportation or forcible transfer of *population*'.[224] Therefore, although the Elements allow that a perpetrator may incur responsibility for the transfer of 'one or more' persons, it would appear that this must take place in the context of the transfer of a 'population'. However, this expression should not be interpreted as requiring that the entire population of a particular area is transferred, but it necessarily requires that a significant amount of people are deported or transferred.[225]

A footnote to the Elements states that 'deported or forcibly transferred', is interchangeable with "forcibly displaced", thus indicating that both deportation and transfer of the population must be done 'forcibly'.[226] However, another footnote defines 'forcibly' in a broad manner, similar to the definition of 'force' in the EOC of rape, as "not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological

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[222] EOC, p.118.
[223] Discussed *supra*, para.2.41.
[224] Emphasis added.
[225] See discussion of population *supra*, paras.5.6 and 5.14.
[226] EOC, p.118, fn.13.

oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment".[227]

The forced displacement must be without grounds permitted under international law. Therefore, forced movement of populations as a result of genuine emergencies, such as threats to the public arising from serious infectious diseases or natural disasters, in either peacetime or conflict would not amount to this offence. Additionally, during a conflict a displacement could also be rendered lawful if carried out under Article 49 of Geneva Convention IV, or Article 17 of APII as absolutely necessary owing to the security of the population or imperative military reasons.[228] 'Expulsion or coercive acts' are not defined, but Hall suggests that these "must include the full range of coercive pressures on people to flee their homes, including death threats, destruction of their homes, and other acts of persecution, such as depriving members of a group of employment, denying them access to schools and forcing them to wear a symbol of their religious identity".[229]

The EOC also require that the persons transferred were 'lawfully present' in the area. The inclusion of lawful presence has caused debate as to whether this standard should be judged according to national or international law. The EOC left the question open to be decided by case law, but it is submitted that Kittichaisaree is correct in asserting that in such circumstances "national law must also be measured against the yardstick of international law" or a State could avoid breaching this provision simply by passing draconian laws.[230]

The *mens rea* of this offence, applying Article 30, is that the perpetrator intended to forcibly displace one or more persons, in the knowledge that a population was being forcibly displaced. The Elements state explicitly that the perpetrator does not have to perform a legal evaluation of the lawfulness of the presence of the person or persons in the area from which he or she displaces them, but should merely be aware of the factual circumstances establishing this.[231] The EOC do not clarify whether the perpetrator must have performed a legal evaluation in respect of whether

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[227] EOC, p.118, fn.12, and see discussion *supra*, para.3.90.1.
[228] See *Krstic*, Trial Judgement, para.524.
[229] Boot *et al*, 'Article 7', p.162.
[230] Kittichaisaree, *International Criminal Law*, p.109 and see Lee, *ICC: Elements*, p.87 and Boot *et al*, 'Article 7', p.161.
[231] EOC, p.118 and W. Rückert and G. Witschel, n.164 *supra*, p.78.

the grounds for forcible displacement were permitted under international law, but it is submitted that again, an awareness of the factual circumstances should suffice.[232]

5.23 *7(1)(e) Imprisonment or other Severe Deprivation of Physical Liberty in Violation of Fundamental Rules of International Law*

5.24 Origins

The offence of imprisonment as a crime against humanity is similar to unlawful confinement as a grave breach and indeed, this was the approach of the Trial Chamber in the case of *Kordic and Cerkez*.[233]

5.25 Development

The ILC prohibited arbitrary imprisonment in the Draft Code, which was defined by the commentary as deprivation of liberty "without due process of law".[234] This definition was adopted by the ICTY in the cases of *Kordic and Cerkez* and *Krnojelac* for the offence of imprisonment as a crime against humanity under the ICTY Statute.[235] Nevertheless, the Judgement of *Kordic and Cerkez* only really examined imprisonment as a crime against humanity in the context of an armed conflict and therefore held that such imprisonment was unlawful when civilians were detained contrary to or without the procedural safeguards of the fourth Geneva Convention.[236]

The ILC commentary, however, made reference to human rights instruments and stated that "concentration camps or detention camps or other forms of long-term detention" could amount to the crime of arbitrary imprisonment.[237] The Trial Chamber in *Krnojelac* also reviewed human rights instruments, but found that they did not "adopt a common approach to the issue of when a deprivation of liberty is or

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[232] See Articles 32 and 33, Rome Statute.
[233] *Kordic and Cerkez*, Trial Judgement, paras.298 and 301 and *Milosevic*, Prosecution's Second Pre-Trial Brief, para.1057. See discussion *supra*, para.2.40.2.
[234] Article 18(h), 1996, ILC Draft Code and Commentary.
[235] Article 5(e), 1993, ICTY Statute and *Kordic and Cerkez*, Trial Judgement, para.302 and *Krnojelac*, Trial Judgement, para.113.
[236] Articles 42-43, Geneva Convention IV, *Kordic and Cerkez*, Trial Judgement, para.303.
[237] 1996, ILC Draft Code, Commentary, referring to Article 9, 1948, UDHR and Article 9, 1966, ICCPR.

becomes arbitrary".[238] Taking an interpretation which could be applied in peacetime or conflict, the *Krnojelac* Judgement held that the deprivation of an individual's liberty will be unlawful if "no legal basis can be called upon to justify the initial deprivation of liberty" and that the legal basis for deprivation of liberty "must apply throughout the period of imprisonment" or an "initially lawful deprivation of liberty may become unlawful at that time and be regarded as arbitrary imprisonment".[239] The Judgement also stated that the legal basis to justify deprivation of liberty must not be contrary to international law.[240]

5.26 **Rome Statute**

This offence is not defined in Article 7(2) of the Rome Statute, but the EOC state that the perpetrator must have "imprisoned one or more persons or otherwise severely deprived one or more persons of physical liberty".[241] The gravity of the conduct must have been such that it was "in violation of fundamental rules of international law" and the perpetrator was aware of the factual circumstances establishing the gravity of the conduct.[242] The expression 'deprivation of physical liberty' is wider than imprisonment and would include such examples as house arrest, restriction to a particular village or similar restrictions.[243] Hall suggests that the term 'severe' would have to be decided by the court on a case-by-case basis, taking into account conditions of detention, whether the individual was cruelly treated and whether the detention was secret or the individual was denied contact with the outside world.[244]

The second Element requires that the conduct be so grave that it violates fundamental rules of international law. These are not defined as such, but it is submitted that the approach of *Krnojelac* could apply, which requires that a legal basis for the detention or continued detention exists either in national law, which

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[238] *Krnojelac*, Trial Judgement, para.113.
[239] *Ibid.*, para.114.
[240] *Ibid.*, para.114. The analysis was influenced by the Report of the Working Group on Arbitrary Detention, 'Question of the Human Rights of all Persons Subjected to any Form of Detention or Imprisonment', Commission on Human Rights, E/CN.4/1998/44, 19 December 1997, Annex 1, para.8.
[241] EOC, p.118.
[242] *Ibid.*
[243] Boot *et al*, 'Article 7', pp.137-138 and see *Blaskic*, Trial Judgement, para.691-692.
[244] Boot *et al*, 'Article 7', p.138 and see *Blaskic*, Trial Judgement, para.692, an example of detention which would amount to severe deprivation of physical liberty according to these criteria.

does not violate international law, or in international law.[245] Therefore, in peacetime, detention justified by national law which does not violate the basic provisions of the UDHR and ICCPR would not breach this provision.[246] During internal disturbances or emergencies, detention justified by proportionate and properly made derogations to human rights conventions would not violate international law. Lastly, in time of armed conflict, a detention justified under the Geneva Conventions would not constitute a violation of international law.[247]

The *mens rea* for this offence, taking into account the default mental element in Article 30, and the final Element of this offence, would be an intention to imprison or severely deprive a person of physical liberty and an awareness of the factual circumstances which made the conduct so grave. Therefore, a legal evaluation is not required by the perpetrator, but there must be sufficient awareness of "some sort of wrongfulness... to warrant individual criminal responsibility for participating in the imprisonment".[248]

5.27 *7(1)(f) Torture*

The origins and development of torture have been discussed in depth with respect to torture as a grave breach and therefore it is only necessary here to look at the EOC of torture as a crime against humanity.[249] The first Element of torture as a crime against humanity requires that the perpetrator "inflicted severe physical or mental pain or suffering upon one or more persons".[250] This is identical to the first Element of torture as a grave breach and should be interpreted in the same way.[251]

However, the remaining Elements for this offence differ and require that "[s]uch person or persons were in the custody or under the control of the perpetrator" and that the "pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions".[252] Notably, a prohibited purpose is not part of torture as a crime against humanity and therefore "random, purposeless or merely

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[245] *Krnojelac*, Trial Judgement, para.114.
[246] The Working Group on Arbitrary Detention, n.240 *supra*, cite Articles 7, 13-14 and 18-21, 1948, UDHR and Articles 12, 18-19, 21-22 and 25-27 of the 1966, ICCPR.
[247] Articles 42-43, I949, Geneva Convention IV and discussion *supra*, para.2.39.2.
[248] Lee, *ICC: Elements*, p.89.
[249] See discussion *supra*, paras.2.19-2.20.2.
[250] EOC, p.119.
[251] Discussed *supra*, para.2.21.1.
[252] EOC, p.119.

sadistic infliction of severe pain or suffering" could amount to torture for the purpose of Article 7(1)(e).[253]

The phrase 'in the custody or under the control' of the perpetrator, is a fairly broad expression and would include unofficial *de facto* control or restraint of a person in addition to imprisonment following arrest.[254] The exclusion of pain and suffering arising from lawful sanctions from the offence of torture, in this context, prevents States which impose corporal punishment for certain offences from being accused of crimes against humanity. However, it is not clear whether 'lawful sanctions' in the EOC refers to sanctions which are lawful under national or international law. It is submitted that whilst this primarily refers to national law, if such law was contrary to international law, it could not shield the perpetrator from the offence of torture as a crime against humanity, or a State could avoid this provision simply by enacting draconian laws.[255]

The *mens rea* of torture, applying the default mental element in Article 30, requires an intention to inflict severe physical or mental pain or suffering on a person or persons in the perpetrator's custody or control. Further there must be an awareness that such pain or suffering was not being imposed as a result of a lawful sanction. This part of the *mens rea* could potentially lead to ignorance of the law as a defence, if the perpetrator genuinely believed that he was carrying out a lawful sanction.[256]

5.28 *7(1)(g) Rape, Sexual Slavery, Enforced Prostitution, Forced Pregnancy, Enforced Sterilization, or any other Form of Sexual Violence of Comparable Gravity*

The origins and development of offences described in Article 7(1)(g) have been discussed in detail in respect of sexual violence as a war crime.[257] Further, the basic EOC are identical in both contexts, with one minor exception. The definition of this offence in the Rome Statute includes "any other form of sexual violence of comparable gravity" as opposed to "any other form of sexual violence also

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[253] Boot *et al*, 'Article 7', p.164 and see Lee, *ICC: Elements*, p.91 and EOC, p.119, fn.14.
[254] See Boot *et al*, 'Article 7', p.163 and K. Ambos and S. Wirth, n.32 *supra*, p.69.
[255] See Boot *et al*, 'Article 7', p.164 and Lee, *ICC: Elements*, p.92.
[256] Article 32(2), Rome Statute.
[257] See discussion *supra*, paras.3.87-3.89.3.

constituting a grave breach of the Geneva Conventions" or "any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions" required for sexual violence as a war crime under Article 8(2)(b)(xxii) or 8(2)(e)(vi).[258] The Elements reflect this change of wording by stating that the "conduct was of a gravity comparable to the other offences in article 7, paragraph 1 (g), of the Statute", but it is submitted that the seriousness of the conduct required for this offence in all three situations should be similar.[259]

5.29 *7(1)(h) Persecution against Any Identifiable Group or Collectivity on Political, Racial, National, Ethnic, Cultural, Religious, Gender as Defined in Paragraph 3, or other Grounds that are Universally Recognised as Impermissible under International Law, in Connection with any Act Referred to in this Paragraph or any Crime within the Jurisdiction of the Court*

5.30 **Origins**

The crime of persecution was included in the Nuremberg Charter as "persecutions on political, racial or religious grounds".[260] The same offence was included in CCL No.10 and in the Tokyo Charter, except that the latter was restricted to "persecutions on political or racial grounds" only, which reflected the factual pattern of persecution in the Far East.[261] The Nuremberg Judgement devoted a section to the persecution of the Jews. This set out the acts of persecution carried out by the Nazis, from discriminatory laws which restricted professions and family life, to the creation of ghettos, to the use of Jews as slave labour and, finally, to the mass execution of the Jews by the Einsatzgruppen and in the gas chambers of the concentration camps.[262] Indeed, the ICTY tribunal in *Kupreskic* commented that it was clear from this part of the Judgement that "the IMT accorded this crime a position of great prominence and understood it to include a wide spectrum of acts perpetrated against the Jewish people".[263]

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[258] See discussion *supra*, para.3.90.6.
[259] EOC, p.121 and see comments in Lee, *ICC: Elements*, p.93.
[260] Article 6(c), Nuremberg Charter.
[261] Article II(c), CCL No.10 and Article 5(c), Tokyo Charter.
[262] *IMT Judgement*, pp.463-466.
[263] *Kupreskic*, Trial Judgement, para.597.

