Chapter VII

CRIMES AGAINST HUMANITY

A. Introduction

108. The Commission, at its sixty-fifth session (2013), decided to include the topic "Crimes against humanity" in its long-term programme of work,[80] on the basis of a proposal prepared by Mr. Sean D. Murphy and reproduced in annex II to the report of the Commission on the work of that session.[81] The General Assembly, in paragraph 8 of its resolution 68/112 of 16 December 2013, took note of the inclusion of this topic in the Commission's long-term programme of work.

109. At its sixty-sixth session (2014), the Commission decided to include the topic in its programme of work and appointed Mr. Sean D. Murphy as Special Rapporteur for the topic.[82] The General Assembly subsequently, in paragraph 7 of its resolution 69/118 of 10 December 2014, took note of the decision of the Commission to include the topic in its programme of work.

B. Consideration of the topic at the present session

110. At the present session, the Commission had before it the first report of the Special Rapporteur (A/CN.4/680), which was considered at its 3254th to 3258th meetings, from 21 to 28 May 2015.

111. In his first report, the Special Rapporteur, after assessing the potential benefits of developing a convention on crimes against humanity (paras. 10–26), provided a general background synopsis with respect to crimes against humanity (paras. 27–64) and addressed some aspects of the existing multilateral conventions that promote prevention, criminalization and inter-State cooperation with respect to crimes (paras. 65–77). Furthermore, the Special Rapporteur examined the general obligation that exists in various treaty regimes for States to prevent and punish such crimes (paras. 78–120) and the definition of "crimes against humanity" for the purpose of the topic (paras. 121–177). The report also contained information as to the future programme of work on the topic (paras. 178–182). In the annex to the report, the Special Rapporteur proposed two draft articles corresponding to the issues addressed in paragraphs 78–120 and 121–177, respectively.[83]

112. At its 3258th meeting, on 28 May 2015, the Commission referred draft articles 1 and 2, as contained in the Special Rapporteur's first report, to the Drafting Committee.

113. At its 3263rd meeting, on 5 June 2015, the Commission considered the report of the Drafting Committee and provisionally adopted draft articles 1, 2, 3 and 4 (see section C.1 below).

114. At its 3282nd to 3284th meetings, on 3 and 4 August 2015, the Commission adopted the commentaries to the draft articles provisionally adopted at the current session (see section C.2 below).

115. At its 3282nd meeting, on 3 August 2015, the Commission requested the Secretariat to prepare a memorandum providing information on existing treaty-based monitoring mechanisms which may be of relevance to its future work on the present topic.[84]

C. Text of the draft articles on crimes against humanity provisionally adopted by the Commission at its sixty-seventh session

1. Text of the draft articles

116. The text of the draft articles provisionally adopted by the Commission at its sixty-seventh session is reproduced below.

Article 1. Scope

The present draft articles apply to the prevention and punishment of crimes against humanity.

Article 2. General obligation

Crimes against humanity, whether or not committed in time of armed conflict, are crimes under international law, which States undertake to prevent and punish.

Article 3. Definition of crimes against humanity

1. For the purpose of the present draft articles, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(*a*) murder;

(*b*) extermination;

(*c*) enslavement;

(*d*) deportation or forcible transfer of population;

(*e*) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

(*f*) torture;

[80] *Yearbook … 2013*, vol. II (Part Two), paras. 169–170.

[81] *Ibid*., annex II.

[82] *Yearbook … 2014*, vol. II (Part Two), para. 266.

[83] Draft article 1 (Prevention and punishment of crimes against humanity) and draft article 2 (Definition of crimes against humanity).

[84] This issue was raised during the Commission's debate in plenary of the Special Rapporteur's first report in May 2015 and was also discussed during a visit to the Commission by the High Commissioner for Human Rights in July 2015.

(*g*) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

(*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 recognized as impermissible under international law, in connection with any act referred to in this paragraph or in connection with the crime of genocide or war crimes;

(*i*) enforced disappearance of persons;

(*j*) the crime of apartheid;

(*k*) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

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

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

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

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

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

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

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

(*h*) "the crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an 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;

(*i*) "enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of the present draft articles, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

4. This draft article is without prejudice to any broader definition provided for in any international instrument or national law.

Article 4. Obligation of prevention

1. Each State undertakes to prevent crimes against humanity, in conformity with international law, including through:

(*a*) effective legislative, administrative, judicial or other preventive measures in any territory under its jurisdiction or control; and

(*b*) cooperation with other States, relevant intergovernmental organizations, and, as appropriate, other organizations.

2. No exceptional circumstances whatsoever, such as armed conflict, internal political instability or other public emergency, may be invoked as a justification of crimes against humanity.[85]

2. Text of the draft articles and commentaries thereto, as provisionally adopted by the Commission at its sixty-seventh session

117. The text of the draft articles, together with commentaries, provisionally adopted by the Commission at its sixty-seventh session, is reproduced below.

Article 1. Scope

The present draft articles apply to the prevention and punishment of crimes against humanity.

Commentary

(1) Draft article 1 establishes the scope of the present draft articles by indicating that they apply both to the prevention and to the punishment of crimes against humanity. Prevention of crimes against humanity is focused on precluding the commission of such offenses, while punishment of crimes against humanity is focused on criminal proceedings against persons after such crimes have occurred or when they are in the process of being committed.

(2) The present draft articles focus solely on crimes against humanity, which are grave international crimes wherever they occur. The present draft articles do not address other grave international crimes, such as genocide, war crimes or the crime of aggression. Although a view was expressed that this topic might include those crimes as well, the Commission decided to focus on crimes against humanity.

(3) Further, the present draft articles will avoid any conflicts with relevant existing treaties. For example, the present draft articles will avoid conflicts with treaties relating to statutes of limitations, refugees, enforced disappearances, and other matters relating to crimes against humanity. In due course, one or more draft articles will be considered to address any such conflicts.

(4) Likewise, the present draft articles will avoid any conflicts with the obligations of States arising under the constituent instruments of international or "hybrid" (containing a mixture of international law and national law elements) criminal courts or tribunals, including the International Criminal Court. Whereas the Rome Statute of the International Criminal Court (the Rome Statute) regulates relations between the Court and its States Parties (a "vertical" relationship), the focus of the present draft articles

[85] The placement of this paragraph will be addressed at a later stage.

will be on the adoption of national laws and on inter-State cooperation (a "horizontal" relationship). Part 9 of the Rome Statute, on international cooperation and judicial assistance, assumes that inter-State cooperation on crimes within the jurisdiction of the Court will continue to exist without prejudice to the Rome Statute, but does not direct itself to the regulation of that cooperation. The present draft articles will address inter-State cooperation on the prevention of crimes against humanity, as well as on the investigation, apprehension, prosecution, extradition, and punishment in national legal systems of persons who commit such crimes, an objective consistent with the Rome Statute. In doing so, the present draft articles will contribute to the implementation of the principle of complementarity under the Rome Statute. Finally, constituent instruments of international or hybrid criminal courts or tribunals address the prosecution of persons for the crimes within their jurisdiction, not steps that should be taken by States to prevent such crimes before they are committed or while they are being committed.

Article 2. General obligation

Crimes against humanity, whether or not committed in time of armed conflict, are crimes under international law, which States undertake to prevent and punish.

Commentary

(1) Draft article 2 sets forth a general obligation of States to prevent and punish crimes against humanity. The content of this general obligation will be addressed through the various more specific obligations set forth in the draft articles that follow, beginning with draft article 4. Those specific obligations will address steps that States are to take within their national legal systems, as well as their cooperation with other States, with relevant intergovernmental organizations, and with, as appropriate, other organizations.

(2) In the course of stating this general obligation, draft article 2 recognizes crimes against humanity as "crimes under international law". The Charter of the International Military Tribunal established at Nuremberg[86] included "crimes against humanity" as a component of the Tribunal's jurisdiction. Among other things, the Tribunal noted that "individuals can be punished for violations of international law. Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[87] Crimes against humanity were also within the jurisdiction of the Tokyo Tribunal.[88]

(3) The principles of international law recognized in the Nürnberg Charter were noted and reaffirmed in 1946 by the General Assembly of the United Nations.[89] The General Assembly also directed the International Law Commission to "formulate" the Nürnberg Charter principles and to prepare a draft code of offences against the peace and security of mankind.[90] In 1950, the Commission produced the "Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal", which stated that crimes against humanity were "punishable as crimes under international law".[91] Further, in 1954 the Commission completed a draft code of offences against the peace and security of mankind, which in article 2, paragraph 11, included as an offence a series of inhuman acts that are today understood to be crimes against humanity, and which stated in article 1 that "[o]ffences against the peace and security of mankind, as defined in this Code, are crimes under international law, for which the responsible individuals shall be punished."[92]

(4) The characterization of crimes against humanity as "crimes under international law" indicates that they exist as crimes whether or not the conduct has been criminalized under national law. The Nürnberg Charter defined crimes against humanity as the commission of certain acts "whether or not in violation of the domestic law of the country where perpetrated."[93] In 1996, the Commission completed a draft code of crimes against the peace and security of mankind, which provided, *inter alia*, that crimes against humanity were "crimes under international law and punishable as such, whether or not they are punishable under national law."[94] The gravity of such crimes is clear; the Commission has previously indicated that the prohibition of crimes against humanity is "clearly accepted and recognized" as a peremptory norm of international law.[95]

(5) Draft article 2 also identifies crimes against humanity as crimes under international law "whether or not committed in time of armed conflict". The reference to "armed conflict" should be read as including both international and non-international armed conflict. The Nürnberg Charter definition of crimes against humanity, as amended by the

[86] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and Charter of the International Military Tribunal, done at London on 8 August 1945 (the Nürnberg Charter), art. 6 (*c*).

[87] International Military Tribunal, Judgment of 30 September 1946, in *Trial of the Major War Criminals Before the International Military Tribunal*, vol. 22 (1948), p. 466.

[88] Charter of the International Military Tribunal for the Far East, art. 5 (*c*), done at Tokyo on 19 January 1946, as amended 26 April 1946 (in C.I. Bevans (ed.), *Treaties and Other International Agreements of the United States of America 1776–1949*, vol. 4 (Washington D.C., Department of State, 1968), p. 20, at p. 28). No persons, however, were convicted of this crime by that tribunal.

[89] Affirmation of the principles of international law recognized by the Charter of the Nürnberg Tribunal, General Assembly resolution 95 (I) of 11 December 1946.

[90] Formulation of the principles recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, General Assembly resolution 177 (II) of 21 November 1947.

[91] *Yearbook ... 1950*, vol. II, document A/1316, p. 376, para. 109 (principle VI).

[92] *Yearbook ... 1954*, vol. II, document A/2693, p. 150.

[93] Nürnberg Charter, art. 6 (*c*).

[94] *Yearbook ... 1996*, vol. II (Part Two), p. 17, para. 50 (art. 1). The 1996 draft code contained five categories of crimes, one of which was crimes against humanity.

[95] *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 85 (para. (5) of the commentary to draft article 26 of the draft articles on responsibility of States for internationally wrongful acts) (maintaining that those "peremptory norms that are clearly accepted and recognized include the prohibitions of … crimes against humanity …"); see also Fragmentation of international law: difficulties arising from the diversification and expansion of international law: Report of the Study Group of the International Law Commission—finalized by Martti Koskenniemi (A/CN.4/L.682 and Corr.1 and Add.1), para. 374 (identifying crimes against humanity as one of the "most frequently cited candidates for the status of *jus cogens*"), available from the Commission's website, documents for the 58th session; the final text will be published as an addendum to the *Yearbook … 2006*, vol. II (Part One).