The ambit of persecution was explored by several US Military Tribunals operating under the auspices of CCL No.10 at Nuremberg. In the case of *Weizsaecker*, the court held that the civilian population of occupied territory had been persecuted on religious grounds, as many Catholic priests were removed from their posts and interned in terrible conditions in concentration camps where a large number died.[264] The Judgement in *Altstötter* found the defendant guilty of racial persecution of the Jews, in particular because of the murders and atrocities committed against the Jews in concentration camps.[265]

The *Flick Trial* considered whether the compulsory taking of industrial property from Jews could amount to persecution.[266] The court reviewed the Nuremberg Judgement and stated that "it nowhere appears in the judgment that IMT considered, much less decided, that a person becomes guilty of a crime against humanity merely by exerting anti-semitic pressure to procure by purchase or through State expropriation industrial property owned by Jews".[267] The court held that on proper construction of CCL No.10, 'other persecutions' must be interpreted *ejusdem generis* with the other crimes in the list, such as murder, extermination and torture, and therefore persecutions must "affect the life and liberty of the oppressed peoples".[268] However, the UN War Crimes Commission emphasised that the court left open the question of whether offences against personal property, such as the burning of houses, would amount to an assault upon the health and life of a human being.[269]

5.31 **Development**

The crime of persecution "on political, racial, religious or ethnic grounds" is included in the 1996 ILC Draft Code.[270] However, the commentary does not provide an expansive definition of this offence, simply observing that "[t]he inhumane act of persecution may take many forms with its common characteristic being the denial of the human rights and fundamental freedoms to which every individual is entitled

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[264] *In re Weizsaecker and Others*, (*Ministries Trial*), 16 AD (1949) 344, pp.357-357.
[265] *Trial of Altstötter and Others*, (*Justice Trial*), 6 LRTWC 1, pp.62-64.
[266] *The Flick Trial*, 9 LRTWC 1.
[267] *Ibid.*, p.27.
[268] *Ibid.*, pp.27-28. This was followed in *The IG Farben Trial*, 10 LRTWC 1, p.64.
[269] *The Flick Trial*, 'Notes on the Case', 9 LRTWC 1, p.50 and see M. Greenspan, *The Modern Law of Land Warfare*, (1959, University of California Press, Berkeley), p.460.

without distinction".[271] The most recent thorough analysis of the content of this offence can be found in the Judgements of the ICTY, which has jurisdiction over "persecutions on political, racial or religious grounds".[272]

The *actus reus* of persecution requires a discriminatory act or omission.[273] However, not every denial of human rights constitutes a crime against humanity and the *Tadic* Judgement explained that "[i]t is the violation of the right to equality in some serious fashion that infringes on the enjoyment of a basic or fundamental right that constitutes persecution".[274] Furthermore, the *Kupreskic* Judgement described the *actus reus* of persecution as a "gross or blatant denial" of a fundamental right, which reaches the same level of gravity as other acts prohibited as crimes against humanity in the ICTY Statute.[275] Nevertheless, the *Kupreskic* Trial Chamber explained that the crimes must be examined in terms of their cumulative effect, and thus although individual acts may not be inhumane, if their overall consequences offend humanity, they could amount to the *actus reus* of persecution.[276] As a result of this, the *Kvoca et al* and *Krnojelac* Judgements have held that it is not necessary that "each discriminatory act alleged must individually be regarded as a violation of international law"[277] and other ICTY cases have held that there does not need to be a link between the persecutory acts and other acts defined as crimes against humanity.[278]

Another issue tackled by the ICTY case law is whether discriminatory attacks against property may amount to a grave denial of fundamental rights and thus persecution. The *Kupreskic* and *Kordic and Cerkez* Judgements held that the cumulative effect of the comprehensive destruction of homes and property was sufficiently severe as it amounted to a destruction of the livelihood of a certain

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[270] Article 18(e), 1996 ILC Draft Code.
[271] 1996 ILC Draft Code Commentary, para.11 to Article 18.
[272] Article 5(h), ICTY Statute, note that despite the conjunctive 'and', the bases of persecution were interpreted to apply in the alternative, *Tadic*, Trial Judgement, para.713.
[273] *Tadic*, Trial Judgement, para.273 and see O. Swaak-Goldman, 'The Crime of Persecution in International Criminal Law', 11 LJIL (1998) 145-154.
[274] *Tadic*, Trial Judgement, para.697.
[275] *Kupreskic*, Trial Judgement, paras.618-621, followed by *Kordic and Cerkez*, Trial Judgement, para.195; *Krstic*, Trial Judgement, para.534 and *Krnojelac*, Trial Judgement, para.434.
[276] *Kupreskic*, Trial Judgement, paras.615 and 622; *Tadic*, Trial Judgement, para.715 and *Kordic and Cerkez*, Trial Judgement, para.199.
[277] *Kvoca et al*, Trial Judgement, para.186 and *Krnojelac*, Trial Judgement, para.434
[278] *Kupreskic*, Trial Judgement, para.581, followed by *Kordic and Cerkez*, Trial Judgement, paras.193-194 and *Krstic*, Trial Judgement, para.535.

population and their removal from their homes.[279] The *Blaskic* Trial Chamber explained that "persecution may take forms other than injury to the human person, in particular those acts rendered serious not by their apparent cruelty but by the discrimination they seek to instil within humankind".[280] In this respect, the *Kordic and Cerkez* Judgement found that the destruction of religious buildings was a clear case of persecution as it amounted "to an attack on the very religious identity of a people".[281]

The *Kvoca et al* and *Krnojelac* Trial Chambers tackled the question of whether the discriminatory act or omission must *in fact* have discriminatory consequences.[282] Whilst the *Kvoca et al* Trial Chamber considered that those wrongly suspected of belonging to the group targeted for persecution could be victims of this offence, the *Kronojelac* Judgement stated more persuasively that in such a case the charge should be 'attempted persecution'.[283] However, it is submitted that the *Kvoca* Trial Chamber was correct in stating that an attack against a person because of their support or sympathy for the persecuted group should also amount to persecution, because that person would have been targeted as a result of his link to the specific group.[284]

The mental element of persecution in the ICTY Statute requires that the act or omission was committed on political, racial or religious grounds.[285] Consequently, the *mens rea* for persecution is higher than for other crimes against humanity.[286] In addition to the awareness of the context of the acts necessary for crimes against humanity and the intention to commit the underlying act (such as torture or rape) the accused must also have had the specific intention to discriminate on political, racial or religious grounds.[287] Therefore, the accused must have committed the *actus reus* with the "specific intent to cause injury to a human being because he belongs to a particular community or group".[288]

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[279] *Kupreskic*, Trial Judgement, para.631 and *Kordic and Cerkez*, Trial Judgement, para.205.
[280] *Blaskic*, Trial Judgement, para.227.
[281] *Kordic and Cerkez*, Trial Judgement, paras.206-207.
[282] *Kvoca et al*, Trial Judgement, para.195 and *Krnojelac*, Trial Judgement para.432.
[283] *Ibid.*
[284] *Kvoka et al*, Trial Judgement, para.195.
[285] Article 5(h), ICTY Statute.
[286] *Kupreskic*, Trial Judgement, para.636.
[287] *Kupreskic*, Trial Judgement, para.634-636; *Blaskic*, Trial Judgement, para.235; *Kordic*, Trial Judgement, para.212; *Kvoca et al*, Trial Judgement, para.200 and *Krnojelac*, Trial Judgement, para.435.
[288] *Blaskic*, Trial Judgement, para.235.

The *Kupreskic* Judgement commented that the deprivation of rights in a case of persecution "can be said to have as its aim the removal of those persons from the society in which they live alongside the perpetrators, or eventually even from humanity itself".[289] It is unclear whether the Trial Chamber was merely observing a common factual situation in cases of persecution or was setting out part of the *mens rea*. The Trial Chamber in *Kordic and Cerkez* treated it as the latter,[290] but this has not been referred to by subsequent Judgements of the ICTY and would if followed set the *mens rea* of persecution practically as high as genocide.

The ICTY cases of *Tadic*, *Blaskic* and *Kvoca* also discussed the concept of a negative discriminatory intention, that is the intention to target all those not belonging to a particular race, religion or political persuasion and held that this would be sufficient *mens rea* for the offence of persecution.[291] Additionally, the *Krnojelac* Judgement held that the intent to discriminate "need not be the primary intent with respect to the act", provided that it was a significant one.[292] Finally, the *Kvoca* and *Krnojelac* Trial Chambers accepted that in certain situations a discriminatory intention could be inferred from the surrounding circumstances, although this could be displaced by evidence that the accused had acted for other reasons.[293]

5.32 **Rome Statute**

Persecution is defined in Article 7(2)(g) of the Rome Statute as "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity". This definition is reflected in the EOC, which commence by requiring that the perpetrator "severely deprived, contrary to international law, one or more persons of fundamental rights" and "targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such".[294]

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[289] *Kupreskic*, Trial Judgement, para.634.
[290] *Kordic and Cerkez*, Trial Judgement, paras.214 and 220.
[291] *Tadic*, Trial Judgement, para.714; *Blaskic*, Trial Judgement, para.236; *Kvoka et al*, Trial Judgement, para.195 and see *Milosevic*, Prosecutor's Second Pre-Trial Brief, para.1049.
[292] *Krnojelac*, Trial Judgement, para.435.
[293] *Kvoca et al*, Trial Judgement, para.201 and *Krnojelac*, Trial Judgement, para.436.
[294] EOC, p.122.

Only fundamental rights are protected by this definition, such as non-derogable rights in human rights instruments.[295] However, the word "severe" refers to the "character of the deprivation of fundamental rights",[296] rather than the character of the act and therefore, as suggested by the ICTY case law, the cumulative effect of several acts could be taken into account when judging the severity of the deprivation.[297] The second Element is interesting as it appears to protect groups *per se*, rather than simply individuals belonging to a group.[298] Kittichaisaree states that this formulation was adopted in order to ensure that those persons who were not part of the group, and yet targeted because of their association or support of the group, would also be protected.[299]

The third element requires that the targeting "was based on political, racial, national, ethnic, cultural, religious, gender... or other grounds that are universally recognized as impermissible under international law".[300] Therefore, the grounds for the discrimination have been extended greatly, although the EOC do not provide any amplification of the individual bases for discrimination. It is submitted that the national, ethnic, racial and religious grounds should be interpreted similarly to those terms as used for the crime of genocide which is set out in Article 6 of the Rome Statute.

Therefore, persecution on 'ethnic' grounds would include the targeting of those "whose identity as such is distinctive in terms of common cultural traditions or heritage".[301] 'Racial' grounds, applying the ICTR jurisprudence on genocide, would be persecution based on "hereditary physical traits often identified with a geographical region".[302] However, taking into account the comment of Schabas that "[a]s a way to classify humans into major subspecies... race has become virtually

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[295] Boot et al, 'Article 7', p.167.
[296] *Ibid.*, p.166.
[297] Discussed *supra*, para.5.31.
[298] C. Byron and D. Turns, 'The Preparatory Commission for the International Criminal Court', 50 ICLQ (2001) 420-435, p.423.
[299] Kittichaisaree, *International Criminal Law*, pp.121-122, and see *Kvoka et al*, Trial Judgement, para.195, discussed *supra*, para.5.31.
[300] EOC, p.122.
[301] The Proxmire Act, para.1093(5) and see the similar definition in *Akayesu*, Trial Judgement, para.513 and *Kayishema and Ruzindana*, Trial Judgement, para.98. Boot *et al*, 'Article 7', p.149, suggest that the term 'ethnic' in Article 7(1)(h) is narrower than the term 'ethnical' in Article 6, however, the terms 'ethnical' and 'ethnic' appear to be treated interchangeably by the ICTR, *Akayesu*, Trial Judgement, para.583.
[302] *Akayesu*, Trial Judgement, para.514 and *Kayishema and Ruzindana*, Trial Judgement, para.98.

obsolete",[303] it may be preferable to take the two concepts of racial and ethnic groups together to cover relevant cases.[304]

Persecution on 'national' grounds should be understood as persecution of "a collection of people who are perceived to share a legal bond based on common citizenship...".[305] This would protect nationals of a particular State, targeted because of their citizenship, irrespective of their ethnic or religious backgrounds. According to the ICTR a 'religious' group is one "whose members share the same religion, denomination or mode of worship"[306] and therefore the targeting of a group, adhering to a particular system of faith and worship,[307] would amount to persecution on religious grounds.

Persecution on 'political' grounds would include targeting on the basis of "party political beliefs and political ideology" according to the ICTR in *Kayishema and Ruzindana.*[308] However, Boot and Hall suggest an even broader approach with 'political' grounds for persecution including a difference of opinion on "public affairs issues such as environment and health".[309] They also suggest a broad meaning of 'cultural' grounds of persecution, as relating to the "customs, arts, social institutions, etc. of a particular group or people".[310]

The ground for persecution which has provoked most comment is that of 'gender',[311] which Article 7(3) of the Statute states "refers to the two sexes, male and female, within the context of society". Whilst the inclusion of gender persecution

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[303] W. Schabas, *Genocide in International Law*, (2000, Cambridge University Press, Cambridge), pp.122-123.

[304] See M. Shaw, 'Genocide and International Law', pp.797-820 in Y. Dinstein ed., *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne*, (1989, Martinus Nijhoff, Dordrecht) p.807.

[305] *Akayesu*, Trial Judgement, para.512. This approach was taken by several participants in the Sixth Committee discussions of the Genocide Convention, UNOR 3rd Session of the GA 1948, Part I, Summary Records of the Sixth Committee Discussions on Article II of the Draft Convention on Genocide, 73rd Meeting, pp.97-98 and 74th Meeting, pp.99 and 106, but some participants understood the word to refer to national minorities, 74th Meeting, p.99 and 75th Meeting, p.116. Compare opposing views of M. Lippman, 'The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later', 15 Ariz.J.Int'l&Comp.L (1998) 415-514, p.456, with W. Schabas, n.303 *supra*, pp.114-120.

[306] *Akayesu*, Trial Judgement, para.515 and *Kayishema and Ruzindana*, Trial Judgement, para.98.

[307] Taken from the definition of 'religion' in the *Concise Oxford Dictionary*.

[308] *Kayishema and Ruzindana*, Trial Judgement, para.130 and see *Akayesu*, Trial Judgement, para.583.

[309] Boot *et al*, 'Article 7', pp.148-149.

[310] *Ibid.*, p.149, referring to definition in Oxford's Advanced Learner's Dictionary of Current English.

[311] See 'What is Gender?' on the website of the Women's Caucus for Gender Justice, available at: <http://www.iccwomen.org/resources/gender.htm>.

was welcomed by many,[312] the definition in Article 7(3) has been criticised.[313] The definition of sex and gender accepted by most commentators is that "sex refers to biologically determined differences between men and women", whereas "gender refers to the social differences between men and women that are learned, changeable over time and have wide variations both within and between cultures".[314] Therefore, Article 7(3) appears to reflect "an unsuccessful attempt to combine the different concepts of "sex" and "gender"".[315]

This compromise language was adopted because of the fear of some States that the expression 'gender' could render suspect laws criminalising homosexuality,[316] and Sadat suggests that the resulting vagueness in the language used allows both sides to assert that the definition reflects their understanding of the term.[317] However, McAuliffe deGuzman asserts that Article 7(3) "represents an acceptance of the view that in applying and interpreting the law, the Court should be concerned not only with discrimination based on "sex" but with any discrimination related to socially constructed roles and power differentials".[318] Therefore, it would seem that, for example, attacks against working women as opposed to housewives, could amount to gender persecution under this definition, but it is still unclear whether attacks against homosexuals could amount to persecution under the Rome Statute.[319]

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[312] The inclusion of gender as a basis for persecution was strongly supported by the NGO group, Women's Caucus for Gender Justice, see <http://www.iccwomen.org/>. See also J. Campanaro, 'Women, War, and International Law: The Historical Treatment of Gender-Based War Crimes', 89 Geo.LJ (2001) 2557-2592, p.2590; G. McDougall, n.193 *supra*, para.31 and B. Moshan, 'Women, War and Words: The Gender Component in the Permanent International Criminal Court's Definition of Crimes against Humanity', 22 Fordham Int'l.LJ (1998) 154-184, p.182.

[313] See H. Charlesworth, in K. Rittich *et al*, 'The Gender of International Law', 93 ASIL Proceedings (1999) 206-209, p.207; K. Askin, 'Women's Issues in International Criminal Law: Recent Developments and the Potential Contribution of the ICC', pp.47-63, in D. Shelton ed., *International Crimes, Peace and Human Rights: The Role of the International Criminal Court*, (2000, Transnational, New York), pp.60-61 and H. Charlesworth and C. Chinkin, *The Boundaries of International Law: A Feminist Analysis*, (2000, Manchester University Press, Manchester), p.335.

[314] Report of the Secretary-General, 'Integrating the Human Rights of Women throughout the UN System', UN Doc.E/CN.4/1997/40, 20 December 1996, para.10.

[315] K. Askin, n.47 *supra*, p.47 and see G. Robertson, n.121 *supra*, p.338. The tension between sex and gender in the context of the UN Fourth World Conference on Women in Beijing, is discussed in S. Baden and A. Goetz, 'Who Needs [Sex] When You Can Have [Gender]', 56 Feminist Review (1997) 3-25.

[316] H. Charlesworth and C. Chinkin, n.313 *supra*, p.335 and L. Sadat, n.13 *supra*, p.159.

[317] L. Sadat, n.13 *supra*, p.160.

[318] M. McAuliffe deGuzman, 'Article 21, Applicable Law', pp.435-446 in Triffterer, *Commentary on the Rome Statute*, p.446 and see K. Askin, n.47 *supra*, p.49.

[319] G. Robertson suggests that transsexuals and homosexuals are not protected under this definition, in n.121 *supra*, p.338 and this interpretation is supported by R. Lehr-Lehnardt, 'One Small Step for Women: Female-Friendly Provisions in the Rome Statute of the International Criminal Court', 16

The final ground of persecution is the open-ended "other grounds that are universally recognized as impermissible under international law".[320] Boot and Hall comment that this final basis for persecution should be understood as other 'widely recognised' grounds and thus not all States would have to recognise a particular ground as impermissible in order for it to form the basis for persecution.[321] However, Robinson states that this is a very high threshold provision and that the Statute may simply be amended to reflect future developments in grounds of persecution.[322]

The EOC specific to the offence of persecution conclude with the requirement that "[t]he conduct was committed in connection with any act referred to in Article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court".[323] An attached footnote states that no additional *mens rea* is necessary as a result of this Element and so the perpetrator does not have to be aware of any specific 'connected acts'.[324] Therefore, this Element simply adds a requirement for an objective contextual link between the persecution and at least one act described by the Statute in Articles 6, 7(1) or 8(2).[325]

Therefore the *actus reus* of this offence is to severely deprive at least one person of fundamental rights, in connection with at least one crime described in the Rome Statute. The *mens rea* requires that the act be carried out intentionally, against the person because of their connection to or identity as part of a group or against the group as such, which was targeted on one of the listed grounds. Accordingly, the crime of persecution under the Rome Statute has a higher mental element than that of other crimes against humanity, because of the necessity to show discrimination on one of the listed bases, but it is clear that it need not be shown that the perpetrator intended to remove the targeted group from society.

5.33 *7(1)(i) Enforced Disappearance of Persons*

BYU J.Pub.L (2002) 317-354, p.340. However, see the opposing view of B. Bedont, 'Gender-Specific Provisions in the Statute of the ICC', pp.183-210 in F. Lattanzi and W. Schabas eds., *Essays on the Rome Statute of the ICC, Volume I*, (1999, Editorale Scientifica, Naples), pp.187-188.

[320] EOC, p.122.

[321] Boot *et al*, 'Article 7', p.150.

[322] D. Robinson, n.95 *supra*, p.54.

[323] EOC, p.122.

[324] *Ibid.*, fn.22 and see W. Rückert and G. Witschel, n.164 *supra*, p.88.

[325] Lee, *ICC: Elements*, p.97, but if the conduct was itself one of the acts referred to in Article 7(1), it would not be necessary to link the conduct to another act, K. Ambos and S. Wirth, n.32 *supra*, p.72.

5.34 **Origins**

The crime of enforced disappearance, although it was not so described at the time, appears to have been invented by Hitler in 1941 in his 'Night and Fog' decree.[326] The Nuremberg Judgement describes how those who committed crimes against the Reich or the German occupation forces, or were even suspected of opposing the policies of the German occupation forces, would be taken secretly to Germany for trial. No word was permitted to reach their relatives, even if they died, in order "to create anxiety in the minds of the family of the arrested person"[327]

The term 'disappearance' was first coined in the 1960's in Guatemala when many political opponents of the ruling regime were abducted and never heard from again.[328] During the 1970's enforced disappearances took place on a massive scale in Argentina and Chile, indeed Lacabe estimates that between 20,000 and 30,000 people disappeared in Argentina alone.[329] This cruel practice then spread to other Latin American countries.[330] A typical enforced disappearance was described by the Argentine National Commission on the Disappeared. A kidnapping by security forces, who concealed their identities, would be followed by detention of the victim in inhuman conditions in a secret detention centre. There he or she would be humiliated and tortured, leading to death. The body would then be destroyed to prevent subsequent identification.[331]

5.35 **Development**

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[326] Boot *et al*, 'Article 7', p.151 and see M. Lippman, 'The Prosecution of Josef Altstoetter et al: Law, Lawyers and Justice in the Third Reich', 16 Dick.J.Int'l.L (1998) 343-433, pp.378-379.
[327] *IMT Judgement*, p.453 and see Judgement of Keitel, p.493.
[328] J. Mendez and J. Vivanco, 'Disappearances and the Inter-American Court: Reflections on a Litigation Experience', 13 Hamline LR (1990) 507-577, p.510.
[329] M. Lacabe, 'The Criminal Procedures against Chilean and Argentinian Repressors in Spain, A Short Summary', Revision One, 11 November 1998, available at: <http://www.derechos.net/marga/papers/spain.html> and see A. Garro and H. Dahl, 'Legal Accountability for Human Rights Violations in Argentina: One Step Forward and Two Steps Backward', 8 HRLJ (1987) 283-344, pp.287-301.
[330] C. Grossman, 'Disappearances in Honduras: The Need for Direct Victim Representation in Human Rights Litigation', 15 Hastings Int.&Comp.LR (1992) 363-389, pp.366-368.
[331] 'Nunca Mas': The Report of the Argentine National Commission on the Disappeared (CONADEP), 1984, Recommendations and Conclusions, available at: <http://www.nuncamas.org/index2.htm> and see 'Guatemala: Memory of Silence', Commission for

Two recent instruments have tried to tackle the practice of enforced disappearance. First, the General Assembly in 1992 passed a 'Declaration on the Protection of all Persons from Enforced Disappearances'.[332] Although enforced disappearance was not defined in the main body of the declaration, the preamble both described enforced disappearances as "persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law" and stated that the "systematic practice of such acts is *of the nature* of a crime against humanity".[333]

The second instrument is the 1994 Organisation of American States Inter-American Convention on the Forced Disappearance of Persons.[334] The definition of enforced disappearance is in Article 2 of the main body of the Convention, which defines it as "the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees". Furthermore, the preamble states unambiguously that "the systematic practice of the forced disappearance of persons *constitutes* a crime against humanity".[335]

Although these definitions of enforced disappearance differ, a common core appears to be the deprivation of a victim's freedom by State agents or those acting with State approval,[336] followed by the refusal to provide information on the whereabouts of the victim, resulting in the impediment or prevention of the legal

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Historical Clarification, Conclusions and Recommendations, para.89, available at: <http://hrdata.aaas.org/ceh/report/english/toc.html>.

[332] GA Res.47/133, 18 December 1992, and see R. Brody and F. González, 'Nunca Más: An Analysis of International Instruments on "Disappearances"', 19 HRQ (1997) 365-405, pp.371-374.

[333] GA Res.47/133, 18 December 1992, emphasis added.

[334] OAS 1994 Inter-American Convention on the Forced Disappearance of Persons and see R. Brody and F. González, n.332 *supra*, pp.374-375.

[335] Emphasis added.

[336] The concept of enforced disappearances with the authorisation of a non-State body is an innovation of the Rome Statute, see *supra*, para.5.35.

protection of the victim.[337] Human rights cases before the IACHR and the ECHR have not tackled the definition of this phenomena, rather they have listed a series of human rights protections breached by such enforced disappearances.[338]

Despite these attempts to eliminate this most cruel of crimes, the Working Group on Enforced Disappearances, established by the Human Rights Commission in 1980,[339] has observed the practice of enforced disappearances spreading to such countries as Iraq, Sri Lanka and the former Yugoslavia.[340] The continuing relevance of enforced disappearance is also shown by its inclusion in the 1996 ILC Draft Code, the commentary of which states that "the present Code proposes its inclusion as a crime against humanity because of its extreme cruelty and gravity".[341] However, the Draft Code and commentary do not define enforced disappearances, but merely refer to the UN Declaration and OAS Convention on the subject.[342]

5.36 **Rome Statute**

Enforced disappearance is defined in the Rome Statute as "the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or

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[337] See also Article 1, 1998 Draft International Convention on the Protection of all Persons from Forced Disappearance, which defines forced disappearance as "the deprivation of a person's liberty, in whatever form or for whatever reason, brought about by agents of the State or by persons or groups of persons acting with the authorization, support of acquiescence of the State, followed by an absence of information, or refusal to acknowledge the deprivation of liberty or information, or concealment of the fate or whereabouts of the disappeared person". Article 3 of the Draft Convention describes the systematic or massive practice of forced disappearance as a crime against humanity.

[338] *Velasquez Rodriguez Case*, IACHR, 28 ILM (1989) 291, paras.155-157; *Çakici v Turkey*, ECHR Judgement, paras.85-107 and *Timurtas v Turkey*, ECHR Judgement, paras.83-98 and see J. Mendez and J. Vivanco, n.328 *supra* and G. Sethi, 'The European Court of Human Rights' Jurisprudence on Issues of Forced Disappearances', 8 HR Brief (2001) 29-31.

[339] For a discussion of the Working Group and its practices see M. Lippman, 'Disappearances: Towards a Declaration on the Prevention and Punishment of the Crime of Enforced or Involuntary Disappearances', 4 Conn.JIL (1988) 121-143, pp.128-137.

[340] Report of the Working Group on Enforced Disappearances, Commission on Human Rights, 12 January 1998, E/CN.4/1998/43, para.409. See I. Taqi, 'Adjudicating Disappearance Cases in Turkey: An Argument for Adopting the Inter-American Court of Human Rights' Approach', 24 Fordham Int'l.LJ (2001) 940-987; D. Udagama, 'Taming of the Beast: Judicial Responses to State Violence in Sri Lanka', 11 Harv.HRJ (1998) 269-294; L. Black, 'Forced Disappearances in Sri Lanka Constitute a Crime against Humanity', 1 January 1999, available at: <http://www.disappearances.org/mainfile.php/articles_srilanka/9/>; J. Kaur, 'A Judicial Blackout: Judicial Impunity for Disappearances in Punjab, India', 15 Harv.HRJ (2002) 269-297 and O. Ben-Naftali and S. Gleichgevitch, 'Missing in Legal Action: Lebanese Hostages in Israel', 41 Harv.ILJ (2000) 185-252, pp.199-205.