Berlin Protocol,[96] was linked to the existence of an international armed conflict; the acts only constituted crimes under international law if committed "in execution of or in connection with" any crime within the Tribunal's jurisdiction, meaning a crime against peace or a war crime. As such, the justification for dealing with matters that traditionally were within the national jurisdiction of a State was based on the crime's connection to inter-State conflict. That connection, in turn, suggested heinous crimes occurring on a large scale, perhaps as part of a pattern of conduct.[97] The Tribunal, charged with trying the senior political and military leaders of the Third Reich, convicted several defendants for crimes against humanity committed during the war, though in some instances the connection of those crimes with other crimes under the Tribunal's jurisdiction was tenuous.[98]

(6) The Commission's 1950 "Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal", however, defined crimes against humanity in principle VI (*c*) in a manner that required no connection to an armed conflict.[99] In its commentary to this principle, the Commission emphasized that the crime need not be committed during a war, but maintained that pre-war crimes must nevertheless be in connection with a crime against peace.[100] At the same time, the Commission maintained that "acts may be crimes against humanity even if they are committed by the perpetrator against his own population."[101] The 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity referred, in article 1 (*b*), to "[c]rimes against humanity whether committed in time of war or in time of peace as they are defined in the Charter of the International Military Tribunal, Nürnberg, of 8 August 1945 and confirmed by resolutions 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations …".[102]

(7) The jurisdiction of the International Tribunal for the Former Yugoslavia includes "crimes against humanity". Article 5 of the Tribunal's Statute provides that the Tribunal may prosecute persons responsible for a series of acts (such as murder, torture or rape) "when committed in armed conflict, whether international or internal in character, and directed against any civilian population".[103] Thus, the formulation used in article 5 retained a connection to armed conflict, but it is best understood contextually. The Tribunal's Statute was developed in 1993 with an understanding that armed conflict in fact existed in the former Yugoslavia; the United Nations Security Council had already determined that the situation constituted a threat to international peace and security, leading to the exercise of the Security Council's enforcement powers under Chapter VII of the Charter of the United Nations. As such, the formulation used in article 5 ("armed conflict") was designed principally to dispel the notion that crimes against humanity had to be linked to an "international armed conflict". To the extent that this formulation might be read to suggest that customary international law requires a nexus to armed conflict, the Appeals Chamber of the Tribunal later clarified that there was "no logical or legal basis" for retaining a connection to armed conflict, since "it has been abandoned" in State practice since Nürnberg.[104] The Appeals Chamber also noted that the "obsolescence of the nexus requirement is evidenced by international conventions regarding genocide and apartheid, both of which prohibit particular types of crimes against humanity regardless of any connection to armed conflict."[105] Indeed, the Appeals Chamber later maintained that such a connection in the Tribunal's Statute was simply circumscribing the subject-matter jurisdiction of the Tribunal, not codifying customary international law.[106]

(8) In 1994, the Security Council established the International Criminal Tribunal for Rwanda and provided it with jurisdiction over "crimes against humanity". Although article 3 of the Tribunal's Statute retained the same series of acts as appeared in the Statute of the International Tribunal for the Former Yugoslavia, the chapeau language did not retain the reference to armed conflict.[107] Likewise, article 7 of the Rome Statute, adopted in 1998, did not retain any reference to armed conflict.

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[96] Protocol Rectifying Discrepancy in Text of Charter, done at Berlin on 6 October 1945 (the "Berlin Protocol"). The Berlin Protocol replaced a semicolon after "during the war" with a comma, so as to harmonize the English and French texts with the Russian text. The effect of doing so was to link the first part of the provision to the latter part of the provision ("in connection with any crime within the jurisdiction of the Tribunal") and hence to the existence of an international armed conflict.

[97] See United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (London, His Majesty's Stationery Office, 1948), p. 179 ("Only crimes which either by their magnitude and savagery or by their large number or by the fact that a similar pattern was applied at different times and places, endangered the international community or shocked the conscience of mankind, warranted intervention by States other than that on whose territory the crimes had been committed, or whose subjects had become their victims").

[98] See, for example, International Tribunal for the Former Yugoslavia, *Prosecutor v. Kupreškić et al*., Judgment, Trial Chamber, Case No. IT-95-16-T, 14 January 2000, *Judicial Reports 2000*, vol. II, p. 1398, at p. 1779, para. 576 (noting the tenuous link between the crimes against humanity committed by Baldur von Schirach and the other crimes within the Nürnberg Tribunal's jurisdiction).

[99] *Yearbook … 1950*, vol. II, document A/1316, p. 377, para. 119.

[100] *Ibid*., para. 123.

[101] *Ibid*., para. 124.

[102] Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, done at New York on 26 November 1968. As of August 2015, there are 55 States Parties to this Convention. For a regional convention of a similar nature, see European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes, done at Strasbourg on 25 January 1974. As of August 2015, there are eight States Parties to this Convention.

[103] Statute of the International Tribunal for the Former Yugoslavia, approved by the Security Council in its resolution 827 (1993) of 25 May 1993, and contained in the report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993) (S/25704 and Corr.1 [and Add.1]), annex.

[104] *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, Case No. IT-94-1-AR72 (2 October 1995), *Judicial Reports 1994–1995*, vol. I, p. 353, at p. 503, para. 140.

[105] *Ibid*.

[106] See, for example, *Prosecutor v. Kordić & Čerkez*, Judgment, Trial Chamber, Case No. IT-95-14/2-T, 26 February 2001, para. 33; *Prosecutor v. Tadić*, Judgment, Appeals Chamber, Case No. IT-94-1-A, 15 July 1999, *Judicial Reports 1999*, p. 3, at pp. 215 and 217, paras. 249–251 ("The armed conflict requirement is satisfied by proof that *there was* an armed conflict; that is all that the Statute requires, and in so doing, it requires more than does customary international law" (p. 217, para. 251)).

[107] Statute of the International Criminal Tribunal for Rwanda, Security Council resolution 955 (1994) of 8 November 1994, annex, art. 3; see International Criminal Tribunal for Rwanda, *Semanza v. Prosecutor*, Judgment, Appeals Chamber, Case No. ICTR-97-20-A, 20 May 2005, para. 269 ("… contrary to Article 5 of the ICTY Statute, Article 3 of the ICTR Statute does not require that the crimes be committed in the context of an armed conflict. This is an important distinction").

(9) As such, while early definitions of crimes against humanity required that the underlying acts be accomplished in connection with armed conflict, that connection has disappeared from the statutes of contemporary international criminal courts and tribunals, including the Rome Statute. In its place, as discussed in relation to draft article 3 below, are the "chapeau" requirements that the crime be committed within the context of a widespread or systematic attack directed against a civilian population in furtherance of a State or organizational policy to commit such an attack.

Article 3. Definition of crimes against humanity

1. For the purpose of the present draft articles, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(*a*) murder;

(*b*) extermination;

(*c*) enslavement;

(*d*) deportation or forcible transfer of population;

(*e*) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

(*f*) torture;

(*g*) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

(*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 recognized as impermissible under international law, in connection with any act referred to in this paragraph or in connection with the crime of genocide or war crimes;

(*i*) enforced disappearance of persons;

(*j*) the crime of apartheid;

(*k*) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

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

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

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

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

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

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

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

(*h*) "the crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an 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;

(*i*) "enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of the present draft articles, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

4. This draft article is without prejudice to any broader definition provided for in any international instrument or national law.

Commentary

(1) The first three paragraphs of draft article 3 establish, for the purpose of the present draft articles, a definition of "crime against humanity". The text of these three paragraphs is verbatim the text of article 7 of the Rome Statute, except for three non-substantive changes (discussed below), which are necessary given the different context in which the definition is being used. Paragraph 4

of draft article 3 is a "without prejudice" clause, which indicates that this definition does not affect any broader definitions provided for in international instruments or national laws.

Definitions in other instruments

(2) Various definitions of "crimes against humanity" have been used since 1945, both in international instruments and in national laws that have codified the crime. The Nürnberg Charter defined "crimes against humanity" 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.[108]

(3) Principle VI (*c*) of the Commission's 1950 "Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal" defined crimes against humanity as:

> Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connexion with any crime against peace or any war crime.[109]

(4) Further, the Commission's 1954 draft code of offences against the peace and security of mankind identified as one of those offences:

> Inhuman acts such as murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, racial, religious or cultural grounds by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities.[110]

(5) Article 5 of the Statute of the International Tribunal for the Former Yugoslavia states that the tribunal "shall have the power to prosecute persons responsible" for a series of acts (such as murder, torture and rape) "when committed in armed conflict, whether international or internal in character, and directed against any civilian population".[111] Although the report of the Secretary-General of the United Nations proposing this article indicated that crimes against humanity "refer to inhumane acts of a very serious nature … committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds",[112] that particular language was not included in the text of article 5.

(6) By contrast, the 1994 Statute of the International Criminal Tribunal for Rwanda, in article 3, retained the same series of acts, but the chapeau language introduced the formulation from the 1993 Secretary-General's report of "crimes when committed as part of a widespread or systematic attack against any civilian population" and then continued with "on national, political, ethnic, racial or religious grounds".[113] As such, this Statute expressly provided that a discriminatory intent was required in order to establish the crime. The Commission's 1996 draft code of crimes against the peace and security of mankind also defined "crimes against humanity" as a series of specified acts "when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group," but did not include the discriminatory intent language.[114] Crimes against humanity have also been defined in the jurisdiction of hybrid criminal courts or tribunals.[115]

(7) Article 5, paragraph 1 (*b*), of the Rome Statute includes crimes against humanity within the jurisdiction of the International Criminal Court. Article 7, paragraph 1, defines "crime against humanity" as any of a series of acts "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack". Article 7, paragraph 2, contains a series of definitions which, *inter alia*, clarify that an attack directed against any civilian population "means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack". Article 7, paragraph 3, provides that "it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above." Article 7 does not retain the nexus to an armed conflict that characterized the Statute of the International Tribunal for the Former Yugoslavia, nor (except with respect to acts of persecution)[116] the discriminatory intent requirement that characterized the Statute of the International Criminal Tribunal for Rwanda.

(8) The Rome Statute article 7 definition of "crime against humanity" has been accepted by the more than 120 States Parties to the Rome Statute and is now being used by many States when adopting or amending their national laws. The Commission considered Rome Statute article 7 as an appropriate basis for defining such crimes in paragraphs 1 to 3 of draft article 3. Indeed, the text of article 7 is used verbatim except for three non-substantive changes, which are necessary given the different context in which the definition is being used. First, the opening phrase of paragraph 1 reads "For the purpose of the present draft articles" rather than "For the purpose of this Statute". Second, the same change has been made in the opening phrase of paragraph 3. Third, article 7, paragraph 1 (*h*), of the Rome Statute criminalizes acts of persecution when undertaken "in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court". Again, to adapt to the different context, in draft article 3 this phrase reads as "in

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[108] Nürnberg Charter, art. 6 (*c*).

[109] *Yearbook ... 1950*, vol. II, document A/1316, p. 377, para. 119.

[110] *Yearbook ... 1954*, vol. II, document A/2693, p. 150 (art. 2, para. 11).

[111] Statute of the International Tribunal for the Former Yugoslavia (see footnote 103 above), art. 5.

[112] Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993) (S/25704 and Add.1 [and Corr.1]), para. 48.

[113] Statute of the International Criminal Tribunal for Rwanda (see footnote 107 above), annex, art. 3.

[114] *Yearbook ... 1996*, vol. II (Part Two), p. 47, art. 18.

[115] See, for example, Agreement between the United Nations and the Government of Sierra Leone on the establishment of a Special Court for Sierra Leone (with Statute), done at Freetown on 16 January 2002, United Nations, *Treaty Series*, vol. 2178, No. 38342, p. 137, at p. 145; and Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (No. NS/RKM/1004/006 of 27 October 2004), art. 5, available from www.eccc.gov.kh, *Legal documents*.

[116] See, in particular, article 7, para. 1 (*h*).

connection with any act referred to in this paragraph or in connection with the crime of genocide or war crimes". In due course, the International Criminal Court may exercise its jurisdiction over the crime of aggression when the requirements established at the Review Conference of the Rome Statute, held in Kampala,[117] are met, in which case this paragraph may need to be revisited.

Paragraphs 1 to 3

(9) The definition of "crimes against humanity" set forth in paragraphs 1 to 3 of draft article 3 contains three overall requirements that merit some discussion. These requirements, all of which appear in paragraph 1, have been illuminated through the case law of the International Criminal Court and other international or hybrid courts and tribunals. The definition also lists the underlying prohibited acts for crimes against humanity and defines several of the terms used within the definition (thus providing definitions within the definition). No doubt the evolving jurisprudence of the International Criminal Court and other international or hybrid courts and tribunals will continue to help inform national authorities, including courts, as to the meaning of this definition, and thereby will promote harmonized approaches at the national level. The Commission notes that relevant case law continues to develop over time, such that the following discussion is meant simply to indicate some of the parameters of these terms as of 2015.

"Widespread or systematic attack"

(10) The first overall requirement is that the acts must be committed as part of a "widespread or systematic" attack. This requirement first appeared in the Statute of the International Criminal Tribunal for Rwanda,[118] though some decisions of the International Tribunal for the Former Yugoslavia maintained that the requirement was implicit even in its own Statute, given the inclusion of such language in the Secretary-General's report proposing it.[119] Jurisprudence of both Tribunals maintained that the conditions of "widespread" and "systematic" were disjunctive rather than conjunctive requirements; either condition could be met to establish the existence of the crime.[120] This reading of the widespread/systematic requirement is also reflected in the Commission's commentary to the 1996 draft code of crimes against the peace and security of mankind, where it stated that "an act could constitute a crime against humanity if either of these conditions [of scale or systematicity] is met."[121]

(11) When this standard was considered for the Rome Statute, some States expressed the view that the conditions of "widespread" and "systematic" should be conjunctive requirements—that they both should be present to establish the existence of the crime—because otherwise the standard would be over-inclusive.[122] Indeed, if "widespread" commission of acts alone were sufficient, these States maintained that spontaneous waves of widespread, but unrelated, crimes would constitute crimes against humanity. Due to that concern, a compromise was developed that involved leaving these conditions in the disjunctive,[123] but adding to Rome Statute article 7, paragraph 2 (*a*), a definition of "attack" that, as discussed below, contains a policy element.