[341] Article 18(i), 1996 ILC Draft Code and Commentary, para.15 to Article 18.

whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time".[343] This was based on the UN Declaration on Enforced Disappearance.[344]

The EOC of this offence reflect the complex nature of the crime and the fact that its commission normally involves several participants over a prolonged period of time.[345] The Elements include alternate parts in order to deal both with those perpetrators who are involved in the initial detention as well as those who refuse to give information, although they do not deal with those who dispose of the bodies of victims of enforced disappearance. In order to simplify the analysis of this crime, the following discussion will deal first with the EOC relating to detention and then with the EOC relating to refusal to give information.

The perpetrator must first have "arrested, detained or abducted one or more persons".[346] These terms cover a wide range of possibilities,[347] which are further widened by two footnotes which state that 'detained' includes a perpetrator who maintained an existing detention and that "under certain circumstances an arrest or detention may have been lawful".[348] Consequently, criminal liability may attach to an individual who takes charge of the detained victim and does not redress the situation and a perpetrator cannot avoid liability because the victim's initial arrest was lawful if the other elements of the offence are met.[349]

The arrest, detention or abduction must have been carried out "by, or with the authorization, support or acquiescence of, a State or a political organization".[350] The inclusion of a 'political organization' is a new development in this crime, but one which is supported by the approach of the Rome Statute that a crime against humanity can be committed pursuant to a 'State or organizational policy'.[351] However, the exact definition of 'political organization' is unclear. Would it, for

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[342] *Ibid.*
[343] Article 7(2)(i), Rome Statute.
[344] C. Hall, 'The Sixth Session of the UN Preparatory Committee on the Establishment of an International Criminal Court', 92 AJIL (1998) 548-556, p.550 and T. McIntyre and C. de Gaston, 'Enforced Disappearance of Persons: Its Inclusion as a Crime against Humanity in the ICC', pp.26-28, available from 'Law without Borders: Student Perspectives on International Law', at: <http://www.law2.byu.edu/lwb>.
[345] EOC, p.122, fn.23 and Lee, *ICC: Elements*, p.99.
[346] EOC, p.122, Element 1(a).
[347] Boot *et al*, 'Article 7', p.170.
[348] EOC, p.122, fns.25 and 26.
[349] See Lee, *ICC: Elements*, p.101.
[350] EOC, p.123, Element 4.
[351] EOC, Introduction para.3, p.116 and see Boot *et al*, 'Article 7', pp.170-171.

example, include a well-organised terrorist group which was carrying out disappearances as part of a violent secession campaign?

The deprivation of freedom must have been accompanied or followed by "a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons" and the perpetrator must have been aware that the deprivation of freedom "would be followed in the ordinary course of events by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons".[352] Therefore, because the perpetrator may not be involved after the initial arrest, it is not necessary to prove that he knew of an actual refusal to give information, but it is sufficient if he is aware that such a refusal would follow in the ordinary course of events.[353] A footnote to the mental element states that a perpetrator maintaining an existing detention would also be liable if he knew that a refusal to give information had already taken place.[354] Finally, it must be shown that the perpetrator "intended to remove such person or persons from the protection of the law for a prolonged period of time".[355] Askin comments that the expression 'prolonged period' should be "interpreted generously on behalf of the disappeared".[356]

In the alternate case of perpetrators refusing to give information, the perpetrator must have "[r]efused to acknowledge the arrest, detention or abduction, or to give information on the fate or whereabouts of such person or persons" and this must have been done "by or with the authorization or support of, such State or political organisation".[357] For this type of perpetrator, State or political organisational acquiescence alone is insufficient.[358]

The perpetrator's refusal must have either accompanied the deprivation of freedom of the victim, or followed this event and the perpetrator must have been aware that this deprivation of freedom was occurring or had occurred.[359] Therefore, an innocent denial that the victim had been deprived of his or her freedom would clearly not amount to an offence. The perpetrator must also, as is the case above,

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[352] EOC, pp.122-123, Elements 2(a) and 3(a).
[353] Lee, *ICC: Elements*, pp.102-103.
[354] EOC, p.123, fn.28.
[355] EOC, p.123, Element 6.
[356] K. Askin, n.47 *supra*, p.49.
[357] EOC, pp.122-123, Elements 1(b) and 5.
[358] This was to harmonise the different language versions of the Rome Statute, Lee, *ICC: Elements*, p.102.
[359] EOC, p.123, Elements 2(b) and 3(b).

intend to "remove such person or persons from the protection of the law for a prolonged period of time".[360]

A final issue raised at the Preparatory Commission was whether the ICC would have jurisdiction over continuing enforced disappearances, in the case of those persons who were deprived of their freedom in the past, but whose whereabouts was still unknown and denied by the relevant authorities, at the date the Rome Statute entered into force.[361] This issue was resolved in a footnote which explains that the crime of enforced disappearance falls under the jurisdiction of the Court only if the widespread and systematic attack against a civilian population of which it forms a part occurs after the entry into force of the Statute.[362]

5.37 *7(1)(j) The Crime of Apartheid*

5.38 **Origins**

The term 'apartheid' is an Afrikaans word meaning apartness or separation. The term was coined in 1944 by the South African Prime Minister Daniel Malan, "to denote South African policies of racial segregation between whites and various nonwhite racial groups" and it became official policy in South Africa after the National Party formed a government in 1948.[363] Nevertheless, the apartheid regime in South Africa was characterised not by a 'separate but equal' policy, even if such were possible, but by institutionalised racism, forced removals of populations, imprisonment without trial, torture and even murder.[364]

Apartheid was condemned by the General Assembly as a crime against humanity as early as 1966,[365] and in 1968 the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity expressly

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[360] EOC, p.123, Element 6.
[361] C. Hall, n.117 *supra*, p.781.
[362] EOC, p.122, fn.24.
[363] L. Sunga, n.1 *supra*, p.74.
[364] For background information on apartheid in South Africa see R. Abel, *Politics by Other Means: Law in the Struggle against Apartheid, 1980-1994*, (1995, Routledge, New York) and M. Coleman ed., *A Crime against Humanity: Analysing the Repression of the Apartheid State*, (1998, Human Rights Committee of South Africa, Johannesburg) and the Truth and Reconciliation Commission of South Africa Final Report (TRC), 29 October 1998, available at: <www.polity.org.za/govdocs/commissions/1998/trc/index.htm>, particularly Vol.1, Chapter 2, paras.45-46 and 80.
[365] GA Res.2202 (XXI), 16 December 1966.

included apartheid as a crime against humanity.[366] In 1971 the ICJ condemned apartheid as a denial of fundamental human rights and a "flagrant violation of the purposes and principles" of the UN Charter.[367] Then in 1973 the General Assembly adopted the International Convention on the Suppression and Punishment of the Crime of Apartheid which declared in Article 1 that "apartheid is a crime against humanity".[368]

The Apartheid Convention explained that the crime of apartheid would "include similar policies and practices of racial segregation and discrimination as practised in southern Africa" and would apply to "the following inhumane acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them".[369] The acts referred to included murder, infliction of serious bodily or mental harm, torture, inhuman or degrading treatment, arbitrary arrest or illegal imprisonment of a racial group; imposition of living conditions calculated to cause a racial group's physical destruction in whole or part; legislative and other measures to prevent a racial group from participation in the political, social, economic and cultural life of the country including the right to work, the right to education and the right to freedom of movement and residence; measures to divide the population along racial lines by creation of separate reserves and ghettos; exploitation of labour of members of a racial group and persecutions of those opposing apartheid.[370] Practices of apartheid "and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination" were also prohibited as a grave breach in API.[371]

5.39 **Development**

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[366] Article 1(b), 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity and see R. Slye, 'Apartheid as a Crime against Humanity: A Submission to the South African Truth and Reconciliation Commission', 20 Mich.J.Int'l.L (1999) 267-300, pp.290-292.

[367] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Rep. (1971) 3, para.131.

[368] Article 1, 1973 Apartheid Convention. See R. Slye, n.366 *supra*, pp.292-295.

[369] Article 2, 1973 Apartheid Convention.

[370] Article 2, *ibid.* As of February 2002 there were 101 States Parties to the Apartheid Convention, details available at: <http://www.unhchr.ch/html>.

[371] Article 85(4)(c), API.

The crime of apartheid was included expressly in the 1991 ILC Draft Code of Crimes with a definition closely based on the Apartheid Convention.[372] A more generic version was included in the 1996 Draft Code, which prohibited "institutionalized discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population".[373] The ILC commentary states that this crime consists of three elements, "a discriminatory act committed against individuals because of their membership in a racial, ethnic or religious group... the denial of their human rights and fundamental freedoms... and a consequential serious disadvantage to members of the group comprising a segment of the population".[374]

The South African Truth and Reconciliation Commission (TRC) published its report in 1998. However, whilst it stated that apartheid was a human rights violation and that "as a system of enforced racial discrimination and separation" it was a crime against humanity,[375] the report did not define apartheid as such. The TRC instead concentrated upon its mandate to investigate gross violations of human rights, defined as "killing, abduction, torture or severe ill-treatment" and so "was restricted to examining only a fraction of the totality of human rights violations that emanated from the policy of apartheid".[376]

5.40 **Rome Statute**

The crime of apartheid is defined in Article 7(2)(h) of the Rome Statute as "inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime". This definition was refined by the Elements, which require that the perpetrator "committed an inhumane act against one or more persons" and that the act was "referred to in article 7, paragraph 1, of the Statute, or was an act of a character similar to any of those acts".[377]

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[372] Article 20, 1991 ILC Draft Code.
[373] Article 18(f) 1996, ILC Draft Code.
[374] 1996 ILC Draft Code Commentary, para12 to Article 18.
[375] TRC Report, Vol.1, Chap.2, para.22; Vol.1, Chap.4, Appendix 'A Crime against Humanity', para.1 and Vol.5, Chap.6, para.101.
[376] TRC Report, Vol.1, Chap.2, para.19.
[377] EOC, p.123, and see Lee, *ICC: Elements*, pp.104-105.

Therefore, the EOC clarify the Rome Statute definition by showing that other acts specified as crimes against humanity can, if the other Elements of this offence are satisfied, constitute apartheid. Although the expression 'inhumane act', is not defined, clearly any of the offences specified in Article 7(1) would amount to such. Furthermore, a footnote states that 'character' "refers to the nature and gravity of the act", so an act which is similar in quality and seriousness to the other crimes against humanity could also constitute an inhumane act for the purposes of this offence.[378] Whilst the perpetrator need not have consciously evaluated his act as inhumane, he must have been "aware of the factual circumstances that established the character of the act".[379]

The conduct must have been "committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups".[380] The TRC provides an insight into the concept of an 'institutionalized regime', by referring to the "violence of the law or what is often referred to as *institutional or structural violence*".[381] Applying this and dictionary definitions, an 'institutionalized regime' could be described as an established law or practice by a government or prevailing order.[382] The regime must impose 'systematic oppression and domination' over one or more racial groups, thus controlling and harshly treating them.[383] As Hall comments, this cumulative requirement will "impose a significant burden on the prosecution".[384] Racial groups are not defined, but 'racial' should be given the same definition as in the crime of persecution.[385] This offence is not restricted to regimes imposed by States and could feasibly also be imposed by an armed group with control over an area where it was not the recognised government.[386]

Finally, the Elements state that the perpetrator "intended to maintain such regime" by his or her conduct.[387] Therefore, the *mens rea* of this offence requires that the perpetrator intended to commit the underlying act, whilst being aware of the

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[378] EOC, p.123, fn.29.
[379] *Ibid.*
[380] EOC, p.123.
[381] TRC Report, Vol.1, Chap.2, para.68, emphasis added and see Vol.4, Chap.1, para.6.
[382] See *Concise Oxford Dictionary*.
[383] *Ibid.*
[384] Boot *et al*, 'Article 7', p.169.
[385] *Supra*, para.5.32.
[386] See Boot *et al*, 'Article 7', p.168.
[387] EOC, p.123.

factual circumstances establishing its nature and gravity and did so with the intention of maintaining an institutionalised regime of systematic oppression and domination over a racial group. Hall criticises the specific intent to maintain the regime, as it "could be interpreted to exclude both acts by those seeking to replace the regime with something worse and by those seeking to replace it with a regime which was less oppressive, but still imposing severe discrimination".[388] Nevertheless, it seems likely that most acts criminalised under this provision would constitute another offence under Article 7(1) if the specific intent were not proven.

5.41 *7(1)(k) Other Inhumane Acts of a Similar Character Intentionally Causing Great Suffering, or Serious Injury to Body or to Mental or Physical Health*

5.42 Origins

The expression 'other inhumane acts' was included in the Nuremberg and Tokyo Charters, but was not defined.[389] Nevertheless, reference should be had to the similar expression 'inhuman treatment' described in the grave breach provisions of the Geneva Conventions, as both provide a 'catch-all' provision in the knowledge that not all war crimes or crimes against humanity can be explicitly defined in advance.[390] Attempts have been made to narrow the ambit of this offence in two Israeli decisions: first, the Tel Aviv District Court in the case of *Attorney-General v Enigster* stated that 'other inhumane acts' must be "of a serious character and likely to embitter the life of a human being, to degrade him and cause him great physical or moral pain and suffering".[391] Second, the Supreme Court in the case of *Eichmann* spoke of acts "causing serious physical and mental harm".[392]

5.43 Development

The ILC 1996 Draft Code includes 'other inhumane acts' in its definition of crimes against humanity, but the offence is limited to those which "severely damage

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[388] Boot *et al*, 'Article 7', pp.169-170.
[389] Article 6(c), Nuremberg Charter; Article 5(c), Tokyo Charter and Article II(c), CCL No.10.
[390] See discussion *supra*, para.2.19.
[391] *Attorney-General v Enigster*, 18 ILR 540, p.541.

physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm".[393] The commentary states that these requirements are intended to ensure that inhumane acts are "similar in gravity to those listed in the preceding subparagraphs" and that the acts "in fact cause injury to a human being in terms of physical or mental integrity, health or human dignity".[394]

The ICTY Judgements have stated that inhumane acts have the same basic elements as cruel treatment under Common Article 3 or inhuman treatment as a grave breach.[395] However, those ICTY and ICTR Judgements which have defined 'inhumane acts' have adopted the ILC method of circumscribing this potentially wide crime and have also been influenced by the description of this offence in the Rome Statute. The cases show that such acts must be as serious as the other listed crimes against humanity and the accused must have intentionally caused serious physical or mental suffering or a serious attack on human dignity.[396] The Trial Chamber in *Krnojelac* commented that the assessment of the seriousness of an act is by its nature relative and all factual circumstances must be taken into account, including "the nature of the act or omission, the context in which it occurs, its duration and/or repetition, the physical, mental and moral effects of the act of the victim and the personal circumstances of the victim, including age, sex and health".[397]

5.44 **Rome Statute**

The Elements of inhumane acts require that the perpetrator "inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act".[398] The act must have been "of a character similar to any other act referred to in article 7, paragraph 1, of the Statute" and the perpetrator "was aware of

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[392] *Attorney-General of the Government of Israel v Eichmann*, Judgement, District Court of Jerusalem, 36 ILR 18, p.239.
[393] Article 18(k), 1996 ILC Draft Code.
[394] 1996, ILC Draft Code Commentary, para.17 to Article 18.
[395] *Jelisic*, Trial Judgement, para.52, *Kupreskic*, Trial Judgement, para.711 and *Krnojelac*, Trial Judgement, para.130 and see discussion *supra*, paras.2.20.3 and 4.6.
[396] *Kupreskic*, Trial Judgement, para.566; *Kordic and Cerkez*, Trial Judgement, paras.269-271; *Kvoca*, Trial Judgement, para.206; *Krnojelac*, Trial Judgement, paras.130-132; *Kayishema and Ruzindana*, Trial Judgement, para.151 and *Bagilishema*, Trial Judgement, para.92.
[397] *Krnojelac*, Trial Judgement, para.131.
[398] EOC, p.124.

the factual circumstances that established the character of the act".[399] Therefore, the Rome Statute takes the same two-stage approach of the ILC in order to circumscribe a potentially wide crime in two ways. First, the Elements restrict the *actus reus* of the offence to those acts similar in nature and gravity to other acts under Article 7(1).[400] Secondly, the Elements restrict the offence to those inhumane acts which result in a level of suffering or injury which should be interpreted as similar to that caused by the grave breach of wilfully causing great suffering or serious injury to body or health.[401]

The *mens rea* of this offence, applying the default mental element of Article 30, requires that the perpetrator intended to commit an inhumane act and intended or knew that in the usual course of events his or her actions would result in the infliction of great suffering or serious injury. Furthermore, the perpetrator must have been aware of the factual circumstances establishing the character of his or her act, but need not have made a conscious evaluation of the act as inhumane.

Ratner and Abrams suggest that inhumane acts would include "medical experimentation, mutilations, severe beatings, food deprivation, sterilizations, violations of corpses, forced undressing, forced witnessing of atrocities against loved ones, and other egregious physical and mental assaults".[402] However, Schabas questions whether acts condemned by the Rwanda tribunal such as forced nudity would still qualify as inhumane acts, given the restrictive language of the Rome Statute.[403] Equally, it is difficult to see how violation of corpses could, of itself, amount to inhumane acts as defined by the Statute and Elements. Nevertheless, the forced witnessing of atrocities against loved ones was discussed in *Kayishima and Ruzindana*, where the Trial Chamber stated that a third party could suffer "serious mental harm" in such circumstances, amounting to inhumane acts, provided that the perpetrator knew or intended that his act would cause such suffering to the third party.[404]

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[399] *Ibid.*
[400] *Ibid.*, fn.30, see discussion of the identical fn.29 *supra*, para.5.40.
[401] Lee, *ICC: Elements*, p.108 and see discussion *supra*, paras.2.24-2.25.
[402] Ratner and Abrams, *Accountability for Human Rights Atrocities*, p.74.
[403] Schabas, *An Introduction to the ICC*, p.39.
[404] *Kayishema and Ruzindana*, Trial Judgement, paras.152-153.

6

CONCLUSION

This thesis has examined crimes against humanity and war crimes under the Rome Statute of the ICC. The concluding chapter commences by considering how this interpretation of crimes may be affected by national prosecutions of war crimes and crimes against humanity under the principle of complementarity. Next, consideration is given to the influence which reservations and interpretative declarations to the conventions which form the basis of Article 8, or interpretative declarations to the Rome Statute, will have on the definition of crimes. Then, the question of whether some of the crimes are still insufficiently defined to enable a fair trial in accordance with the principle of legality is addressed.

This chapter also reviews the influence of human rights law upon the definition of crimes in the Rome Statute and questions whether human rights bodies may provide an effective alternative method of ending impunity for conduct described in Articles 7 and 8 rather than prosecutions before the ICC. The Rome Statute is praised for its approach to gender issues in the definitions of crimes but criticised for failure to sufficiently address the issue of prohibited weapons. Finally, the particular problems of applying international humanitarian law in non-international armed conflicts and the extent to which Article 8(2)(e) of the Rome Statute addresses these concerns is discussed.

6.1 Domestic Prosecutions and the Definition of Crimes in the Rome Statute

The definitions of war crimes and crimes against humanity in the Rome Statute discussed in this thesis are already making an impact on national legislation worldwide, despite the fact that no one has yet been indicted by the ICC.[1] Now that the Statute has achieved sufficient ratifications to enter into force,[2] States Parties will be obliged to investigate and prosecute not only grave breaches but also all the listed

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[1] C. Kreß and F. Lattanzi eds., *The Rome Statute and Domestic Legal Orders, Volume I: General Aspects and Constitutional Issues*, (2000, Editrice il Sirente Piccola Società Cooperativa a.r.l.).
[2] Pursuant to Article 126, the Rome Statute entered into force on 1 July 2002.

offences in the Rome Statute or they will risk action by the ICC.[3] Indeed, as Aldrich comments, "the mere existence of the court should spur trials by national courts".[4]

However, in certain circumstances, States alone will have jurisdiction over offences described in the Rome Statute. The *chapeau* to crimes against humanity in Article 7 ensures that only widespread or systematic incidences of this offence, with State or organisational involvement, will come within the jurisdiction of the ICC.[5] Furthermore, with respect to minor or isolated war crimes the ICC may be unable to act as Article 8(1) establishes that the Court should deal with such offences "*in particular* when committed as part of a plan or policy or as part of a large-scale commission of such crimes".[6] Whilst this restriction is not mandatory, it is submitted that when considered in conjunction with Article 17(1)(d), which allows the Court to find that a case is not of "sufficient gravity" to justify further action, the ICC would be unlikely to find admissible a single or small number of war crimes unless they were of extreme gravity.[7]

Nevertheless, in such circumstances States Parties may still be obliged to take action under the grave breach system of the Geneva Conventions and Additional Protocol 1.[8] Further responsibility is conferred on States under the principle of complementarity by which the Rome Statute concedes primacy to national jurisdictions even in the case of crimes serious enough to come within the jurisdiction of the ICC.[9] This, combined with the reluctance of States to relinquish their sovereignty in respect of criminal trials makes it is very likely that more prosecutions will take place at a national level than at an international level even with respect to crimes serious enough to come within the jurisdiction of the ICC. Therefore, effective national implementation of the Rome Statute is of great importance in ensuring that consistent definitions of crimes are applied in the different national trials and before the ICC.

However, a review of national implementing legislation reveals that States are not simply enacting the definitions of crimes in the Rome Statute and EOC

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[3] Due to the principle of complementarity, Articles 1, 17 and 18, Rome Statute.
[4] G. Aldrich, 'The Laws of War on Land', 94 AJIL (2000) 42-63, p.55.
[5] See discussion *supra*, paras.5.4 and 5.7.
[6] See discussion *supra*, para.2.10.
[7] Note that the reference to seriousness is repeated in the chapeaux to Article 8(2)(b), (c) and (e).
[8] See Articles 50/51/130/147 of the 1949 Geneva Conventions. See also para.6 of the Preamble, Rome Statute "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes".
[9] Articles 1, 17 and 18, Rome Statute.

without change.[10] For example, the definitions in the Canadian implementing legislation are extremely broad, essentially allowing prosecutions against any war crime or crime against humanity which "at the time and in the place of its commission" constituted a crime "according to customary international law", although to avoid confusion the Act confirms that the crimes set out in the Rome Statute are crimes according to customary international law.[11] The definitions of crimes in the German Code of Crimes against International Law are broadly similar to those in the Rome Statute, but extend national jurisdiction over several offences restricted to international armed conflict in the Rome Statute, to include those offences when committed in non-international armed conflicts.[12]

Differing definitions of international crimes in different States may cause conflicting case law in respect of the crimes in the Rome Statute. However, with regard to the issue of complementarity, the main difficulty for the ICC lies, not in the fact that States may decide to prosecute a greater range of offences than those provided for in Rome Statute,[13] but when, owing to inadequate implementation, they are unable to prosecute those crimes set out within the Rome Statute to the same extent as the ICC. This could occur, first if the definition of an offence were drawn more narrowly than its equivalent in the Rome Statute. For example, the Australian ICC Act defines the crimes by way of detailed elements which differ somewhat from the EOC adopted by the Assembly of States Parties.[14] Under this Act, the crime against humanity of persecution requires that the perpetrator severely deprived one or more person of specifically listed rights guaranteed by the ICCPR.[15] The EOC adopted by the Assembly of States Parties, in contrast, contain a far more open-ended definition in which deprivation of rights not mentioned in the ICCPR could still feasibly amount to the offence of persecution.[16]

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[10] See International Criminal Court Act, 2001, (England, Wales and Northern Ireland); International Criminal Court (Consequential Amendments) Act, 2002, No.42 (Australia); Crimes against Humanity and War Crimes Act, 2000, C.24 (Canada) and Act to Introduce the Code of Crimes against International Law, 2002, (Germany) translated by B. Duffett.

[11] Crimes against Humanity and War Crimes Act, 2000, C.24, Article 4(3) and (4).

[12] For example see Section 12 on prohibited means of warfare, 2002 Act to Introduce the Code of Crimes against International Law, translated by B. Duffett.

[13] See Article 10, Rome Statute.

[14] International Criminal Court (Consequential Amendments) Act, 2002, No.42, Schedule 1 - Amendment of the Criminal Code Act 1995, subdivisions B-G.

[15] *Ibid.*, subdivision C, para.268.20.

[16] EOC, p.122.

Secondly, a failure to enact an equivalent of Article 25 on individual criminal responsibility, or Article 28 on command and superior responsibility, could result in an inability on the part of a State to prosecute those who attempt to commit or assist in the commission of war crimes or crimes against humanity, or an inability to prosecute commanders who fail to repress such crimes. For example, the Finish ICC Crimes Act completely fails to mention command responsibility and, at present, provision is not made for command responsibility in the Norwegian penal code.[17] Thirdly, if defences were more widely drawn in the national legislation than the Rome Statute, there would be the possibility of an accused escaping liability for an offence for which he or she would have been liable had they been tried before the ICC.[18] Finally, the different rules and procedure of evidence in different States could result in confessions being excluded or hearsay evidence disallowed when it might have been admissible before the ICC.

These problems of national implementation raise the question of whether, in circumstances such as those discussed above, the ICC could either find that a State Party was in such circumstances unwilling or unable genuinely to carry out the investigation or prosecution, or retry a person who had been acquitted by a national court under such circumstances.[19] It is practically unthinkable that the ICC would re-try a person who had been acquitted by a national court solely because of evidence excluded owing to different rules of procedure and evidence or because of additional defences available under national law, provided that the prosecution was genuine and conducted with due diligence within a working judicial system. The ICC could only re-try a person for crimes arising from the same conduct in such circumstances if the State concerned was attempting to shield the person from criminal responsibility or conducted a trial which was not independent or impartial and inconsistent with an intent to bring the accused to justice.[20]

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[17] See Human Rights Watch, 'Table 2: Implementation of the Rome Statute, Implementation Strategies Adopted by: Norway, Finland, Estonia, the Netherlands and Germany', available at: <http://www.hrw.org/campaigns/icc/implementation.htm> at p.6.

[18] Although English law disallows the defence of duress on a charge of murder or attempted murder, see *R v Howe* [1987] 1 AC 417 and *R v Gotts* [1992] 2 WLR 284, it may be available on such a charge before the ICC under Article 31(1)(d), Rome Statute. See R. Cryer, 'Implementation of the International Criminal Court Statute in England and Wales', 51 ICLQ (2002) 733-743, p.740.

[19] Article 17, Rome Statute.

[20] Article 20, Rome Statute. It is submitted that the ICC would not find that there was an intention to shield the accused simply because the application of that State's normal legal process resulted in an acquittal which would not have occurred if the trial had taken place before the ICC.