(12) According to the Trial Chamber of the International Tribunal for the Former Yugoslavia in *Kunarac*, "[t]he adjective 'widespread' connotes the large-scale

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[117] See *Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May to 11 June 2010*, International Criminal Court publication RC/9/11, resolution 6: "The crime of aggression" (RC/Res.6).

[118] See footnote 107 above. Unlike the English version, the French version of article 3 of the Statute of the International Criminal Tribunal for Rwanda used a conjunctive formulation (*généralisée et systématique*). In the *Akayesu* case, the Trial Chamber of the International Criminal Tribunal for Rwanda indicated: "In the original French version of the Statute, these requirements were worded cumulatively…, thereby significantly increasing the threshold for application of this provision. Since Customary International Law requires only that the attack be either widespread or systematic, there are sufficient reasons to assume that the French version suffers from an error in translation" (*Prosecutor v. Jean-Paul Akayesu*, Judgment, Trial Chamber I, Case No. ICTR-96-4-T, 2 September 1998, *Reports of Orders, Decisions and Judgements 1998*, vol. I, p. 44, at p. 334, para. 579, footnote 144).

[119] *Prosecutor v. Blaškić*, Judgment, Trial Chamber, Case No. IT-95-14-T, 3 March 2000, *Judicial Reports 2000*, vol. I, p. 557, at p. 703, para. 202; *Prosecutor v. Tadić*, Opinion and Judgment, Trial Chamber, Case No. IT-94-1-T, 7 May 1997, *Judicial Reports 1997*, vol. I, p. 3, at p. 431, para. 648. See also footnote 112 above.

[120] See, for example, International Tribunal for the Former Yugoslavia, *Prosecutor v. Mrkšić et al.*, Judgment, Trial Chamber II, Case No. IT-95-13/1-T, 27 September 2007, para. 437 ("… the attack must be widespread or systematic, the requirement being disjunctive rather than cumulative"); International Criminal Tribunal for Rwanda, *Prosecutor v. Kayishema and Ruzindana*, Judgment, Trial Chamber II, Case No. ICTR-95-1-T, 21 May 1999, *Reports of Orders, Decisions and Judgements 1999*, vol. II, p. 824, at p. 896, para. 123 ("The attack must contain one of the alternative conditions of being widespread or systematic"); International Criminal Tribunal for Rwanda, *Akayesu* case (footnote 118 above), para. 579; and International Tribunal for the Former Yugoslavia, *Tadić* case (footnote 119 above), para. 648 ("… either a finding of widespreadness … or systematicity … fulfills this requirement").

[121] *Yearbook … 1996*, vol. II (Part Two), p. 47 (para. (4) of the commentary to draft article 18). See also Report of the Ad Hoc Committee on the Establishment of a Permanent International Criminal Court, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 22* (A/50/22), para. 78 ("elements that should be reflected in the definition of crimes against humanity included … [that] the crimes usually involved a widespread *or** systematic attack"); *Yearbook … 1995*, vol. II (Part Two), p. 25, para. 90 ("the concepts of 'systematic' and 'massive' violations were complementary elements of the crimes concerned"); *Yearbook … 1994*, vol. II (Part Two), p. 40, para. (14) of the commentary to draft article 20 ("the definition of crimes against humanity encompasses inhumane acts of a very serious character involving widespread *or** systematic violations"); and *Yearbook … 1991*, vol. II (Part Two), p. 103, para. (3) of the commentary to draft article 21 ("Either one of these aspects—systematic or mass scale—in any of the acts enumerated … is enough for the offence to have taken place").

[122] See *Official Records of the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June to 17 July 1998*, vol. II: *Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.183/13 (Vol. II), United Nations publication, Sales No. E.02.I.5), p. 148 (India); p. 150 (United Kingdom of Great Britain and Northern Ireland, France); p. 151 (Thailand, Egypt); p. 152 (Islamic Republic of Iran); p. 154 (Turkey); p. 155 (Russian Federation); p. 156 (Japan).

[123] Case law of the International Criminal Court has affirmed that the conditions of "widespread" and "systematic" in article 7 of the Rome Statute are disjunctive. See *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Pre-Trial Chamber II, ICC-01/09, 31 March 2010, para. 94; see also *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61, para. 7 (*a*) and (*b*), of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, Pre-Trial Chamber II, ICC-01/05-01/08, 15 June 2009, para. 82. The decisions of the International Criminal Court are available from the Court's website: www.icc-cpi.int/.

nature of the attack and the number of its victims."[124] As such, this requirement refers to a "multiplicity of victims"[125] and excludes isolated acts of violence,[126] such as murder directed against individual victims by persons acting of their own volition rather than as part of a broader initiative. At the same time, a single act committed by an individual perpetrator can constitute a crime against humanity if it occurs within the context of a broader campaign.[127] There is no specific numerical threshold of victims that must be met for an attack to be "widespread".

(13) "Widespread" can also have a geographical dimension, with the attack occurring in different locations.[128] Thus, in the *Bemba* case, the Pre-Trial Chamber of the International Criminal Court found that there was sufficient evidence to establish that an attack was "widespread" based on reports of attacks in various locations over a large geographical area, including evidence of thousands of rapes, mass grave sites, and a large number of victims.[129] Yet a large geographical area is not required; the International Tribunal for the Former Yugoslavia has found that the attack can be in a small geographical area against a large number of civilians.[130]

(14) In its 2010 *Situation in the Republic of Kenya decision*, the Pre-Trial Chamber of the International Criminal Court indicated that "[t]he assessment is neither exclusively quantitative nor geographical, but must be carried out on the basis of the individual facts."[131] An attack may be widespread due to the cumulative effect of multiple inhumane acts or the result of a single inhumane act of great magnitude.[132]

(15) Like "widespread", the term "systematic" excludes isolated or unconnected acts of violence,[133] and jurisprudence from the International Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda and the International Criminal Court reflects a similar understanding of what is meant by the term. The International Tribunal for the Former Yugoslavia defined "systematic" as "the organised nature of the acts of violence and the improbability of their random occurrence"[134] and found that evidence of a pattern or methodical plan establishes that an attack was systematic.[135] Thus, the Appeals Chamber in *Kunarac* confirmed that "patterns of crimes—that is the non-accidental repetition of similar criminal conduct on a regular basis—are a common expression of such systematic occurrence."[136] The International Criminal Tribunal for Rwanda has taken a similar approach.[137]

(16) Consistent with the jurisprudence of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, a Pre-Trial Chamber of the International Criminal Court in *Harun* found that "systematic" refers to " 'the organised nature of the acts of violence and the improbability of their random occurrence.' "[138] A Pre-Trial Chamber of the International Criminal Court in *Katanga* found that the term "has been understood as either an organized plan in furtherance of a common policy, which follows a regular pattern and results in a continuous commission of acts or as 'patterns of crimes' such that the crimes constitute a 'non-accidental repetition of similar criminal conduct on a regular basis.' "[139] In applying the standard, a Pre-Trial Chamber of the International Criminal Court in *Ntaganda* found an

[124] *Prosecutor v. Kunarac et al.*, Judgment, Trial Chamber, Case No. IT-96-23-T, 22 February 2001, para. 428; see International Criminal Court, *Prosecutor v. Katanga*, Judgment, Trial Chamber II, ICC-01/04-01/07, 7 March 2014, para. 1123; and *Prosecutor v. Katanga*, Decision on the Confirmation of Charges, Pre-Trial Chamber I, ICC-01/04-01/07, 30 September 2008, para. 394 (www.icc-cpi.int/); International Tribunal for the Former Yugoslavia, *Prosecutor v. Blagojević & Jokić*, Judgment, Trial Chamber I, Section A, Case No. IT-02-60-T, 17 January 2005, paras. 545–546; and *Prosecutor v. Kordić & Čerkez*, Judgment, Appeals Chamber, Case No. IT-95-14/2-A, 17 December 2004, para. 94.

[125] *Bemba* case (see footnote 123 above), para. 83; *Kayishema* case (see footnote 120 above), para. 123; *Akayesu* case (footnote 118 above), para. 580; draft code of offences against the peace and security of mankind adopted by the Commission at its forty-eighth session, *Yearbook … 1996*, vol. II (Part Two), p. 47, draft article 18 (using the phrase "on a large scale" instead of widespread); see also *Mrkšić* case, Judgment, 27 September 2007 (footnote 120 above), para. 437 (" 'widespread' refers to the large scale nature of the attack and the number of victims"). In *Prosecutor v. Ntaganda*, Decision Pursuant to Article 61, para. 7 (*a*) and (*b*), of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, Pre-Trial Chamber II of the International Criminal Court, ICC-01/04-02/06, 9 June 2014, para. 24, the Chamber found that the attack against the civilian population was widespread "as it resulted in a large number of civilian victims" (www.icc-cpi.int/).

[126] See International Criminal Court, *Prosecutor v. Ntaganda*, Decision on the Prosecutor's Application under Article 58, Pre-Trial Chamber II, ICC-01/04-02/06, 13 July 2012, para. 19, and *Prosecutor v. Harun and Kushayb*, Decision on the Prosecution Application under Article 58, para. 7, of the Statute, Pre-Trial Chamber I, ICC-02/05-01/07, 27 April 2007, para. 62 (www.icc-cpi.int/); see also International Criminal Tribunal for Rwanda, *Prosecutor v. Rutaganda*, Judgment, Trial Chamber I, Case No. ICTR-96-3-T, 6 December 1999, *Reports of Orders, Decisions and Judgements 1999*, vol. II, p. 1704, at pp. 1734 and 1736, paras. 67–69, and *Kayishema* case (footnote 120 above), paras. 122–123; *Yearbook … 1996*, vol. II (Part Two), p. 47 (commentary to draft article 18); and *Yearbook … 1991*, vol. II (Part Two), p. 103 (para. (3) of commentary to draft article 21).

[127] *Kupreškić* case (see footnote 98 above), para. 550; *Tadić* case, Opinion and Judgment, 7 May 1997 (see footnote 119 above), para. 649.

[128] See, for example, *Ntaganda* case, Decision on the Prosecutor's Application under Article 58, 13 July 2012 (footnote 126 above), para. 30; *Prosecutor v. Ruto and Sang*, Decision on the Confirmation of Charges Pursuant to Article 61, para. 7 (*a*) and (*b*) of the Rome Statute, Pre-Trial Chamber II of the International Criminal Court, ICC-01/09-01/11, 23 January 2012, para. 177 (www.icc-cpi.int/).

[129] *Bemba* case (see footnote 123), paras. 117–124.

[130] *Kordić* case, Judgment, 17 December 2004 (see footnote 124 above), para. 94; *Blaškić* case (see footnote 119 above), para. 206.

[131] *Situation in the Republic of Kenya* (see footnote 123 above), para. 95; see also para. 96.

[132] See the draft code of offences against the peace and security of mankind adopted by the Commission at its forty-eighth session, *Yearbook … 1996*, vol. II (Part Two), p. 47 (para. (4) of the commentary to draft article 18); see also *Bemba* case (footnote 123 above), para. 83 (finding that widespread "entails an attack carried out over a large geographical area or an attack in a small geographical area directed against a large number of civilians").

[133] *Yearbook … 1996*, vol. II (Part Two), p. 47; *Yearbook … 1991*, vol. II (Part Two), p. 103.

[134] *Mrkšić* case, Judgment, 27 September 2007 (see footnote 120 above), para. 437; *Kunarac* case, Judgment, 22 February 2001 (see footnote 124 above), para. 429.

[135] See, for example, *Tadić* case, Opinion and Judgment, 7 May 1997 (see footnote 119 above), para. 648.

[136] *Prosecutor v. Kunarac*, Judgment, Appeals Chamber, Case No. IT-96-23/1-A, 12 June 2002, para. 94.

[137] *Kayishema* case (see footnote 120 above), para. 123; *Akayesu* case (see footnote 118 above), para. 580.

[138] *Harun* case (see footnote 126 above), para. 62 (citing *Kordić* case, Judgment, 17 December 2004 (see footnote 124 above), para. 94, which in turn cites *Kunarac* case, Judgment, 22 February 2001 (see footnote 124 above), para. 429); see also *Ruto* case (footnote 128 above), para. 179; *Situation in the Republic of Kenya* (footnote 123 above), para. 96; and *Katanga* case, Decision on the confirmation of charges, 30 September 2008 (footnote 124 above), para. 394.

[139] *Katanga* case, Decision on the confirmation of charges, 30 September 2008 (see footnote 124 above), para. 397.

attack to be systematic since "the perpetrators employed similar means and methods to attack the different locations: they approached the targets simultaneously, in large numbers, and from different directions, they attacked villages with heavy weapons, and systematically chased the population by similar methods, hunting house by house and into the bushes, burning all properties and looting."[140] Additionally, in the *Ntaganda* confirmation of charges decision, a Pre-Trial Chamber held that the attack was systematic as it followed a "regular pattern" with a "recurrent *modus operandi*, including the erection of roadblocks, the laying of land mines, and coordinated the commission of the unlawful acts … in order to attack the non-Hema civilian population."[141] In *Gbagbo*, a Pre-Trial Chamber of the International Criminal Court found an attack to be systematic when "preparations for the attack were undertaken in advance" and the attack was planned and coordinated with acts of violence revealing a "clear pattern".[142]

"Directed against any civilian population"

(17) The second overall requirement is that the act must be committed as part of an attack "directed against any civilian population". Draft article 3, paragraph 2 (*a*), defines "attack directed against any civilian population" for the purpose of paragraph 1 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".[143] As discussed below, jurisprudence from the International Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda and the International Criminal Court has construed the meaning of each of these terms: "directed against", "any", "civilian", "population", "a course of conduct involving the multiple commission of acts" and "State or organizational policy".