The situation if the State concerned had refused to prosecute because of provisions of national law, such as the absence of a law of command responsibility, is more complex. It would be difficult to find that the State was 'unwilling' to prosecute if an independent and impartial investigation had concluded that the national laws simply did not allow such a prosecution.[21] The situation would be closer to one of 'inability', but this would be for the reason that such conduct was not criminalised under national law, rather than because of a collapse of the State's judicial system. In determining whether a State is unable to carry out a prosecution, under Article 17(3) the ICC must consider whether "due to a total or substantial collapse or unavailability of its national judicial system the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings".

The wording of this section could be interpreted as indicating that the ICC was intended to determine a case admissible only when the 'inability' of States Parties arose from the collapse of a national judicial system, rather than when the basis of the inability of a State Party with a working judicial system arose owing to inadequate implementation of the Rome Statute. Nevertheless, such an interpretation would allow States Parties to the Rome Statute to shield some or all of those accused of war crimes or crimes against humanity, simply by failing to legislate in order to criminalise such conduct. Such an interpretation would clearly be contrary to the object and purpose of the Rome Statute.[22]

Therefore, although the ICC must consider whether the judicial system of a country has collapsed or is unavailable, Article 17(3) does not state that this must be the Court's *only* consideration. It is submitted that the ICC may also take into account the inability of a State to prosecute as a result of insufficient provisions in national criminal law when making an admissibility decision.

Nevertheless, it seems likely that most prosecutions of individuals for war crimes and crimes against humanity will take place in national jurisdictions. This will undoubtedly lead to some inconsistencies as different States interpret crimes in

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[21] But see discussion of this in J. Gurulé, 'United States Opposition to the 1998 Rome Statute Establishing an International Criminal Court: Is the Court's Jurisdiction Truly Complementary to National Criminal Jurisdictions?', 35 Cornell Int'l.LJ (2001-2) 1-45, pp.23-30.

[22] The preamble to the Rome Statute affirms that "the most serious crimes of concern to the international community as a whole must not go unpunished" and determines "to put an end to impunity for the perpetrators of these crimes". See Article 31(1) and (2), 1969 Vienna Convention on the Law of Treaties.

accordance with their national legislation and past jurisprudence. For example, the French cases of *Barbie* and *Touvier*, in their interpretation of crimes against humanity, included the unnecessary requirement that "the acts charged were performed in a systematic manner in the name of a State practising by those means a policy of ideological supremacy" as a result of the background in which crimes against humanity took place in France during WW2.[23]

The approach of the UK International Criminal Court Act offers a constructive method of reducing the likelihood of inconsistencies between the definitions of war crimes and crimes against humanity applied by UK Courts and those applied by the ICC.[24] Section 50 of the Act allows the Court to "take into account" the EOC adopted under Article 9 of the Rome Statute, "any relevant judgement or decision of the ICC" and "any other relevant international jurisprudence".[25] Whilst the expression "take into account" does not make ICC decisions binding upon national Courts, in the absence of contradictory precedents, it is highly likely that ICC jurisprudence would be applied by the UK Courts. It is submitted that similar provisions should be enacted by all States Parties to the Rome Statute in order to encourage consistency of interpretations.

6.2 The Effect of Reservations and Interpretative Declarations on the Definition of Crimes

Another issue which could influence national interpretation of crimes are reservations and interpretative declarations to the Geneva Conventions and Additional Protocols upon which many of the war crimes in the Rome Statute are based.[26] However, a more interesting question is the extent to which such reservations and declarations should have an effect upon the interpretation of crimes by the International Criminal Court.

According to Article 30 of the Vienna Convention on the Law of Treaties, if two treaties cover the same subject matter, with respect to States Parties to both treaties, "the earlier treaty applies only to the extent that its provisions are compatible

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[23] *Barbie*, 100 ILR 330, p.336 and *Touvier*, 100 ILR 337, p.352, discussed *supra* para.5.7.
[24] International Criminal Court Act, 2001, (England, Wales and Northern Ireland). The International Criminal Court (Scotland) Act, 2001, in Article 9(2) and (4) contains a similar provision for Scottish Courts.
[25] The latter would presumably allow the Court to take into account ICTY or ICTR jurisprudence.

with those of the later treaty".[27] Therefore, in the case of inconsistencies between the Geneva Conventions and Protocols and the Rome Statute, the Rome Statute would take precedence with respect to States Parties to both. This Article also implies that States Parties to the Rome Statute could not rely upon a reservation to a similar provision in the Geneva Conventions or Protocols before the ICC, as the Rome Statute does not permit reservations.[28]

Nevertheless, an interpretative declaration, or even in some cases a reservation,[29] can change the interpretation of a particular provision in customary international law if widely held. Indeed, under Article 31 of the Vienna Convention on the Law of Treaties, "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" should be taken into account when interpreting treaty provisions.[30] Therefore, reference has been made to various reservations and interpretative declarations when discussing the interpretation of crimes in the previous chapters.[31] In this respect, the UK declaration upon ratification of the Rome Statute drew attention to its statements made upon ratification of API as evidence of customary international law to be taken into account by the ICC.[32]

A related question is the extent to which the ICC should take into account interpretative declarations to the Rome Statute. Interpretative declarations are not mentioned in Article 21 on law to be applied by the Court. Therefore, such declarations are only relevant to the definitions of crimes in so much as they provide evidence of the principles and rules of international law, or are applied by the Court as general principles of law derived from national legal systems, or as national laws of States that would normally exercise jurisdiction over the crime, "provided that

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[26] See, in particular, reservations and interpretative declarations to API, available at: <www.icrc.org>.
[27] Article 30, 1969 Vienna Convention on the Law of Treaties.
[28] Article 120, Rome Statute. The Geneva Conventions and Additional Protocols are silent on the issue of reservations and therefore under customary law, codified by Article 19 of the Vienna Convention Law of Treaties, States Parties could make reservations compatible "with the object and purpose of the treaty".
[29] As in the case of reservations with respect to second use of gas under the 1925 Gas Protocol, which arguably may create a defence under customary international law to a breach of Article 8(2)(b)(xviii) in such circumstances under Articles 31(3) and 21(1), Rome Statute.
[30] Article 31(3), 1969 Vienna Convention on the Law of Treaties.
[31] See *supra* paras.3.5, 3.72 and 3.94.
[32] Declaration of the UK made upon ratification of the Rome Statute on 4/10/2001, available at <www.icrc.org>. The ICC would not necessarily accept such a claim.

those principles are not inconsistent" with the Rome Statute or "with international law and internationally recognized norms and standards".[33]

One of the most contentious statements made upon ratification of the Rome Statute has been the French declaration, discussed in Chapter 3 with respect to Article 8(2)(b)(iv), that the provisions of Article 8 "relate solely to conventional weapons and can neither regulate not prohibit the possible use of nuclear weapons".[34] It is submitted that if this were an interpretative declaration, it would be considered under Article 21 as discussed above. In deciding whether this reflected customary international law the ICC could have regard, *inter alia*, to the New Zealand declaration that "it would be inconsistent with principles of international humanitarian law to purport to limit the scope of article 8... to events that involve conventional weapons only".[35]

However, the French 'interpretative declaration' could be interpreted as purporting to "exclude or to modify the legal effect of certain provisions of the treaty" and so could be termed a reservation.[36] This approach of looking behind the label given by the State concerned was taken by the European Court of Human Rights in the case of *Belilos v Switzerland*, which stated that "[i]n order to establish the legal character of such a declaration, one must look behind the title given to it and seek to determine the substantive content".[37] Nevertheless, given that reservations are not permitted to the Rome Statute, would a classification of the French 'declaration' as being in effect a reservation, invalidate France's ratification of the Rome Statute?

It is submitted that if this question were to arise before the ICC, it should take the same approach as the European Court of Human Rights and the Human Rights Committee with respect to States Parties to the ECHR and ICCPR. The European Court in the case of *Belilos v Switzerland*, having held that the Swiss declaration in effect amounted to an invalid reservation, proceeded to hold Switzerland bound by the ECHR without the benefit of the reservation as "it is beyond doubt that Switzerland is, and regards itself as, bound by the Convention irrespective of the

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[33] Article 21(1)(b) and (c), Rome Statute.
[34] See *supra* para.3.18.
[35] New Zealand declaration upon ratification of the Rome Statute on 7/09/2000 and see Swedish statement upon ratification of the Rome Statute on 28/06/2001, available at: <www.icrc.org>.
[36] Article 2(d), 1969 Vienna Convention on the Law of Treaties.

validity of the declaration".[38] The Human Rights Committee stated in General Comment 24 that "[t]he normal consequence of an unacceptable reservation is... [that] such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation".[39] Therefore, unless it was absolutely clear that the invalid 'declaration', which in fact amounted to a reservation, constituted an essential condition of the State's consent to be bound, it should be nullified and the State should remain a party to the Rome Statute without the benefit of the 'declaration' in question.[40]

6.3 Offences Insufficiently Defined?

A serious criticism which may be levelled at the Rome Statute is that the offences, or some of them, are not sufficiently well defined to enable a fair trial in accordance with the principle of legality. It is certainly true that most national jurisdictions define offences with more clarity and precision than the vague expressions sometimes used in Articles 7 and 8.[41] Indeed, it was this concern that lead to the US suggestion for the inclusion of Elements of Crimes, which have been drafted by the Preparatory Commission and adopted by the Assembly of States Parties, to assist the Court in the interpretation and application of the definitions of offences.[42]

However, the EOC fail to deal adequately with certain issues. A source of uncertainty is the standard of *mens rea* required for each crime. Whilst Article 30 provides a default mental element which applies, "[u]nless otherwise provided", it is not always clear whether the Statute, Elements or customary international law

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[37] *Belilos v Switzerland*, ECHR Judgement (Merits and Just Satisfaction), 29 April 1988, Application No.00010328/83, para.49 and see R. Edwards Jr., 'Reservations to Treaties', 10 Mich.J.Int'l.L (1989) 362-405, pp.368-372.

[38] *Belilos v Switzerland*, ECHR Judgement (Merits and Just Satisfaction), 29 April 1988, Application No.00010328/83, para.60 and see *Loizidou v Turkey*, ECHR Judgement, (Preliminary Objections), 23 March 1995, Application No.00015318/89, paras.96-98.

[39] HRC General Comment 24, UN Doc.CCPR/C/21/Rev.1/Add.6 (1994), para.18.

[40] This is still controversial, see discussion in R. Goodman, 'Human Rights Treaties, Invalid Reservations, and State Consent', 96 AJIL (2002) 531-560.

[41] See J. Murphy, 'The Quivering Gulliver: US Views on a Permanent International Criminal Court', 34 Int.Law. (2000) 45-64, p.54 and see the Australian approach to implementing the Rome Statute *supra* para.6.1.

[42] See M. Politi, 'Elements of Crimes', pp.443-473 in Cassese *et al*, *ICC Commentary*, pp.445-446; Schabas, *An Introduction to the ICC*, p.29 and Article 9(1), Rome Statute.

displace this.[43] Furthermore, some of the expressions used in the Statute and EOC which appear to replace the default mental element, such as 'wilful' or 'wantonly', are not clear in their meaning.[44] The question of *mens rea* for certain offences, such as wilful killing, murder contrary to Common Article 3 and murder as a crime against humanity, are particularly difficult to evaluate given the conflicting decisions of the ICTY and ICTR.[45]

With respect to some crimes, the EOC can be criticised for doing little more than repeating the wording of the offence in the Statute, with inadequate or no amplification. A notable example of inadequate amplification is the crime of transfer, by the occupying power, of all or parts of its own civilian population into the territory it occupies.[46] Although in this case, a vague definition was probably adopted purposely in order to avoid antagonising the State of Israel, which is sensitive to the accusation that it is breaching this provision in the West Bank and Gaza, such political considerations will not ease the future task of the ICC in interpreting this offence.

The EOC have avoided attempting to define the potentially broad and rather vague offence of 'violence to life and person', from Common Article 3, by only providing Elements to the crimes of murder, mutilation, cruel treatment and torture, which are listed as specific types of this violence.[47] Given the refusal of the ICTY Trial Chamber in *Vasiljevic* to hold the accused guilty of this crime "[i]n the absence of any clear indication in the practice of states as to what the definition of the offence... may be under customary law",[48] it is unfortunate that the Preparatory Commission chose not to clarify the Elements of 'violence to life and person'.

Two crimes against humanity which may be singled out as worryingly vague are persecution on the basis of "other grounds that are universally recognized as impermissible under international law" and "[o]ther inhumane acts".[49] However, with respect to the former, universal recognition is a very high threshold and so could only be utilised to reflect a basis of discrimination very widely accepted as

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[43] See discussion *supra*, para.2.4
[44] See *supra* paras.2.14-2.17 and 2.26-2.29.
[45] Discussed *supra*, paras.2.17, 4.6 and 5.10.
[46] See, Article 8(2)(b)(viii), Rome Statute, discussed *supra*, para.3.34.
[47] See Article 8(2)(c)(i), Rome Statute, discussed *supra*, para.4.8.
[48] *Vasiljevic*, Trial Judgement, para.203.
[49] Article 7(1)(h) and (k), Rome Statute and see the similarly vague war crimes in Article 8(2)(a)(ii) and (c)(i).

customary international law.[50] Additionally, the existence of catch-all provisions such as "[o]ther inhumane acts" is arguably necessary, given that it is impossible to imagine and proscribe in detail every atrocity of which an evil mind could conceive. Therefore, provided that such crimes are limited by a level of intentional injury or suffering which would, in any case, offend against national laws, they are undeniably a necessary part of the ICC's weaponry.[51]

Despite the questions which remain with respect to the definitions of crimes, it must be remembered that the principle of legality is enshrined as a general principle of criminal law under Article 22 of the Rome Statute. This states that "[t]he definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted".

6.4 The Rome Statute and Human Rights Law

The analysis of war crimes and crimes against humanity in the Rome Statute has revealed the interaction between international humanitarian law and human rights law. The convergence between these two fields can be seen in the subject matter of the ICC's jurisdiction discussed in the preceding chapters.[52] For example, the war crime and crime against humanity of torture has been greatly influenced by the Torture Convention. Furthermore, the case law relied on by the ICTY with respect to this crime includes decisions of human rights bodies such as the Human Rights Committee, the ECHR and the Inter-American Commission of Human Rights.[53] Similarly, the grave breach of inhuman treatment or crime against humanity of other inhumane acts, is equally affected by human rights conventions and jurisprudence.[54] The same influence can also be seen in the war crimes of

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[50] See discussion *supra*, para.5.32.
[51] See discussion *supra*, para.5.43.
[52] On convergence between human rights and international humanitarian law see T. Meron, 'The Humanization of Humanitarian Law', 94 AJIL (2000) 239-278; A. Benison, 'War Crimes: A Human Rights Approach to a Humanitarian Law Problem at the International Criminal Court', 88 Geo.LJ (1999) 141-175, pp.155-158 and H. Espiell, 'Humanitarian Law and Human Rights', pp.345-359, in J. Symonides ed., *Human Rights: Concept and Standards*, (2000, UNESCO and Dartmouth, Aldershot), pp.353-356.
[53] Articles 8(2)(a)(ii) and 7(1)(f), Rome Statute, see *supra*, paras.2.20-2.20.2 and 5.27.
[54] Articles 8(2)(a)(ii) and 7(1)(k), Rome Statute, see *supra*, paras.2.20.3 and 5.43.

sentencing or execution without due process and conscripting or enlisting children under 15.[55]

Moreover, pursuant to Article 21 of the Rome Statute on applicable law, human rights law is directly relevant to the definitions of war crimes and crimes against humanity as the interpretation and application of the Statute, the EOC and other sources of law applied by the ICC must be "consistent with internationally recognized human rights".[56] Article 21(3) also sets out the principle that no adverse distinction based on "gender... age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status" must affect the interpretation or application of the law.

This incorporation of human rights principles into the interpretation of crimes in the Rome Statute demonstrates a recognition that human rights instruments and international humanitarian law "share a common nucleus of non-derogable rights and a common purpose of protecting human life and dignity".[57] It further leads to the realisation that the two systems are not mutually exclusive and can be applied simultaneously.[58] Therefore, victims of gross breaches of human rights, whether they amount to war crimes or crimes against humanity, can potentially apply to human rights bodies for relief as an alternative to prosecutions before the ICC. Indeed, in cases of isolated war crimes or offences which fail to reach the threshold required for crimes against humanity, if national authorities refuse to investigate and prosecute, an application to a human rights body may be the only way for victims to achieve some form of redress.

In this respect, human rights bodies have already shown themselves capable of tackling breaches of human rights in armed conflicts. The Inter-American Commission of Human Rights found itself competent to apply international humanitarian law in the *Abella* case, stating, *inter alia*, that in order to resolve violations of the right to life in an armed conflict, it is necessary to "look to and apply definitional standards and relevant rules of humanitarian law" as authoritative

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[55] Articles 8(2)(c)(iv) and 8(2)(b)(xxvi), Rome Statute, see *supra*, paras.4.9-4.10 and 3.104-3.105.
[56] See R. Lehr-Lehnardt, 'One Small Step for Women: Female-Friendly Provisions in the Rome Statute of the International Criminal Court', 16 BYU J.Pub.L (2002) 317-354, p.341.
[57] *Abella v United States* (1997), IAComHR Case 11.137, Report No.55/97, para.158
[58] C. Sepulveda, 'Interrelationships in the Implementation and Enforcement of International Humanitarian Law and Human Rights Law', 33 Am.ULR (1983) 117-124, p.118.

guidance on whether a deprivation of life was arbitrary.[59] The Human Rights Committee has also indicated that it will consider a State's duties under international humanitarian law in order to decide whether a derogation to the ICCPR is properly made and has confirmed that States Parties "may in no circumstances invoke article 4 of the Covenant [on derogations] as justification for acting in violation of humanitarian law".[60]

Furthermore, human rights bodies have shown that the duty of States Parties to ensure rights "may imply an affirmative duty to prosecute violators".[61] Therefore, when the subject matter of the application breaches the provisions of the relevant human rights convention, applications to human rights bodies may result in domestic prosecutions for war crimes or crimes against humanity. This obligation to investigate and prosecute has been referred to by the Human Rights Committee in *Muteba v Zaire*,[62] a case concerning torture, and by the Inter-American Court of Human Rights in the *Castillo Páez Case*, which concerned forced disappearances.[63]

Whilst human rights law may often provide an alternative or complementary route of redress for victims of violations contained within the Rome Statute, there are problems with this approach. First, not only must the State concerned be a party to the human rights convention in question, but the convention must either automatically allow for individual applications from victims complaining of abuse of their rights,[64] or the State concerned must have specifically accepted the individual application procedure.[65] Secondly, human rights bodies may require that the victim complains within a certain time-limit of the alleged abuse of human rights,[66] whereas

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[59] *Abella v United States* (1997), IAComHR Case 11.137, Report No.55/97, para.161, but see criticism of this decision in L. Zegveld, 324 IRRC (1998) 505-511. See also *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Rep. (1996) 226, para.25.

[60] HRC General Comment 29, UN Doc.CCPR/C/21/Rev.1/Add.11 (2001), paras.10-11.

[61] G. Mugwanya, 'Expunging the Ghost of Impunity for Severe and Gross Violations of Human Rights and the Commission of Delicti Jus Gentium: A Case for the Domestication of International Criminal Law and the Establishment of a Strong Permanent International Criminal Court', 8 Mich.SU-Detroit Col.LJIL (1999) 701-779, p.748.

[62] *Mutaba v Zaire*, (124/1982) HRC Report, UNOR, GA 22 Session, Supplement No.40, (1984), para.13 and see also *Muiyo v Zaire*, (194/1985), HRC Decision, UN Doc.CCPR/C/OP/2, (1990) 219, para.11 and *Chongwe v Zambia*, (821/1998), HRC Decision, UN Doc.CCPR/C/70/D/821/1998, para.7.

[63] *Castillo Páez Case*, IACHR Judgement, 3 November 1997, No.34 (1997), para.90 and see also *Velasquez Rodriguez Case*, IACHR Judgement, 29 July 1988, No.4 (1988), 28 ILM (1989) 291, para.174.

[64] For example see Article 34, ECHR.

[65] For example see Article 1, First Optional Protocol ICCPR and Article 22, Convention against Torture.

[66] For example under Article 35(1), an applicant under the ECHR must apply within six months of exhausting domestic remedies for the alleged violation of human rights.

the Rome Statute does not have any such limitations upon the prosecution of crimes committed after the entry into force of the Statute for the State concerned.[67]

Thirdly, human rights bodies do not necessarily have jurisdiction over the actions of States Parties committed on the territory of other States during an international armed conflict. The ECHR case of *Bankovic v Belgium* demonstrates the limits of jurisdiction in such cases.[68] The applicants (citizens of FRY) were relatives of those killed or were themselves injured in the NATO bombing of a television station during the Kosovo conflict. The Court found that "recognition of the exercise of extra-territorial jurisdiction by a Contracting State is exceptional" and that in ECHR case-law it had been restricted to situations "when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government".[69] It was not persuaded by the argument that in bombing the television station the NATO States exercised limited jurisdiction over FRY (a non-party to the ECHR) for the purposes of applying human rights,[70] and commented that the ECHR was not "designed to be applied throughout the world, even in respect of the conduct of Contracting States".[71]

Finally, even if the alleged incident takes place entirely within the territory of a State Party to a human rights convention, which has accepted the individual applications procedure, actions taken by rebels in a non-international armed conflict cannot in any case be examined as human rights law "does not extend to the conduct of private actors which is not imputable to the State".[72] Peterson comments that "[t]his inherent unfairness might suggest a lack of legitimacy in the decisions of

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[67] See also the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.

[68] *Bankovic v Belgium*, ECHR Judgement (Admissibility), 12 December 2001, Application No.52207/99, 41 ILM (2002) 517.

[69] *Ibid.*, para.71. See the ECHR decisions in *Loizidou v Turkey*, ECHR Judgement, (Preliminary Objections), 23 March 1995, Application No.00015318/89, para.62 and *Cyprus v Turkey*, ECHR Judgement (Merits), 10 May 2001, Application No.00025781/94, paras.77-78.

[70] *Bankovic v Belgium*, ECHR Judgement (Admissibility), 12 December 2001, Application No.52207/99, 41 ILM (2002) 517, paras.74-75.

[71] *Ibid.*, para.80. For further analysis of this case see C. Cerna et al, 'Bombing for Peace: Collateral Damage and Human Rights', 96 ASIL Proceedings (2002) 95-108 and T. Schiers, 'European Court of Human Rights Declares Application against NATO Member States Inadmissible', 18 Int'l Enforcement L.Rep. (2002) 154-156.

[72] *Abella v United States* (1997), IAComHR Case 11.137, Report No.55/97, para.175.

these human rights bodies" when they are "left with the capacity to govern only one side of an armed conflict".[73]

6.5 Gender Issues

The prohibition of adverse distinction on grounds of gender in Article 21(3), referred to above,[74] represents the efforts of feminists groups which lobbied for the inclusion of gender issues in the ICC, particularly with respect to the definition of crimes.[75] The incorporation of the offences of rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation and sexual violence, was a victory for groups, such as the Women's Caucus for Gender Justice, who were determined to ensure the responsiveness of the ICC to "gender justice".[76] The explicit inclusion of these offences as war crimes in both international and non-international armed conflicts, as well as within crimes against humanity, is a vast improvement over the ICTY Statute, which only mentioned rape as a crime against humanity,[77] and over the Nuremberg and Tokyo Charters, which ignored the subject altogether.[78]

The gender issue which caused the most controversy was forced pregnancy, which was included in the Rome Statute as a war crime and a crime against humanity.[79] Indeed, forced pregnancy proved difficult to define at the Rome Conference, owing to fears by delegates that it could be construed as guaranteeing women the right to an abortion.[80] Therefore, the definition this crime in Article 7(2)(f) explicitly states that the definition "shall not in any way be interpreted as affecting national laws relating to pregnancy". Additionally, the definition of forced pregnancy requires proof of an intention to affect "the ethnic composition of any

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[73] A. Peterson, 'Order out of Chaos: Domestic Enforcement of the Law of Internal Armed Conflict', 171 Milit.LR (2002) 1-90, p.58.
[74] *Supra*, para.6.4.
[75] *Ibid.*, p.318 and see comments on Article 21(3) by B. Bedont, 'Gender-Specific Provisions in the Statute of the ICC', pp.183-210 in F. Lattanzi and W. Schabas eds., *Essays on the Rome Statute of the ICC, Volume I*, (1999, Editorale Scientifica, Naples), p.185.
[76] Women's Caucus of Gender Justice, available at: <http://www.iccwomen.org/aboutcaucus.htm> and see *supra*, paras.3.87-3.90.
[77] Article 5(g), 1993 ICTY Statute, although Article 4(e), 1994 ICTR Statute, also included jurisdiction over rape, enforced prostitution and indecent assault as war crimes in non-international armed conflicts.
[78] See discussion *supra*, paras.3.88.
[79] See *supra*, para.3.90.4.
[80] *Ibid.*

population" or, alternatively, to carry out "other grave violations of international law". It is to be hoped that the alternative form of intention provides sufficient flexibility for this crime to remain relevant in conflicts which are not based on ethnic grounds.

Gender issues were also addressed specifically within crimes against humanity. First, enslavement was defined under Article 7(2)(c) as including the exercise of the powers of the rights of ownership "in the course of trafficking in persons, in particular women and children".[81] This fairly broad definition ensures that contemporary problems of trafficking, which affect predominantly women and children, are addressed within this offence. Secondly, gender was included as a basis of persecution, raising concerns among some delegates at the Rome Conference that such a ground would criminalise discrimination against homosexuals.[82] However, whilst the definition of gender in Article 7(3) of the Rome Statute is broad enough to cover discrimination related to socially constructed roles,[83] it is unclear whether this would include discrimination on the basis of homosexuality as persecution.

Nevertheless, the impact of gender concerns upon the definitions of crimes against humanity and war crimes goes far beyond these specific crimes. Mainly owing to the jurisprudence of the ICTY, it must be acknowledged that grave breaches, such as torture or wilfully causing great suffering, may be committed through rape or sexual violence.[84] Additionally, the jurisprudence of the ICTY also shows that other war crimes, such as outrages upon personal dignity, may be committed through sexual violence.[85] Therefore, the definitions of war crimes and crimes against humanity in the Rome Statute address gender concerns, both explicitly and implicitly, in a manner more comprehensive than previous treaties.

6.6 Prohibited Weapons

[81] Article 7(1)(c) and (2)(c), Rome Statute, see *supra*, paras.5.15-5.18.
[82] Discussed *supra*, para.5.32.
[83] *Ibid.*
[84] Discussed *supra*, paras.2.20.2 and 2.24.1.
[85] Discussed *supra*, paras.3.85-3.86.