(18) The International Tribunal for the Former Yugoslavia has found that the phrase "directed against" requires that civilians be the intended primary target of an attack, rather than incidental victims.[144] The Pre-Trial Chambers of the International Criminal Court subsequently adopted this interpretation in the *Bemba* case and the 2010 *Situation in the Republic of Kenya* decision.[145] A Trial Chamber of the International Criminal Court adopted the same interpretation in the *Katanga* trial judgment.[146] In the *Bemba* case, the Pre-Trial Chamber found that there was sufficient evidence showing the attack was "directed against" civilians of the Central African Republic.[147] The Chamber concluded that soldiers of the Movement for the Liberation of Congo were aware that their victims were civilians, based on direct evidence of civilians being attacked inside their houses or in their courtyards.[148] The Chamber further found that the Movement's soldiers targeted *primarily* civilians, demonstrated by an attack at one locality where the Movement's soldiers did not find any rebel troops that they claimed to be chasing.[149] The term "directed" places its emphasis on the intention of the attack, rather than the physical result of the attack.[150] It is the attack, not the acts of the individual perpetrator, which must be "directed against" the target population.[151]

(19) The word "any" indicates that "civilian population" is to have a wide definition and should be interpreted broadly.[152] An attack can be committed against any civilians, "regardless of their nationality, ethnicity or any other distinguishing feature",[153] and can be committed against either nationals or foreigners.[154] Those targeted may "include a group defined by its (perceived) political affiliation."[155] In order to qualify as a "civilian population" during a time of armed conflict, those targeted must be "predominantly" civilian in nature; the presence of certain combatants within the population does not change its character.[156] This approach is in

[140] *Ntaganda* case, Decision on the Prosecutor's Application under Article 58, 13 July 2012 (see footnote 126 above), para. 31; see also *Ruto* case (footnote 128 above), para. 179.

[141] *Ntaganda* case, Decision Pursuant to Article 61, para. 7 (*a*) and (*b*) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, 9 June 2014 (see footnote 125 above), para. 24.

[142] *Prosecutor v. Gbagbo*, Decision on the Confirmation of Charges against Laurent Gbagbo, Pre-Trial Chamber I, ICC-02/11-01/11, 12 June 2014, para. 225 (www.icc-cpi.int/).

[143] Rome Statute, art. 7, para. 2 (*a*); see also Report of the Preparatory Commission for the International Criminal Court, Addendum, Part II: Finalized draft text of the Elements of Crimes (PCNICC/2000/1/Add.2), art. 7, introduction, para. 3.

[144] See, for example, *Kunarac* case, Judgment, 22 February 2001 (footnote 124 above), para. 421 ("The expression 'directed against' specifies that in the context of a crime against humanity the civilian population is the primary object of the attack").

[145] *Bemba* case (see footnote 123 above), para. 76; *Situation in the Republic of Kenya* (see footnote 123 above), para. 82.

[146] *Katanga* case, Judgment, 7 March 2014 (see footnote 124 above), para. 1104.

[147] *Bemba* case (see footnote 123 above), para. 94; see also *Ntaganda* case, Decision on the Prosecutor's Application under Article 58, 13 July 2012 (footnote 126 above), paras. 20–21.

[148] *Bemba* case (see footnote 123 above), para. 94.

[149] *Ibid*., paras. 95–98.

[150] See, for example, *Blaškić* case (footnote 119 above), para. 208, footnote 401.

[151] *Kunarac* case, Judgment, 12 June 2002 (see footnote 136 above), para. 103.

[152] See, for example, *Mrkšić* case, Judgment, 27 September 2007 (footnote 120 above), para. 442; *Kupreškić* case (footnote 98 above), para. 547 ("… a wide definition of 'civilian' and 'population' is intended. This is warranted first of all by the object and purpose of the general principles and rules of humanitarian law, in particular by the rules prohibiting crimes against humanity"); *Kayishema* case (footnote 120 above), para. 127; and *Tadić* case, Judgment, 7 March 2014 (footnote 119 above), para. 643.

[153] *Katanga* case, Decision on the confirmation of charges, 30 September 2008 (see footnote 124 above), para. 399 (quoting *Tadić* case, Opinion and Judgment, 7 May 1997 (see footnote 119 above), para. 635); see also *Katanga* case, Judgment, 7 March 2014 (footnote 124 above), para. 1103.

[154] See, for example, *Kunarac* case, Judgment, 22 February 2001 (footnote 124 above), para. 423.

[155] *Ruto* case (see footnote 128 above), para. 164.

[156] See, for example, *Katanga* case, Judgment, 7 March 2014 (footnote 124 above), para. 1105 (holding that the population targeted "must be primarily composed of civilians" and that the "presence of non-civilians in its midst has therefore no effect on its status of civilian population"); *Mrkšić* case, Judgment, 27 September 2007 (footnote 120 above), para. 442; *Kunarac* case, Judgment, 22 February 2001 (footnote 124 above), para. 425 ("the presence of certain non-civilians in its midst does not change the character of the population"); *Kordić* case, Judgment, 26 February 2001 (footnote 106 above), para. 180; *Blaškić* case (footnote 119 above), para. 214 ("the presence of soldiers within an intentionally targeted civilian population does not alter the civilian nature of that population"); *Kupreškić* case (footnote 98 above), para. 549 ("the presence of those actively involved in the conflict should not prevent the characterization of a population as civilian"); *Kayishema* case (footnote 120 above), para. 128; *Akayesu* case (footnote 118 above), para. 582 ("Where there are certain individuals within the civilian population who do not come within the definition of civilians, this does not deprive the population of its civilian character"); and *Tadić* case, Opinion and Judgment, 7 May 1997 (footnote 119 above), para. 638.

accordance with other rules arising under international humanitarian law. For example, Additional Protocol I to the Geneva Conventions states: "The 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."[157] The Trial Chamber of the International Criminal Tribunal for Rwanda in *Kayishema* found that during a time of peace, "civilian" shall include all persons except those individuals who have a duty to maintain public order and have legitimate means to exercise force to that end at the time they are being attacked.[158] The status of any given victim must be assessed at the time the offence is committed;[159] a person should be considered a civilian if there is any doubt as to his or her status.[160]

(20) "Population" does not mean that the entire population of a given geographical location must be subject to the attack;[161] rather, the term implies the collective nature of the crime as an attack upon multiple victims.[162] As the Trial Chamber of the International Tribunal for the Former Yugoslavia noted in *Gotovina*, the concept means that the attack is upon more than just "a limited and randomly selected number of individuals."[163] International Criminal Court decisions in the *Bemba* case and *Situation in the Republic of Kenya (2010)* have adopted a similar approach, declaring that the Prosecutor must establish that the attack was directed against more than just a limited group of individuals.[164]

(21) The first part of draft article 3, paragraph 2 (*a*), refers to "a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population". Although no such language was contained in the statutory definition of crimes against humanity for the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda,[165] this language reflects jurisprudence from both these tribunals,[166] and was expressly stated in Rome Statute article 7, paragraph 2 (*a*). The finalized draft text of elements of crimes under the Rome Statute provides that the "acts" referred to in article 7, paragraph 2 (*a*), "need not constitute a military attack."[167] The Trial Chamber in *Katanga* stated that "the attack need not necessarily be military in nature and it may involve any form of violence against a civilian population."[168]

(22) The second part of draft article 3, paragraph 2 (*a*), states that the attack must be "pursuant to or in furtherance of a State or organizational policy to commit such an attack". The requirement of a "policy" element did not appear as part of the definition of crimes against humanity in the statutes of international courts and tribunals until the adoption of the Rome Statute.[169] While the Statutes of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda contained no policy requirement in their definition of crimes against humanity,[170] some early jurisprudence required it.[171] Indeed, the *Tadić* Trial Chamber provided an important discussion of the policy element early in the tenure of the International Tribunal for the Former Yugoslavia, one that would later influence the drafting of the Rome Statute. The Trial Chamber found that

> the reason that crimes against humanity so shock the conscience of mankind and warrant intervention by the international community is because they are not isolated, random acts of individuals but rather result

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[157] Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), art. 50, para. 3.

[158] *Kayishema* case (see footnote 120 above), para. 127 (referring to "all persons *except* those who have the duty to maintain public order and have the legitimate means to exercise force. Non-civilians would include, for example, members of the FAR [Armed Forces of Rwanda], the RPF [Rwandan Patriotic Front], the police and the Gendarmerie Nationale").

[159] *Blaškić* case (see footnote 119 above), para. 214 ("the specific situation of the victim at the moment the crimes were committed, rather than his status, must be taken into account in determining his standing as a civilian"); see also *Kordić* case, Judgment, 26 February 2001 (footnote 106 above), para. 180 ("individuals who at one time performed acts of resistance may in certain circumstances be victims of a crime against humanity"); *Akayesu* case (footnote 118 above), para. 582 (finding that civilian population includes "members of the armed forces who laid down their arms and those persons placed *hors de combat*").

[160] *Kunarac* case, Judgment, 22 February 2001 (see footnote 124 above), para. 426.

[161] See *Situation in the Republic of Kenya* (footnote 123 above), para. 82; *Bemba* case (footnote 123 above), para. 77; *Kunarac* case, Judgment, 22 February 2001 (footnote 124 above), para. 424; *Tadić* case, Opinion and Judgment, 7 May 1997 (footnote 119 above), para. 644; see also *Yearbook ... 1994*, vol. II (Part Two), p. 40 (para. (14) of commentary to draft article 20, defining crimes against humanity as "inhumane acts of a very serious character involving widespread or systematic violations aimed at the civilian population *in whole or in part**").

[162] See *Tadić* case, Opinion and Judgment, 7 May 1997 (footnote 119 above), at para. 644.

[163] *Prosecutor v. Gotovina et al.*, Judgment, Trial Chamber I, Case No. IT-06-90-T, 15 April 2011, para. 1704.

[164] *Bemba* case (see footnote 123 above), para. 77; *Situation in the Republic of Kenya* (see footnote 123 above), para. 81.

[165] See footnotes 103 and 107 above, respectively.

[166] See, for example, *Kunarac* case, Judgment, 22 February 2001 (footnote 124 above), para. 415 (defining attack as "a course of conduct involving the commission of acts of violence"); *Kayishema* case (footnote 120 above), para. 122 (defining attack as the "event in which the enumerated crimes must form part"); and *Akayesu* case (footnote 118 above), para. 581 ("The concept of attack may be defined as an unlawful act of the kind enumerated [in the Statute]. An attack may also be non-violent in nature, like imposing a system of apartheid … or exerting pressure on the population to act in a particular manner …").

[167] Report of the Preparatory Commission for the International Criminal Court (PCNICC/2000/1/Add.2) (see footnote 143 above), art. 7, introduction, para. 3.

[168] *Katanga* case, Judgment, 7 March 2014 (see footnote 124 above), para. 1101.

[169] Article 6 (*c*) of the Nürnberg Charter contains no explicit reference to a plan or policy. The Judgment of the International Military Tribunal of 30 September 1946, however, did use a "policy" descriptor when discussing article 6 (*c*) in the context of the concept of the "attack" as a whole: "The policy of terror was certainly carried out on a vast scale, and in many cases was organized and systematic. The policy of persecution, repression and murder of civilians in Germany before the war of 1939, who were likely to be hostile to the Government, was most ruthlessly carried out" (*Trial of the Major War Criminals …* (see footnote 87 above), p. 498). Article II (1) (*c*) of Control Council Law No. 10 also contains no reference to a plan or policy in its definition of crimes against humanity (*Official Gazette of the Control Council for Germany*, No. 3 (31 January 1946), p. 51).

[170] The Appeals Chamber of the International Tribunal for the Former Yugoslavia determined that there was no policy element on crimes against humanity in customary international law: see *Kunarac* case, Judgment, 12 June 2002 (footnote 136 above), para. 98 ("There was nothing in the Statute or in customary international law at the time of the alleged acts which required proof of the existence of a plan or policy to commit these crimes"), although that position has been criticized in writings.

[171] *Tadić* case, Opinion and Judgment, 7 May 1997 (see footnote 119 above), paras. 626, 644 and 653–655.

from a deliberate attempt to target a civilian population. Traditionally this requirement was understood to mean that there must be some form of policy to commit these acts … Importantly, however, such a policy need not be formalized and can be deduced from the way in which the acts occur.[172]

The Trial Chamber further noted that, because of the policy element, such crimes "cannot be the work of isolated individuals alone."[173] Later jurisprudence of the Tribunal, however, downplayed the policy element, regarding it as sufficient simply to prove the existence of a widespread or systematic attack.[174]

(23) Prior to the Rome Statute, the work of the International Law Commission in its draft codes tended to require a policy element. The Commission's 1954 draft code of offences against the peace and security of mankind defined crimes against humanity as: "Inhuman acts such as murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, racial or cultural grounds *by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities**."[175] The Commission decided to include the State instigation or tolerance requirement in order to exclude inhumane acts committed by private persons on their own without any State involvement.[176] At the same time, the definition of crimes against humanity included in the 1954 draft code did not include any requirement of scale ("widespread") or systematicity.

(24) The Commission's 1996 draft code of crimes against the peace and security of mankind also recognized a policy requirement, defining crimes against humanity as "any of the following acts, when committed in a systematic manner or on a large scale and *instigated or directed by a Government or by an organization or group**."[177] The Commission included this requirement to exclude inhumane acts committed by 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."[178] In other words, the policy element sought to exclude "ordinary" crimes of individuals acting on their own initiative and without any connection to a State or organization.

(25) Draft article 3, paragraph 2 (*a*), contains the same policy element as set forth in Rome Statute article 7, paragraph 2 (*a*). The finalized draft text of elements of crimes under the Rome Statute provides that a "policy to commit such attack" requires that "the State or organization actively promote or encourage such an attack against a civilian population"[179] and that "a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack."[180]

(26) This "policy" element has been addressed in several cases at the International Criminal Court.[181] In *Katanga* 2014, a Trial Chamber of the Court stressed that the policy requirement is not synonymous with "systematic", since that would contradict the disjunctive requirement in article 7 of a "widespread" or "systematic" attack.[182] Rather, while "systematic" requires high levels of organization and patterns of conduct or recurrence of violence,[183] to "establish a 'policy', it need be demonstrated only that the State or organization meant to commit an attack against a civilian population. An analysis of the systematic nature of the attack therefore goes beyond the existence of any policy seeking to eliminate, persecute or undermine a community."[184] Further, the "policy" requirement does not require formal designs or pre-established plans, can be implemented by action or inaction, and can be inferred from the circumstances.[185] The Trial Chamber found that the policy need not be formally established or promulgated in advance of the attack and can be deduced from the repetition of acts, from preparatory activities, or from a collective mobilization.[186] Moreover, the policy need not be concrete or precise, and it may evolve over time as circumstances unfold.[187]

(27) Similarly, in its decision confirming the indictment of Laurent Gbagbo, a Pre-Trial Chamber of the International Criminal Court held that "policy" should not be conflated with "systematic".[188] Specifically, the Trial Chamber stated that "evidence of planning, organisation

[172] *Ibid*., para. 653.

[173] *Ibid*., para. 655 (citing *Prosecutor v. Nikolić*, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, Trial Chamber, Case No. IT-94-2-R61, 20 October 1995, para. 26).

[174] See, for example, *Kunarac* case, Judgment, 12 June 2002 (footnote 136 above), para. 98; *Kordić c*ase, Judgment, 26 February 2001 (footnote 106 above), para. 182 (finding that "the existence of a plan or policy should better be regarded as indicative of the systematic character of offences charged as crimes against humanity"); *Kayishema* case (footnote 120 above), para. 124 ("For an act of mass victimisation to be a crime against humanity, it must include a policy element. Either of the requirements of widespread or systematic are enough to exclude acts not committed as part of a broader policy or plan"); and *Akayesu* case (footnote 118 above), para. 580.

[175] *Yearbook ... 1954*, vol. II, document A/2693, para. 54 (art. 2, para. 11).

[176] *Ibid*., commentary.

[177] *Yearbook ... 1996*, vol. II (Part Two), p. 47 (art. 18).

[178] *Ibid*. (para. (5) of the commentary). In explaining its inclusion of the policy requirement, the Commission noted: "It would be extremely difficult for a single individual acting alone to commit the inhumane acts as envisaged in article 18" (*ibid*.).

[179] Report of the Preparatory Commission for the International Criminal Court (PCNICC/2000/1/Add.2) (see footnote 143 above), art. 7, introduction, para. 3.

[180] *Ibid*., footnote 6. Other precedents also emphasize that deliberate failure to act can satisfy the policy element. See *Kupreškić* case (footnote 98 above), paras. 554–555 ("approved," "condoned," "explicit or implicit approval"); *Yearbook ... 1954*, vol. II, document A/2693, p. 150 (1954 draft code, art. 2 (11)) ("toleration"); Final Report of the Commission of Experts Established Pursuant to Security Council resolution 780 (1992) (S/1994/674, annex), para. 85.

[181] See, for example, *Ntaganda* case, Decision on the Prosecutor's Application under Article 58, 13 July 2012 (footnote 126 above), para. 24; *Bemba* case (footnote 123 above), para. 81; and *Katanga* case, Decision on the confirmation of charges, 30 September 2008 (footnote 124 above), para. 396.

[182] *Katanga* case, Judgment, 7 March 2014 (see footnote 124 above), para. 1112; see also *ibid*., para. 1101, and *Gbagbo* case (footnote 142 above), para. 208.

[183] *Katanga* case, Judgment, 7 March 2014 (see footnote 124 above), paras. 1111–1113.

[184] *Ibid*., para. 1113.

[185] *Ibid*., paras. 1108–1109 and 1113.

[186] *Ibid*., para. 1109; see also *Gbagbo* case (footnote 142 above), paras. 211–212 and 215.

[187] *Katanga* case, Judgment, 7 March 2014 (see footnote 124 above), para. 1110.

[188] *Gbagbo* case (see footnote 142 above), paras. 208 and 216.

or direction by a State or organisation may be relevant to prove both the policy and the systematic nature of the attack, although the two concepts should not be conflated as they serve different purposes and imply different thresholds under article 7, paragraphs 1 and 2 (*a*) of the Statute."[189] The policy element requires that the acts be "linked" to a State or organization,[190] and it excludes "spontaneous or isolated acts of violence", but a policy need not be formally adopted[191] and proof of a particular rationale or motive is not required.[192] In the *Bemba* case, a Pre-Trial Chamber of the Court found that the attack was pursuant to an organizational policy based on evidence establishing that troops of the Movement for the Liberation of Congo "carried out attacks following the same pattern."[193]

(28) The second part of draft article 3, paragraph 2 (*a*), refers to either a "State" or "organizational" policy to commit such an attack, as does article 7, paragraph 2 (*a*), of the Rome Statute. In its 2010 *Situation in the Republic of Kenya decision*, a Pre-Trial Chamber of the International Criminal Court suggested that the meaning of "State" in article 7, paragraph 2 (*a*), is "self-explanatory".[194] The Chamber went on to note that a policy adopted by regional or local organs of the State could satisfy the requirement of State policy.[195]

(29) Jurisprudence from the International Criminal Court suggests that "organizational" includes any organization or group with the capacity and resources to plan and carry out a widespread or systematic attack. For example, a Pre-Trial Chamber in *Katanga* stated: "Such a policy may be made either by groups of persons who govern a specific territory or by any organisation with the capability to commit a widespread or systematic attack against a civilian population."[196] A Trial Chamber of the Court in *Katanga* held that the organization must have "sufficient resources, means and capacity to bring about the course of conduct or the operation involving the multiple commission of acts … a set of structures or mechanisms, whatever those may be, that are sufficiently efficient to ensure the coordination necessary to carry out an attack directed against a civilian population."[197]

(30) In its 2010 *Situation in the Republic of Kenya decision*, a majority of the Pre-Trial Chamber of the Court rejected the idea that "only State-like organizations may qualify" as organizations for the purpose of article 7, paragraph 2 (*a*), of the Rome Statute, and further stated that "the formal nature of a group and the level of its organization should not be the defining criterion. Instead … a distinction should be drawn on whether a group has the capability to perform acts which infringe on basic human values".[198] In 2012, a Pre-Trial Chamber of the Court in *Ruto* stated that, when determining whether a particular group qualifies as an "organization" under Rome Statute article 7,

> the Chamber may take into account a number of factors, *inter alia*: (i) whether the group is under a responsible command, or has an established hierarchy; (ii) whether the group possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population; (iii) whether the group exercises control over part of the territory of a State; (iv) whether the group has criminal activities against the civilian population as a primary purpose; (v) whether the group articulates, explicitly or implicitly, an intention to attack a civilian population; (vi) whether the group is part of a larger group, which fulfils some or all of the above-mentioned criteria.[199]

(31) As a consequence of the "policy" potentially emanating from a non-State organization, the definition set forth in paragraphs 1 to 3 of draft article 3 does not require that the offender be a State official or agent. This approach is consistent with the development of crimes against humanity under international law. The Commission, commenting in 1991 on the draft provision on crimes against humanity for what would become the 1996 draft code of crimes against the peace and security of mankind, stated "that the draft article does not confine possible perpetrators of the crimes to public officials or representatives alone" and that it "does not rule out the possibility that private individuals with *de facto* power or organized in criminal gangs or groups might also commit the kind of systematic or mass violations of human rights covered by the article; in that case, their acts would come under the draft Code."[200] As discussed previously, the 1996 draft code added the requirement that, to be crimes against humanity, the inhumane acts must be "instigated or directed by a Government *or by any organization or group**."[201] In its commentary to this requirement, the Commission noted: "The instigation or direction of a Government or any organization or group, which may or may not be affiliated with a Government, gives the act its great dimension and makes it a crime against humanity imputable to private persons or agents of a State."[202]

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[189] *Ibid*., para. 216.

[190] *Ibid*., para. 217.

[191] *Ibid*., para. 215.

[192] *Ibid*., para. 214.

[193] *Bemba* case (see footnote 123 above), para. 115.

[194] *Situation in the Republic of Kenya* (see footnote 123 above), para. 89.

[195] *Ibid*.

[196] *Katanga* case, Decision on the confirmation of charges, 30 September 2008 (see footnote 124 above), para. 396 (citing case law of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, as well as para. (5) of the commentary to draft article 21 of the draft code of crimes against the peace and security of mankind provisionally adopted by the Commission in 1991 (*Yearbook … 1991*, vol. II (Part Two), p. 103)); see also *Bemba* case (footnote 123 above), para. 81.

[197] *Katanga* case, Judgment, 7 March 2014 (see footnote 124 above), para. 1119.

[198] *Situation in the Republic of Kenya* (see footnote 123 above), para. 90. This understanding was similarly adopted by the Trial Chamber in *Katanga*, which stated: "That the attack must further be characterised as widespread or systematic does not, however, mean that the organisation that promotes or encourages it must be structured so as to assume the characteristics of a State" (*Katanga* case, Judgment, 7 March 2014 (footnote 124 above), para. 1120). The Trial Chamber also found that "the 'general practice accepted as law'… adverts to crimes against humanity committed by States and organisations that are not specifically defined as requiring quasi-State characteristics" (*ibid*., para. 1121).

[199] *Ruto* case (see footnote 128 above), para. 185; see also *Situation in the Republic of Kenya* (footnote 123 above), para. 93; and *Situation in the Republic of Côte d'Ivoire*, Corrigendum to "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire", Pre-Trial Chamber III, ICC-02/11, 15 November 2011, paras. 45–46 (www.icc-cpi.int/).

[200] *Yearbook … 1991*, vol. II (Part Two), pp. 103–104 (para. (5) of the commentary to draft article 21 provisionally adopted by the Commission in 1991).

[201] *Yearbook … 1996*, vol. II (Part Two), p. 47 (art. 18).

[202] *Ibid*. (para. (5) of the commentary).