One of the most disappointing exclusions from the jurisdiction of the ICC was in respect of weapons of mass destruction.[86] Although agreement was reached on jurisdiction over the use of poisoned weapons, asphyxiating or poisonous gases or expanding bullets in international armed conflicts,[87] even this limited jurisdiction was not extended to the use of such weapons in non-international armed conflicts. Furthermore, on the contentious issue of weapons of mass destruction, agreement was rendered more difficult by the refusal of the nuclear weapon States to contemplate a proscription on their use.[88] The perceived inequity of a Statute silent with respect to nuclear weapons whilst outlawing "poor man's weapons of mass destruction" such as biological and chemical weapons, resulted in a Statute which prohibited neither.[89]

Nevertheless, it is arguable that, in international armed conflicts, the use of most chemical weapons would in any case be contrary to Article 8(2)(b)(xviii), which forbids the employment of "asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices".[90] Alternatively, use of weapons of mass destruction during an international armed conflict could be judged under Article 8(2)(b)(iv) as causing excessive incidental loss of life or injury to civilians or widespread, long-term and severe damage to the natural environment.[91] Additionally, if such weapons were used at any time as part of a widespread or systematic attack upon civilians, irrespective of type or existence of conflict, their employment could amount to crimes against humanity.[92]

Despite the possibility of adding new prohibited weapons in an annex to the Statute under Article 8(2)(b)(xx), Cassese is of the opinion that the necessary agreement to add new weapons will never be reached.[93] Given the political problems surrounding the prohibition of nuclear weapons and other weapons of mass

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[86] See comments of E. Kalivretakis, 'Are Nuclear Weapons above the Law? A Look at the International Criminal Court and the Prohibited Weapons Category", 15 Emory Int'l.L.Rev. (2001) 683-732, pp.686-688 and discussion of 8(2)(b)(xx), Rome Statute, *supra*, paras.3.79-3.82.

[87] Article 8(2)(b)(xvii), (xviii) and (xix), Rome Statute, discussed *supra*, paras.3.67-3.78.

[88] E. Kalivretakis, n.86 *supra*, p.703. Note that even the ICJ did not hold that the use of nuclear weapons would be illegal in all circumstances, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Rep. (1996) 226, decision para.E.

[89] E. Kalivretakis, n.86 *supra*, p.703.

[90] See discussion *supra*, paras.3.73-3.74.

[91] See discussion *supra*, paras.3.17-3.18.

[92] See T. Meron, 'Crimes under the Jurisdiction of the International Criminal Court', pp.47-55, in von Hebel *et al*, *Reflections on the ICC*, p.54.

[93] A. Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections', 10 EJIL (1999) 144-171, p.152.

destruction this is an understandable conclusion. However, a qualified jurisdiction over the use of weapons of mass destruction could provide a way to deal with this problem.[94] For example, ICC jurisdiction over the first use of nuclear, biological or chemical weapons (to the extent that they are not already prohibited under Article 8(2)(b)(xviii)), would be an improvement over the present situation and would counter the resistance of the nuclear weapon States who defend the possession of such weapons on the basis of their deterrent value. Second use of such weapons should still be considered as a potential breach of Article 8(2)(b)(iv) or as a crime against humanity.

6.7 Offences Committed in Non-International Armed Conflicts

An important achievement of the Rome Statute is the inclusion of jurisdiction over offences committed in non-international armed conflicts. It not only provides for jurisdiction over serious violations of Common Article 3, but a list of twelve other violations of laws and customs of war applicable in non-international armed conflict.[95] The inclusion of jurisdiction over these crimes is an indication of how far the international community has come in recognising that atrocities committed in internal conflicts are no less severe in their effects on the victims or post-conflict reconciliation than those committed in international conflicts. However, the distinction between the two, in terms of the reduced list of non-international war crimes and the failure to include prohibited weapons in Article 8(2)(e), demonstrates that the desire to create an ICC did not totally overcome the reluctance of States to accept interference in internal conflicts.[96]

The inclusion of war crimes committed in non-international armed conflicts necessitates a distinction between mere riots or internal disturbances and armed conflict. The definition of the threshold for application of Article 8(2)(c) is vague, only making it clear that "internal disturbances and tensions, such as riots, isolated and sporadic acts of violence" are excluded.[97] The threshold for the application of Article 8(2)(e) is somewhat clearer, requiring "protracted armed conflict between

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[94] See E. Kalivretakis, n.86 *supra*, pp.731-732.
[95] See J. Pejic, 'Accountability for International Crimes: From Conjecture to Reality', 845 IRRC (2002) 13-33, pp.21-22.
[96] Article 8(3), Rome Statute is a reminder of the issue of State sovereignty, but does not really restrict the jurisdiction of the ICC over non-international armed conflicts, see *supra*, para.4.19.

governmental authorities and organised armed groups or between such groups".[98] This is undoubtedly an improvement over the much higher threshold of APII which was restricted to internal conflict between the government of a state and organised rebel groups which controlled part of the territory.[99]

Nevertheless, the definitions used in Article 8(2)(c) and (e) cannot alter the practical problem that, when facing an armed rebellion, the State concerned may seek to exclude the application of international humanitarian law entirely by denying that the situation has escalated into a non-international armed conflict. A practical way that the Rome Statute could be used to make an impression, if such a situation was referred to the Prosecutor, would be an announcement that the investigation of alleged crimes were being conducted on the basis that the situation amounted to a non-international armed conflict. Alternatively, if the Prosecutor commenced a *proprio motu* investigation of the situation, the authorisation of this investigation by the Pre-Trial Chamber should necessarily include a provisional analysis of the status of the situation as a non-international armed conflict.

A further complex issue is the distinction between international and non-international armed conflicts, which is particularly difficult to make in situations where *prima facie* internal conflicts may have been internationalised by the involvement of another State.[100] In this type of armed conflict it is possible that the State concerned may attempt to implicate another State, for political reasons,[101] even though their involvement is insufficient to internationalise an essentially internal conflict. Therefore, whilst it remains necessary to distinguish between the two types of conflict under the Rome Statute, an intricate legal and factual analysis of the situation will be necessary.

Nevertheless, even when the situation in a particular State is accepted as amounting to a non-international armed conflict, there are problems peculiar to internal conflicts which jeopardise compliance with Common Article 3 and the other basic rules of international humanitarian law criminalised in Article 8(2)(e). Part of the problem is that the rebels are usually 'ex-civilians' with little or no training in

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[97] Article 8(2)(d), Rome Statute, discussed *supra*, para.4.2.
[98] Article 8(2)(f), Rome Statute, discussed *supra*, para.4.2.
[99] Article 1(1), APII.
[100] See discussion *supra*, para.2.11.
[101] Such as to justify governmental recourse to third State assistance, or in order to elicit world support.

international humanitarian law and in fact may never have heard of the Geneva Conventions or the ICC.[102]

The main problem in the application of humanitarian law in such conflicts, however, is the position of rebels *vis-à-vis* the government in terms of resources and infrastructure, which is a more difficult issue to overcome. In practical terms it will be harder for rebels to comply with rules of international humanitarian law which require resources than it will be for the State Party. Therefore, there is to some extent more pressure on the non-State party to declare that no quarter will be given, as prohibited under Article 8(2)(e)(x), if they have insufficient soldiers to guard prisoners and perhaps insufficient infrastructure to house them or supplies to feed them. Additionally, if facing a better trained and equipped force with superior numbers, the rebels may be more likely to enlist anyone who can fight, including children under 15, as prohibited by Article 8(2)(e)(vii). The problems of rebels operating a 'regularly constituted court' as required under Article 8(2)(c)(iv) have already been discussed in Chapter 4 above.[103]

It is submitted that the ICC should take problems of infrastructure into account to some extent when, for example, deciding whether a rebel court was 'regularly constituted',[104] and with respect to available buildings and supplies when deciding whether the conditions in which government soldiers were held prisoner amounted to cruel treatment by rebels, particularly if they were no worse than the conditions faced by the rebel troops stationed in that area themselves. However, on the whole the individual problems of accused non-State actors with respect to non-compliance with international humanitarian law should only be considered as potential mitigating circumstances if they are found guilty of an offence under the Rome Statute. This approach is necessary in order to maintain an even-handed approach between the rebels and the State party. If a rebel group do not apply and are led to believe that they will not be required to apply basic international humanitarian law, it will be increasingly difficult to ensure that the State party itself applies this law.[105]

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[102] See Y. Dinstein, 'Humanitarian Law and the Conflict in Afghanistan', 96 ASIL Proceedings (2002) 23-41, p.29.
[103] See discussion *supra*, para.4.10.
[104] See discussion *supra*, para.4.10.
[105] See comments of C. Nier III, 'The Yugoslavia Civil War: An Analysis of the Applicability of the Law of War Governing Non-International Armed Conflicts in the Modern World', 10 Dick J.Int'l.L (1992) 303-331, p.320 and the discussion of reciprocity in Detter, *The Law of War*, pp.400-413.

In any case, the difficulties with enforcement of international humanitarian law in non-international armed conflicts are not restricted to the non-State party. Particularly in the case of guerrilla warfare, commonly used in internal conflicts, the State party may fail to distinguish between civilians and rebels. This is due to the nature of guerrilla warfare which blurs the line between civilians and military when a person may appear to be a civilian by day and a soldier by night and when civilians are actively involved in supporting and assisting a rebel movement.[106]

Under Article 8(2)(e)(i) of the Rome Statute the State party may be prosecuted for directing attacks against "the civilian population as such or against individual civilians not taking direct part in hostilities". However, in internal conflicts involving guerrilla warfare, the definition applied to taking a "direct part in hostilities" becomes crucial. Whilst the Trial Chamber in *Rutaganda* defined this as "acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces",[107] the temptation in an internal conflict will be for the State party to interpret this widely enough to include civilians who assist rebels by providing food and shelter.[108] Even if the State party only attacks military objectives, the Rome State does not give jurisdiction over methods of warfare in an internal conflict which cause excessive collateral damage to civilians. This omission would leave the ICC powerless to deal with a situation such the Chechen conflict where the Russian forces continued to use artillery and rocket fire in Grozny "even after they became aware of the consequent high civilian casualty rate".[109]

6.8 Conclusion

Whilst this thesis has concentrated upon the definitions that the ICC will apply to the war crimes and crimes against humanity set out in the Rome Statute, undoubtedly most prosecutions will take place before national courts either with respect to crimes which do not meet the jurisdictional threshold of the ICC, or as a

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[106] See K. Brown, 'Counter-Guerilla Operations: Does the Law of War Proscribe Success?', 44 Nav.LR (1997) 123-173, p.152.
[107] *Rutaganda*, Trial Judgement, para.100, see *supra*, para.4.4 and 3.105.
[108] See K. Brown, n.106 *supra*, pp.152-155 and discussion *supra*, para.3.4-3.6.
[109] D. Hollis, 'Accountability in Chechnya - Addressing Internal Matters with Legal and Political International Norms', BCL Rev.(1995) 793-846, p.829.

result of the operation of the principle of complementarity.[110] Therefore, in order to promote consistency in the definitions of crimes in national prosecutions, it is essential that States Parties to the Rome Statute should be encouraged to pass legislation which allows their courts to take into account the EOC and the decisions and judgements of the ICC.[111]

The influence of human rights law can be seen throughout this thesis, both with respect to its influence upon specific definitions of crimes, such as torture, and as a result of the pervasive influence of Article 21 of the Rome Statute, which requires that the interpretation of the Statute and EOC are "consistent with internationally recognized human rights".[112] Whilst applications to human rights bodies cannot be discounted as an alternative solution for victims of atrocities, nevertheless, the worst atrocities often occur when human rights mechanisms have failed and, moreover, human rights bodies do not have jurisdiction over non-States parties in non-international armed conflicts.

The definitions of crimes in the Rome Statute are to be praised for their incorporation of gender concerns and their inclusion of jurisdiction over a substantial number of crimes in non-international armed conflict.[113] However, criticism must be made of the failure to include jurisdiction over weapons of mass destruction in international armed conflicts, or even over any prohibited weapons whatsoever in non-international armed conflicts.[114] Furthermore, uncertainty remains in respect of the exact *mens rea* required for each crime, or indeed whether crimes within the Statute may be committed by omission.[115]

To conclude, whilst this thesis raises many criticisms of the definitions of crimes in the Rome Statute, nevertheless, the Statute and EOC contribute significantly to a contemporary interpretation of war crimes and crimes against humanity. Furthermore, the establishment of an International Criminal Court with jurisdiction over the most serious crimes of international concern, coupled with the principle of complementarity, should promote a resurgence of national and international prosecutions for war crimes and crimes against humanity. In the long-term it is to be hoped that such denial of impunity for serious abuses of human rights

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[110] See *supra*, para.6.1.
[111] *Ibid.*
[112] See *supra*, para.6.4.
[113] See *supra*, paras.6.5 and 6.7.
[114] See *supra*, para.6.6.

will deter such offences from being committed and will break the cycle of violence, so ensuring that justice replaces revenge.[116] For the present though, whilst we cannot prevent all atrocities from being committed, the ICC brings us one step closer to ensuring that those who commit such crimes are held accountable for their actions.[117]

[115] See *supra*, paras.6.3; 2.17 and 2.25.

[116] See C. Elliott, 'A Permanent International Criminal Court: 'A Giant Step towards Universal Human Rights' or 'Dead on Arrival'?', 64 JCL (2000) 398-408, p.398.

[117] See J. Roy, 'Strengthening Human Rights Protection: Why the Holocaust Slave Labour Claims Should be Litigated', 1 Scholar: St. Mary's LR.Min.Issues (1999) 153-205, p.205.

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