(32) The jurisprudence of the International Tribunal for the Former Yugoslavia accepted the possibility of non-State actors being prosecuted for crimes against humanity. For example, a Trial Chamber of the Tribunal in the *Tadić* case stated that "the law in relation to crimes against humanity has developed to take into account forces which, although not those of the legitimate government, have *de facto* control over, or are able to move freely within, defined territory."[203] That finding was echoed in the *Limaj* case, where the Trial Chamber viewed the defendant members of the Kosovo Liberation Army as prosecutable for crimes against humanity.[204]

(33) In the *Ntaganda* case at the International Criminal Court, charges were confirmed against a defendant associated with two paramilitary groups, the *Union des patriotes congolais and the Forces patriotiques pour la libération du Congo* in the Democratic Republic of the Congo.[205] Similarly, in the *Callixte Mbarushimana* case, the prosecutor pursued charges against a defendant associated with the *Forces démocratiques de libération du Rwanda*, described, according to its statute, as an "armed group seeking to 'reconquérir et défendre la souveraineté nationale' of Rwanda."[206] In the case against Joseph Kony relating to the *Situation in Uganda*, the defendant is allegedly associated with the Lord's Resistance Army, "an armed group carrying out an insurgency against the Government of Uganda and the Ugandan Army"[207] which "is organised in a military-type hierarchy and operates as an army".[208] With respect to the situation in Kenya, a Pre-Trial Chamber confirmed charges of crimes against humanity against defendants due to their association in a "network" of perpetrators "comprised of eminent [Orange Democratic Movement Party] political representatives, representatives of the media, former members of the Kenyan police and army, Kalenjin elders and local leaders."[209] Likewise, charges were confirmed with respect to other defendants associated with " 'coordinated attacks that were perpetrated by the Mungiki and pro-Party of National Unity ("PNU") youth in different parts of Nakuru and Naivasha' " that " '… were targeted at perceived Orange Democratic Movement … supporters using a variety of means of identification such as lists, physical attributes, roadblocks and language'."[210]

"With knowledge of the attack"

(34) The third overall requirement is that the perpetrator must commit the act "with knowledge of the attack". Jurisprudence from the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda have concluded that the perpetrator must have knowledge that there is an attack on the civilian population and, further, that his or her act is a part of that attack.[211] This two-part approach is reflected in the finalized draft text of elements of crimes under the Rome Statute, which for each of the proscribed acts requires as that act's last element: "The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population." Even so,

> the last element should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization. In 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.[212]

(35) In its decision confirming the charges against Laurent Gbagbo, a Pre-Trial Chamber of the International Criminal Court found that "it is only necessary to establish that the person had knowledge of the attack in general terms."[213] Indeed, it need not be proven that the perpetrator knew the specific details of the attack;[214] rather, the perpetrator's knowledge may be inferred from circumstantial evidence.[215] Thus, when finding in the *Bemba* case that the troops of the Movement for the Liberation of Congo acted with knowledge of the attack, a Pre-Trial Chamber of the Court stated that the troops' knowledge could be "inferred from the methods of the attack they followed", which reflected a clear pattern.[216] In the *Katanga* case, a Pre-Trial Chamber of the Court found that

> knowledge of the attack and the perpetrator's awareness that his conduct was part of such attack may be inferred from circumstantial evidence, such as: the accused's position in the military hierarchy; his assuming an important role in the broader criminal campaign; his presence at the scene of the crimes; his references to the superiority of his group over the enemy group; and the general historical and political environment in which the acts occurred.[217]

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[203] *Tadić* case, Opinion and Judgment, 7 May 1997 (see footnote 119 above), para. 654. For further discussion of non-State perpetrators, see *ibid*., para. 655.

[204] *Prosecutor v. Limaj et al*., Judgment, Trial Chamber II, Case No. IT-03-66-T, 30 November 2005, paras. 212–213.

[205] *Ntaganda* case, Decision on the Prosecutor's Application under Article 58, 13 July 2012 (see footnote 126 above), para. 22.

[206] *Prosecutor v. Mbarushimana*, Decision on the confirmation of charges, Pre-Trial Chamber I, ICC-01/04-01/10, 16 December 2011, para. 2 (www.icc-pci.int/).

[207] *Situation in Uganda*, Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005, Pre-Trial Chamber II, ICC-02/04-01/05, 27 September 2005, para. 5 (www.icc-pci.int/).

[208] *Ibid*., para. 7.

[209] *Ruto* case (see footnote 128 above), para. 182.

[210] *Prosecutor v. Muthaura et al*., Decision on the Confirmation of Charges Pursuant to Article 61, para. 7 (*a*) and (*b*) of the Rome Statute, Pre-Trial Chamber II, ICC-01/09-02/11, 23 January 2012, para. 102 (www.icc-cpi.int/).

[211] See, for example, *Kunarac* case, Judgment, 22 February 2001 (footnote 124 above), para. 418; and *Kayishema* case (footnote 120 above), para. 133.

[212] Report of the Preparatory Commission for the International Criminal Court (PCNICC/2000/1/Add.2) (see footnote 143 above), art. 7, introduction, para. 2.

[213] *Gbagbo* case (see footnote 142 above), para. 214.

[214] *Kunarac* case Judgment, 22 February 2001 (see footnote 124 above), para. 434 (finding that the knowledge requirement "does not entail knowledge of the details of the attack").

[215] See *Blaškić* case (footnote 119 above), para. 259 (finding that knowledge of the broader context of the attack may be surmised from a number of facts, including "the nature of the crimes committed and the degree to which they are common knowledge"), and *Tadić* case, Opinion and Judgment, 7 May 1997 (footnote 119 above), para. 657 ("While knowledge is thus required, it is examined on an objective level and factually can be implied from the circumstances"); see also *Kayishema* case (footnote 120 above), para. 134 (finding that "actual or constructive knowledge of the broader context of the attack" is sufficient).

[216] *Bemba* case (see footnote 123 above), para. 126.

[217] *Katanga* case, Decision on the confirmation of charges, 30 September 2008 (see footnote 124 above), para. 402.

(36) Further, the personal motive of the perpetrator for taking part in the attack is irrelevant; the perpetrator does not need to share the purpose or goal of the broader attack.[218] According to the Appeals Chamber of the International Tribunal for the Former Yugoslavia in *Kunarac*, evidence that the perpetrator committed the prohibited acts for personal reasons could at most "be indicative of a rebuttable assumption that he was not aware that his acts were part of that attack."[219] It is the perpetrator's knowledge or intent that his or her act is part of the attack that is relevant to satisfying this requirement. Additionally, this element will be satisfied where it can be proven that the underlying offence was committed by directly taking advantage of the broader attack, or where the commission of the underlying offence had the effect of perpetuating the broader attack.[220] For example, in the *Kunarac* case, the perpetrators were accused of various forms of sexual violence, acts of torture, and enslavement in regards to Muslim women and girls. A Trial Chamber of the Tribunal found that the accused had the requisite knowledge because they not only knew of the attack against the Muslim civilian population, but also perpetuated the attack "by directly taking advantage of the situation created" and "fully embraced the ethnicity-based aggression."[221] Likewise, a Trial Chamber of the International Criminal Court has held that the perpetrator must know that the act is part of the widespread or systematic attack against the civilian population, but the perpetrator's motive is irrelevant for the act to be characterized as a crime against humanity. It is not necessary for the perpetrator to have knowledge of all the characteristics or details of the attack, nor is it required for the perpetrator to subscribe to the "State or the organisation's criminal design."[222]

Prohibited acts

(37) Like article 7 of the Rome Statute, draft article 3, paragraph 1, at subparagraphs (*a*)–(*k*), lists the prohibited acts for crimes against humanity. These prohibited acts also appear as part of the definition of crimes against humanity contained in article 18 of the Commission's 1996 draft code of crimes against the peace and security of mankind, although the language differs slightly. An individual who commits one of these acts can commit a crime against humanity; the individual need not have committed multiple acts, but the individual's act must be "part of" a widespread or systematic attack directed against any civilian population.[223] The offence does not need to be committed in the heat of the attack against the civilian population to satisfy this requirement; the offence can be part of the attack if it can be sufficiently connected to the attack.[224]

Definitions within the definition

(38) As noted above, draft article 3, paragraph (2) (*a*), defines "attack directed against any civilian population" for the purpose of draft article 3, paragraph 1. The remaining subparagraphs (*b*) to (*i*) of draft article 3, paragraph 2, define further terms that appear in paragraph 1, specifically: "extermination"; "enslavement"; "deportation or forcible transfer of population"; "torture"; "forced pregnancy"; "persecution"; "the crime of apartheid"; and "enforced disappearance of persons". Further, draft article 3, paragraph 3, provides a definition for the term "gender". These definitions also appear in article 7 of the Rome Statute and were viewed by the Commission as relevant for retention in draft article 3.

Paragraph 4

(39) Paragraph 4 of draft article 3 provides: "This draft article is without prejudice to any broader definition provided for in any international instrument or national law." This provision is similar to article 1, paragraph 2, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides: "This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application." Rome Statute article 10 (appearing in part II, "Jurisdiction, admissibility, and applicable law") also contains a "without prejudice clause", which reads: "Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute."

(40) Paragraph 4 is meant to ensure that the definition of "crimes against humanity" set forth in draft article 3 does not call into question any broader definitions that may exist in other international instruments or national legislation. "International instrument" is to be understood in the broad sense and not only in the sense of being a binding international agreement. For example, the definition of "enforced disappearance of persons" as contained in draft article 3 follows Rome Statute article 7, but differs from the definitions contained in the 1992 Declaration on the Protection of All Persons from Enforced Disappearance,[225] the Inter-American Convention on the Forced Disappearance of Persons, and the International Convention for the Protection of All Persons from Enforced Disappearance. Those differences principally are that the latter instruments do not include the element "with the intention of removing them from the protection of the law", do not include the words "for a prolonged period of time", and do not refer to organizations as potential perpetrators of the crime when they act without State participation.

[218] See, for example, *Kunarac* case, Judgment, 12 June 2002 (footnote 136 above), para. 103, and *Kupreškić* case (footnote 98 above), para. 558.

[219] *Kunarac* case, Judgment, 12 June 2002 (see footnote 136 above), para. 103.

[220] See, for example, *Kunarac* case, Judgment, 22 February 2001 (footnote 124 above), para. 592.

[221] *Ibid*.

[222] *Katanga* case, Judgment, 7 March 2014 (see footnote 124 above), para. 1125.

[223] See, for example, *Kunarac* case, Judgment, 12 June 2002 (footnote 136 above), para. 100, and *Tadić* case, Opinion and Judgment, 7 May 1997 (footnote 119 above), para. 649.

[224] See, for example, *Prosecutor v. Mrkšić et al*., Judgment, Appeals Chamber, Case No. IT-95-13/1-A, 5 May 2009, para. 41; *Prosecutor v. Naletilić and Martinović*, Judgment, Trial Chamber, Case No. IT-98-34-T, 31 March 2003, para. 234; *Mrkšić* case, Judgment, 27 September 2007 (footnote 120 above), para. 438; and *Tadić* case, Judgment, 15 July 1999 (footnote 106 above), para. 249.

[225] General Assembly resolution 47/133 of 18 December 1992.

(41) In the light of such differences, the Commission thought it prudent to include draft article 3, paragraph 4. In essence, while the first three paragraphs of draft article 3 define crimes against humanity for the purpose of the draft articles, this is without prejudice to broader definitions in international instruments or national laws. Thus, if a State wishes to adopt a broader definition in its national law, the present draft articles do not preclude it from doing so. At the same time, an important objective of the draft articles is the harmonization of national laws, so that they may serve as the basis for robust inter-State cooperation. Any elements adopted in a national law, which would not fall within the scope of the present draft articles, would not benefit from the provisions set forth within them, including on extradition and mutual legal assistance.

Article 4. Obligation of prevention

1. Each State undertakes to prevent crimes against humanity, in conformity with international law, including through:

(*a*) effective legislative, administrative, judicial or other preventive measures in any territory under its jurisdiction or control; and

(*b*) cooperation with other States, relevant intergovernmental organizations, and, as appropriate, other organizations.

2. No exceptional circumstances whatsoever, such as armed conflict, internal political instability or other public emergency, may be invoked as a justification of crimes against humanity.

Commentary

(1) Draft article 4 sets forth an obligation of prevention with respect to crimes against humanity. In considering such an obligation, the Commission viewed it as pertinent to survey existing treaty practice concerning the prevention of crimes and other acts. In many instances, those treaties address acts that, when committed under certain circumstances, can constitute crimes against humanity (for example, genocide, torture, apartheid, or enforced disappearance). As such, the obligation of prevention set forth in those treaties extends as well to prevention of the acts in question when they also qualify as crimes against humanity.

(2) An early significant example of an obligation of prevention may be found in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, which provides in article I: "The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish." Further, article V provides: "The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III." Article VIII provides: "Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III." As such, the Genocide Convention contains within it several elements relating to prevention: a general obligation to prevent genocide; an obligation to enact national measures to give effect to the provisions of the Convention; and a provision on cooperation of States parties with the United Nations for the prevention of genocide.

(3) Such an obligation of prevention is a feature of most multilateral treaties addressing crimes since the 1960s. Examples include: the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation;[226] the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents;[227] the International Convention on the Suppression and Punishment of the Crime of Apartheid;[228] the International Convention against the Taking of Hostages;[229] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;[230] the Inter-American Convention to Prevent and Punish Torture;[231] the Inter-American Convention on the Forced Disappearance of Persons;[232] the Convention on the Safety of United Nations and Associated Personnel;[233] the International Convention for the Suppression of Terrorist Bombings;[234] the United Nations

[226] Article 10, paragraph 1, provides: "Contracting States shall, in accordance with international and national law, endeavour to take all practicable measure for the purpose of preventing the offences mentioned in Article 1."

[227] Article 4 (*a*) provides: "States Parties shall cooperate in the prevention of the crimes set forth in article 2, particularly by: (*a*) taking all practicable measures to prevent preparations in their respective territories for the commission of those crimes within or outside their territories …"

[228] Article IV (*a*) provides: "The States Parties to the present Convention undertake: (*a*) to adopt any legislative or other measures necessary to suppress as well as to prevent any encouragement of the crime of *apartheid* and similar segregationist policies or their manifestations and to punish persons guilty of that crime …"

[229] Article 4 (*a*) provides: "States Parties shall co-operate in the prevention of the offences set forth in article 1, particularly by: (*a*) Taking all practicable measures to prevent preparations in their respective territories for the commission of … offences … including measures to prohibit in their territories illegal activities of persons, groups and organizations that encourage, instigate, organize or engage in the perpetration of acts of taking of hostages …"

[230] Article 2, paragraph 1, provides: "Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."

[231] Article 1 provides: "The State Parties undertake to prevent and punish torture in accordance with the terms of this Convention." Article 6 provides: "The States Parties likewise shall take effective measures to prevent and punish other cruel, inhuman, or degrading treatment or punishment within their jurisdiction."

[232] Article I (*c*) and (*d*) provide: "The States Parties to this Convention undertake: … (*c*) To cooperate with one another in helping to prevent, punish and eliminate the forced disappearance of persons; (*d*) To take legislative, administrative, judicial, and any other measures necessary to comply with the commitments undertaken in this Convention."

[233] Article 11 provides: "States Parties shall cooperate in the prevention of the crimes set out in article 9, particularly by: (*a*) Taking all practicable measures to prevent preparations in their respective territories for the commission of those crimes within or outside their territories; and (*b*) Exchanging information in accordance with their national law and coordinating the taking of administrative and other measures as appropriate to prevent the commission of those crimes."

[234] Article 15 provides: "States Parties shall cooperate in the prevention of the offences set forth in article 2 …"

Convention against Transnational Organized Crime;[235] the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime;[236] the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;[237] and the International Convention for the Protection of All Persons from Enforced Disappearance.[238]

(4) Some multilateral human rights treaties, even though not focused on the prevention and punishment of crimes as such, contain obligations to prevent and suppress human rights violations. Examples include: the International Convention on the Elimination of All Forms of Racial Discrimination;[239] the Convention on the Elimination of All Forms of Discrimination against Women;[240] and the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence.[241] Some treaties do not refer expressly to "prevention" or "elimination" of the act but, rather, focus on an obligation to take appropriate legislative, administrative, and other measures to "give effect" to or to "implement" the treaty, which may be seen as encompassing necessary or appropriate measures to prevent the act. Examples include the International Covenant on Civil and Political Rights[242] and the Convention on the Rights of the Child.[243]

(5) International courts and tribunals have addressed these obligations of prevention. The International Court of Justice, in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),* noted that the duty to punish in the context of that convention is connected to but distinct from the duty to prevent. While "one of the most effective ways of preventing criminal acts, in general, is to provide penalties for persons committing such acts, and to impose those penalties effectively on those who commit the acts one is trying to prevent",[244] the Court found that "the duty to prevent genocide and the duty to punish its perpetrators … are … two distinct yet connected obligations".[245] Indeed, the "obligation on each contracting State to prevent genocide is both normative and compelling. It is not merged in the duty to punish, nor can it be regarded as simply a component of that duty."[246]

(6) Such treaty practice, jurisprudence, and the well-settled acceptance by States that crimes against humanity are crimes under international law that should be punished whether or not committed in time of armed conflict, and whether or not criminalized under national law, imply that States have undertaken an obligation to prevent crimes against humanity. Paragraph 1 of draft article 4, therefore, formulates an obligation of prevention in a manner

[235] Article 9, paragraph 1, provides: "In addition to the measures set forth in article 8 of this Convention, each State Party shall, to the extent appropriate and consistent with its legal system, adopt legislative, administrative or other effective measures to promote integrity and to prevent, detect and punish the corruption of public officials." Article 9, paragraph 2, provides: "Each State Party shall take measures to ensure effective action by its authorities in the prevention, detection and punishment of the corruption of public officials, including providing such authorities with adequate independence to deter the exertion of inappropriate influence on their actions." Article 29, paragraph 1, provides: "Each State Party shall, to the extent necessary, initiate, develop or improve specific training programmes for its law enforcement personnel, including prosecutors, investigating magistrates and customs personnel, and other personnel charged with the prevention, detection and control of the offences covered by this Convention …" Article 31, paragraph 1, provides: "States Parties shall endeavour to develop and evaluate national projects and to establish and promote best practices and policies aimed at the prevention of transnational organized crime."

[236] Article 9, paragraph 1, provides: "States Parties shall establish comprehensive policies, programmes and other measures: (*a*) To prevent and combat trafficking in persons; and (*b*) To protect victims of trafficking in persons, especially women and children, from revictimization."

[237] The preamble provides: "Recalling that the effective prevention of torture and other cruel, inhuman or degrading treatment or punishment requires education and a combination of various legislative, administrative, judicial and other measures …" Article 3 provides: "Each State party shall set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment …"

[238] The preamble provides: "Determined to prevent enforced disappearances and to combat impunity for the crime of enforced disappearance …" Article 23 provides: "1. Each State Party shall ensure that the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody or treatment of any person deprived of liberty includes the necessary education and information regarding the relevant provisions of this Convention, in order to: (*a*) Prevent the involvement of such officials in enforced disappearances; (*b*) Emphasize the importance of prevention and investigations in relation to enforced disappearances; (*c*) Ensure that the urgent need to resolve cases of enforced disappearance is recognized. 2. Each State Party shall ensure that orders or instructions prescribing, authorizing or encouraging enforced disappearance are prohibited. Each State Party shall guarantee that a person who refuses to obey such an order will not be punished. 3. Each State Party shall take the necessary measures to ensure that the persons referred to in paragraph 1 of this article who have reason to believe that an enforced disappearance has occurred or is planned report the matter to their superiors and, where necessary, to the appropriate authorities or bodies vested with powers of review or remedy."

[239] Article 3 provides: "States Parties particularly condemn racial segregation and *apartheid* and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction."

[240] Article 2 provides: "States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women …" Article 3 provides: "States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men."

[241] Article 4, paragraph 2, provides: "Parties condemn all forms of discrimination against women and take, without delay, the necessary legislative and other measures to prevent it, in particular by: embodying in their national constitutions or other appropriate legislation the principle of equality between women and men and ensuring the practical realisation of this principle; prohibiting discrimination against women, including through the use of sanctions, where appropriate; abolishing laws and practices which discriminate against women."

[242] Article 2, paragraph 2, provides: "Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant."

[243] Article 4 provides: "States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention …"

[244] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, *I.C.J. Reports 2007*, p. 43, at p. 219, para. 426.

[245] *Ibid*., para. 425.

[246] *Ibid*., pp. 219–220, para. 427.

similar to that set forth in article I of the Convention on the Prevention and Punishment of the Crime of Genocide, by beginning: "Each State undertakes to prevent crimes against humanity …"

(7) In the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, the International Court of Justice analysed the meaning of "undertake to prevent" as contained in article I of the Convention on the Prevention and Punishment of the Crime of Genocide. At the provisional measures phase, the Court determined that such an undertaking imposes "a clear obligation" on the parties "to do all in their power to prevent the commission of any such acts in the future".[247] At the merits phase, the Court described the ordinary meaning of the word "undertake" in that context as

> to give a formal promise, to bind or engage oneself, to give a pledge or promise, to agree, to accept an obligation. It is a word regularly used in treaties setting out the obligations of the Contracting Parties … It is not merely hortatory or purposive. The undertaking is unqualified …; and it is not to be read merely as an introduction to later express references to legislation, prosecution and extradition. Those features support the conclusion that Article I, in particular its undertaking to prevent, creates obligations distinct from those which appear in the subsequent Articles.[248]

The undertaking to prevent crimes against humanity, as formulated in paragraph 1 of draft article 4, is intended to express the same kind of legally binding effect upon States; it, too, is not merely hortatory or purposive, and is not merely an introduction to later draft articles.

(8) In the same case, the International Court of Justice further noted that, when engaging in measures of prevention, "it is clear that every State may only act within the limits permitted by international law".[249] The Commission deemed it important to express that requirement explicitly in paragraph 1 of draft article 4, and has therefore included a clause indicating that any measures of prevention must be "in conformity with international law". Thus, the measures undertaken by a State to fulfil this obligation must be consistent with the rules of international law, including rules on the use of force set forth in the Charter of the United Nations, international humanitarian law, and human rights law. The State is only expected to take such measures as it legally can take under international law to prevent crimes against humanity.

(9) As set forth in paragraph 1 of draft article 4, this obligation of prevention either expressly or implicitly contains four elements. First, by this undertaking, States have an obligation not "to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law."[250] According to the International Court of Justice, when considering the analogous obligation of prevention contained in article I of the Convention on the Prevention and Punishment of the Crime of Genocide:

> Under Article I the States parties are bound to prevent such an act, which it describes as "a crime under international law", being committed. The Article does not *expressis verbis* require States to refrain from themselves committing genocide. However, in the view of the Court, taking into account the established purpose of the Convention, the effect of Article I is to prohibit States from themselves committing genocide. Such a prohibition follows, first, from the fact that the Article categorizes genocide as "a crime under international law": by agreeing to such a categorization, the States parties must logically be undertaking not to commit the act so described. Secondly, it follows from the expressly stated obligation to prevent the commission of acts of genocide. That obligation requires the States parties, *inter alia*, to employ the means at their disposal, in circumstances to be described more specifically later in this Judgment, to prevent persons or groups not directly under their authority from committing an act of genocide or any of the other acts mentioned in Article III. It would be paradoxical if States were thus under an obligation to prevent, so far as within their power, commission of genocide by persons over whom they have a certain influence, but were not forbidden to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law. In short, the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide.[251]

(10) The Court also decided that the substantive obligation reflected in article I was not, on its face, limited by territory but, rather, applied "to a State wherever it may be acting or may be able to act in ways appropriate to meeting the obligatio[n] in question."[252]

(11) A breach of this obligation not to commit directly such acts implicates the responsibility of the State if the conduct at issue is attributable to the State pursuant to the rules on State responsibility. Indeed, in the context of disputes that may arise under the Convention on the Prevention and Punishment of the Crime of Genocide, article IX refers, *inter alia*, to disputes "relating to the responsibility of a State for genocide". Although much of the focus of the Genocide Convention is upon prosecuting individuals for the crime of genocide, the International Court of Justice stressed that the breach of the obligation to prevent is not a *criminal* violation by the State but, rather, concerns a breach of international law that engages State responsibility.[253] The Court's approach is consistent with views previously expressed by the Commission,[254] including in the commentary to the 2001 articles on responsibility of States for internationally wrongful acts: "Where crimes against international law are committed by State officials, it will often be the case that the State itself is responsible for the acts in question or for failure to prevent or punish them."[255]

(12) Second, by the undertaking set forth in paragraph 1 of draft article 4, States have an obligation "to employ the means at their disposal … to prevent persons or groups not directly under their authority from committing" such

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[247] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Provisional Measures, Order of 8 April 1993, *I.C.J. Reports 1993*, p. 3, at p. 22, para. 45.

[248] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007 (see footnote 244 above), p. 111, para. 162.

[249] *Ibid*., p. 221, para. 430.

[250] *Ibid*., p. 113, para. 166.

[251] *Ibid.*

[252] *Ibid*., p. 120, para. 183.

[253] *Ibid*., p. 114, para. 167 (finding that international responsibility is "quite different in nature from criminal responsibility").

[254] *Yearbook … 1998*, vol. II (Part Two), para. 249 (finding that the Convention on the Prevention and Punishment of the Crime of Genocide "did not envisage State crime or the criminal responsibility of States in its article IX concerning State responsibility").

[255] *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 142 (para. (3) of the commentary to article 58).

acts.[256] For the latter, the State party is expected to use its best efforts (a due diligence standard) when it has a "capacity to influence effectively the action of persons likely to commit, or already committing, genocide", which in turn depends on the State party's geographic, political and other links to the persons or groups at issue.[257] Such a standard with respect to the obligation of prevention in the Convention on the Prevention and Punishment of the Crime of Genocide was analysed by the International Court of Justice as follows:

> [I]t is clear that the obligation in question is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible. A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide. In this area the notion of "due diligence", which calls for an assessment *in concreto*, is of critical importance. Various parameters operate when assessing whether a State has duly discharged the obligation concerned. The first, which varies greatly from one State to another, is clearly the capacity to influence effectively the action of persons likely to commit, or already committing, genocide. This capacity itself depends, among other things, on the geographical distance of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events. The State's capacity to influence must also be assessed by legal criteria, since it is clear that every State may only act within the limits permitted by international law; seen thus, a State's capacity to influence may vary depending on its particular legal position *vis-à-vis* the situations and persons facing the danger, or the reality, of genocide. On the other hand, it is irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide. As well as being generally difficult to prove, this is irrelevant to the breach of the obligation of conduct in question, the more so since the possibility remains that the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result—averting the commission of genocide—which the efforts of only one State were insufficient to produce.[258]

At the same time, the Court maintained that "a State can be held responsible for breaching the obligation to prevent genocide only if genocide was actually committed."[259]

(13) Third, and following from the above, the undertaking set forth in paragraph 1 of draft article 4 obliges States to pursue actively and in advance measures designed to help prevent the offence from occurring, such as by taking "effective legislative, administrative, judicial or other preventive measures in any territory under their jurisdiction or control", as indicated in subparagraph (*a*). This text is inspired by article 2, paragraph 1, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides: "Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."

(14) The term "other preventive measures" rather than just "other measures" is used to reinforce the point that the measures at issue in this clause relate solely to prevention. The term "effective" implies that the State is expected to keep the measures that it has taken under review and, if they are deficient, to improve them through more effective measures. In commenting on the analogous provision in the Convention against Torture, the Committee against Torture has stated:

> States parties are obligated to eliminate any legal or other obstacles that impede the eradication of torture and ill-treatment; and to take positive effective measures to ensure that such conduct and any recurrences thereof are effectively prevented. States parties also have the obligation continually to keep under review and improve their national laws and performance under the Convention in accordance with the Committee's concluding observations and views adopted on individual communications. If the measures adopted by the State party fail to accomplish the purpose of eradicating acts of torture, the Convention requires that they be revised and/or that new, more effective measures be adopted.[260]

(15) As to the specific types of measures that shall be pursued by a State, in 2015 the United Nations Human Rights Council adopted a resolution on the prevention of genocide,[261] which provides some insights into the kinds of measures that are expected in fulfilment of article I of the Convention on the Prevention and Punishment of the Crime of Genocide. Among other things, the resolution reiterated "the responsibility of each individual State to protect its population from genocide, which entails the prevention of such a crime, including incitement to it, through appropriate and necessary means";[262] encouraged "Member States to build their capacity to prevent genocide through the development of individual expertise and the creation of appropriate offices within Governments to strengthen the work on prevention";[263] and encouraged "States to consider the appointment of focal points on the prevention of genocide, who could cooperate and exchange information and best practices among themselves and with the Special Adviser to the Secretary-General on the Prevention of Genocide, relevant United Nations bodies and with regional and subregional mechanisms."[264]

(16) In the regional context, the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) contains no express obligation to "prevent" violations of the Convention, but the European Court of Human Rights has construed article 2, paragraph 1 (on the right to life) to contain such an obligation and to require that appropriate measures of prevention be taken, such as "putting in place an appropriate legal and administrative framework to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and

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[256] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007 (see footnote 244 above), p. 113, para. 166.

[257] *Ibid*., p. 221, para. 430.

[258] *Ibid*.

[259] *Ibid*., p. 221, para. 431; see *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 27 (draft articles on responsibility of States for internationally wrongful acts, draft art. 14, para. 3: "The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs …").

[260] Committee Against Torture, general comment No. 2 (2007), para. 4 (*Official Records of the General Assembly, Sixty-third Session, Supplement No. 44* (A/63/44), annex VI, p. 176).

[261] Human Rights Council resolution 28/34 of 27 March 2015 (A/HRC/28/34).

[262] *Ibid*., para. 2.

[263] *Ibid*., para. 3.

[264] *Ibid*., para. 4.

punishment of breaches of such provisions."[265] At the same time, the Court has recognized that the State party's obligation in this regard is limited.[266] Likewise, although the 1969 American Convention on Human Rights (the Pact of San José) contains no express obligation to "prevent" violations of the Convention, the Inter-American Court of Human Rights, when construing the obligation of the States parties to "ensure" the free and full exercise of the rights recognized by the Convention,[267] has found that this obligation implies a "duty to prevent", which in turn requires the State party to pursue certain steps. The Court has said: "This duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages. It is not possible to make a detailed list of all such measures, since they vary with the law and the conditions of each State Party."[268] Similar reasoning has animated the Court's approach to the interpretation of article 6 of the 1985 Inter-American Convention to Prevent and Punish Torture.[269]

(17) Thus, the specific preventive measures that any given State shall pursue with respect to crimes against humanity will depend on the context and risks at issue for that State with respect to these offences. Such an obligation would usually oblige the State at least to: (*a*) adopt national laws and policies as necessary to establish awareness of the criminality of the act and to promote early detection of any risk of its commission; (*b*) continually keep those laws and policies under review and as necessary improve them; (*c*) pursue initiatives that educate governmental officials as to the State's obligations under the draft articles; (*d*) implement training programmes for police, military, militia, and other relevant personnel as necessary to help prevent the commission of crimes against humanity; and (*e*) once the proscribed act is committed, fulfil in good faith any other obligations to investigate and either prosecute or extradite offenders, since doing so serves, in part, to deter future acts by others.[270] Some measures, such as training programmes, may already exist in the State to help prevent wrongful acts (such as murder, torture or rape) that relate to crimes against humanity. The State is obligated to supplement those measures, as necessary, specifically to prevent crimes against humanity. Here, too, international responsibility of the State arises if the State has failed to use its best efforts to organize the governmental and administrative apparatus, as necessary and appropriate, in order to prevent as far as possible crimes against humanity.

(18) Draft article 4, paragraph 1 (*a*), refers to a State pursuing effective legislative, administrative, judicial or other preventive measures "in any territory under its jurisdiction or control". This formula is to be understood in the same way as prior topics of the Commission addressing prevention in other contexts, such as prevention of environmental harm.[271] Such a formulation covers the territory of a State, but also covers activities carried out in other territory under the State's control. As the Commission has previously explained,

[265] *Makaratzis v. Greece* [GC], Judgment (Merits and Just Satisfaction), 20 December 2004, Application No. 50385/99, ECHR 2004-XI, para. 57; see *Kiliç v. Turkey*, Judgment (Merits and Just Satisfaction), 28 March 2000, Application No. 22492/93, ECHR 2000-III, para. 62 (finding that article 2, paragraph 1, obliged a State Party not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps within its domestic legal system to safeguard the lives of those within its jurisdiction).

[266] *Mahmut Kaya v. Turkey*, Judgment (Merits and Just Satisfaction), 28 March 2000, Application No. 22535/93, ECHR 2000-III, para. 86 ("Bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, the positive obligation [of article 2, paragraph 1] must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities"); see also *Kerimova and Others v. Russia*, Judgment (Merits and Just Satisfaction), 3 May 2011 (final 15 September 2011), Applications Nos. 17170/04, 20792/04, 22448/04, 23360/04, 5681/05, and 5684/05, para. 246; *Osman v. the United Kingdom*, Judgment (Merits and Just Satisfaction), 28 October 1998, Application No. 87/1997/871/1083, *Reports of Judgements and Decisions* 1998-VIII, para. 116.

[267] Article 1, paragraph 1, reads: "The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination …" It is noted that article 1 of the African Charter on Human and Peoples' Rights provides that the States Parties "shall recognize the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them."

[268] *Velásquez Rodríguez v. Honduras*, Judgment (Merits), 29 July 1988, Series C No. 4, para. 175; see also *Gómez-Paquiyauri Brothers v. Peru*, Judgment (Merits, Reparations and Costs), 8 July 2004, Series C No. 110, para. 155; *Juan Humberto Sánchez v. Honduras*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 7 June 2003, Series C No. 99, paras. 137 and 142.

[269] *Tibi v. Ecuador*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 7 September 2004, Series C No. 114, para. 159; see also *Gómez-Paquiyauri Brothers v. Peru* (footnote 268 above), para. 155.

it covers situations in which a State is exercising *de facto* jurisdiction, even though it lacks jurisdiction *de jure*, such as in cases of unlawful intervention, occupation and unlawful annexation. Reference may be made, in this respect, to the advisory opinion by [the International Court of Justice] in the *Namibia* case. In that advisory opinion, the Court, after holding South Africa responsible for having created and maintained a situation which the Court declared illegal and finding South Africa under an obligation to withdraw its administration from

[270] For comparable measures with respect to prevention of specific types of human rights violations, see Committee on the Elimination of Discrimination against Women, general recommendation No. 6 (1988), paras. 1–2 (*Official Records of the General Assembly, Forty-third Session, Supplement No. 38* (A/43/38), p. 110); general recommendation No. 15 (1990) (*ibid*., *Forty-fifth Session, Supplement No. 38* (A/45/38), p. 81); general recommendation No. 19 (1992), para. 9 (*ibid*., *Forty-seventh Session, Supplement No. 38* (A/47/38), p. 2); Committee on the Rights of the Child, general comment No. 5 (2003), para. 9 (*ibid*., *Fifty-ninth Session, Supplement No. 41* (A/59/41), annex XI, p. 116); Human Rights Committee, general comment No. 31 (2004) (*ibid*., *Fifty-ninth Session, Supplement No. 40* (A/59/40), vol. I, annex III, p. 175); Committee on the Rights of the Child, general comment No. 6 (2005), paras. 50–63 (*ibid*., *Sixty-first Session, Supplement No. 41* (A/61/41), annex II, pp. 28–31); Committee on the Elimination of Racial Discrimination, general recommendation XXXI (2005), para. 5 (*ibid*., *Sixtieth Session, Supplement No. 18* (A/60/18), pp. 101–102); see also Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, General Assembly resolution 60/147 of 16 December 2005, annex, para. 3 (*a*) ("The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, *inter alia*, the duty to (*a*) Take appropriate legislative and administrative and other appropriate measures to prevent violations").

[271] *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 150–151 (paras. (7)–(12) of the commentary to draft article 1 of the draft articles on the prevention of transboundary harm from hazardous activities).

Namibia, nevertheless attached certain legal consequences to the *de facto* control of South Africa over Namibia.[272]

(19) Fourth, by the undertaking set forth in paragraph 1 of draft article 4, States have an obligation to pursue certain forms of cooperation, not just with each other but also with organizations, such as the United Nations, the International Committee of the Red Cross, and the International Federation of Red Cross and Red Crescent Societies. The duty of States to cooperate in the prevention of crimes against humanity arises, in the first instance, from Article 1, paragraph 3, of the Charter of the United Nations, which indicates that one of the purposes of the Charter is to "achieve international co-operation in solving international problems of … [a] humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all …" Further, in Articles 55 and 56 of the Charter, all Members of the United Nations pledge "to take joint and separate action in co-operation with the Organization for the achievement of" certain purposes, including "universal respect for, and observance of, human rights and fundamental freedoms for all …" Specifically with respect to preventing crimes against humanity, the General Assembly of the United Nations recognized, in its 1973 Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity, a general responsibility for inter-State cooperation and intra-State action to prevent the commission of war crimes and crimes against humanity. Among other things, the Assembly declared: "States shall co-operate with each other on a bilateral and multilateral basis with a view to halting and preventing war crimes and crimes against humanity, and shall take the domestic and international measures necessary for that purpose."[273]

(20) Consequently, subparagraph (*b*) of draft article 4 indicates that States shall cooperate with each other to prevent crimes against humanity and cooperate with relevant intergovernmental organizations. The term "relevant" is intended to indicate that cooperation with any particular intergovernmental organization will depend, among other things, on the organization's functions, on the relationship of the State to that organization, and on the context in which the need for cooperation arises. Further, subparagraph (*b*) provides that States shall cooperate, as appropriate, with other organizations. These organizations include non-governmental organizations that could play an important role in the prevention of crimes against humanity in specific countries. The term "as appropriate" is used to indicate that the obligation of cooperation, in addition to being contextual in nature, does not extend to these organizations to the same extent as it does to States and relevant intergovernmental organizations.

(21) Draft article 4, paragraph 2, indicates that no exceptional circumstances may be invoked as a justification for the offence. This text is inspired by article 2, paragraph 2, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[274] but has been refined to fit better in the context of crimes against humanity. The expression "state of war or threat of war" has been replaced by the expression "armed conflict", as was done in draft article 2. In addition, the words "such as" are used to stress that the examples given are not meant to be exhaustive.

(22) Comparable language may be found in other treaties addressing serious crimes at the global or regional level. For example, article 1, paragraph 2, of the 2006 International Convention for the Protection of All Persons from Enforced Disappearance contains similar language,[275] as does article 5 of the 1985 Inter-American Convention to Prevent and Punish Torture.[276]

(23) One advantage of this formulation with respect to crimes against humanity is that it is drafted in a manner that can speak to the conduct of either State or non-State actors. At the same time, the paragraph is addressing this issue only in the context of the obligation of prevention and not, for example, in the context of possible defences by an individual in a criminal proceeding or other grounds for excluding criminal responsibility, which will be addressed at a later stage.

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[272] *Ibid*., p. 151, para. (12) (citing *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, *I.C.J. Reports 1971*, p. 16, at p. 54, para. 118); see also *Yearbook … 2006*, vol. II (Part Two), p. 70 (para. (25) of the commentary to draft principle 2 of the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities); *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *I.C.J. Reports 1996*, p. 226, at p. 241–242, para. 29 (referring to the general obligation of States to ensure that activities within their "jurisdiction and control" respect the environment of other States or of areas beyond national control).

[273] General Assembly resolution 3074 (XXVIII) of 3 December 1973, para. 3.

[274] Article 2, paragraph 2, provides: "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."

[275] Article 1, paragraph 2, provides: "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance."

[276] Article 5 provides: "The existence of circumstances such as a state of war, threat of war, state of siege or of emergency, domestic disturbance or strife, suspension of constitutional guarantees, domestic political instability, or other public emergencies or disasters shall not be invoked or admitted as justification for the crime of torture."