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Crimes Against Humanity and the International Criminal Court

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This chapter examines the question of the need for a specialized Convention for Crimes against Humanity from the perspective of the existing protection granted by the International Criminal Court (ICC) Statute. The ICC's role in the prevention and prosecution of crimes against humanity is predicated on its normative framework, especially article 7 of the ICC Statute. A critical analysis of this provision and its comparison with the definition in the *Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity* (*Proposed Convention*) lies at the heart of this chapter. A second, related issue to be dealt with is the ICC's effective capacity to prevent and prosecute crimes against humanity. This issue touches on one of the fundamental cornerstones of the criminal law: its possible effect of deterrence.

I. INTRODUCTION: HISTORICAL BACKGROUND AND RATIONALE OF CAH

The concept of Crimes Against Humanity (CAH) in its modern usage can be traced as far back as the declaration of May 28, 1915 by the governments of France, Great Britain, and Russia, relating to the massacres of the Armenian population in Turkey. In this declaration, the atrocities committed were described as "crimes against humanity for which all members of the Turkish Government will be held responsible together with its agents implicated in the massacres."[1] The novelty in this case was that the crimes were committed by citizens of a State on their own fellow citizens and not those of another State. The Nuremberg Trials were similar in nature, for they dealt with crimes committed by Germans against fellow Germans.[2] However, a historical overview of the development of CAH shows that the Nuremberg Charter was

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1 Egon Schwelb, *Crimes Against Humanity*, 23 BRIT. Y.B. INT'L L. 178, 181 (1946). *See also* John P. Cerone, *The Jurisprudential Contributions of the ICTR to the Legal Definition of Crimes Against Humanity*, 14 NEW ENG. J. INT'L & COMP. L. 191, 191–92 (2008).

2 Roger S. Clark, *Crimes Against Humanity at Nuremberg*, *in* THE NUREMBERG TRIAL AND INTERNATIONAL LAW 193, 195–98 (George Ginsburgs & Vladimir Nikolaevich Kudriavtsev eds., 1990).

not a legislative act that created a new crime, but rather articulated a crime alread embedded in the fabric of customary international law.[3] This is evidenced by at lea three instruments: the Martens Clause of the 1899 and 1907 Hague Conventions referring to the "laws of humanity"; the already mentioned Joint Declaration of Ma 28, 1915, condemning "crimes against humanity and civilization"[5]; and the 191 Report of the Commission on the Responsibility of the Authors of War, supportin individual criminal responsibility for "violations of the laws of humanity."[6] It is not worthy that with respect to historic recognitions of "laws of humanity" and CAH the reach of these principles was potentially quite broad, perhaps as far-reaching a human rights. They dealt with a wide range of conducts, performed by either Sta or non-State actors, and in times of war or peace.[7]

Yet, the definition of CAH has thus far been vague and, in many respects, contr dictory. A more refined definition of CAH, reflecting the historical development was only achieved with the ICC Statute. Article 7 represents both a "codification and a "progressive development" of international law.[8] It unites the distinct legal fe tures that may be thought of as the "common law" of CAH.[9] Yet, to understand th *rationale* of CAH, one must dig deeper and go beyond the mere positivist analysis Statutes and other norms. History teaches us that the State always had an importa role in the organization and actual commission of CAH. This historical fact len a strong argument to a concept of CAH as a State crime in the sense of Richa Vernon's definition: "a moral inversion, or travesty, of the state;"[10] "an abuse of sta

[3] *Cf.* Darryl Robinson, *Defining Crimes Against Humanity at the Rome Conference*, 93 AM. J. INT'L L. 43, 44 (1999).

[4] The Preamble to the Convention with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, and the Preamble to the Convention Respecting the Laws and Customs of War on Land, with annexed Regulations, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539, specify that in cases not included in the Hague Regulations, "the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience."

[5] Schwelb, *supra* note 1; *see also* UN WAR CRIMES COMM'N, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 35 (1948).

[6] The 1919 Report Presented to the Preliminary Peace Conference by the Commission on the Responsibility of the Authors of War and on Enforcement of Penalties for Violations of the Laws and Customs of War, recommended the establishment of a high tribunal to try persons belonging to enemy countries who were guilty of "offences against the laws and customs of war or the laws of humanity," excerpted in M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 553–65 (2d ed. 1999).

[7] *Cf.* JORDAN J. PAUST ET AL., INTERNATIONAL CRIMINAL LAW, CASES AND MATERIALS 703 (2007).

[8] *Cf.* UN Charter art. 13; *cf. also* Roger S. Clark, *Crimes Against Humanity and The Rome Statute of the International Criminal Court*, *in* INTERNATIONAL AND NATIONAL LAW IN RUSSIA AND EASTERN EUROPE 139–56 (Roger Clark et al. eds., 2001).

[9] David Luban, *A Theory of Crimes against Humanity*, 29 YALE J. INT'L L. 85, 93 et seq. (2004), summarizing these legal features as follows: "Crimes against humanity are international crimes committed by politically organized groups acting under color of policy, consisting of the most severe and abominable acts of violence and persecution, and inflicted on victims because of their membership in a population or group rather than their individual characteristics." *Id.* at 108.

[10] Richard Vernon, *What is Crime against Humanity?*, 10 J. POL. PHIL. 231, 233 (2002).

power involving a systematic inversion of the jurisdictional resources of the state;"[11] "a systematic inversion: powers that justify the state are, perversely, instrumentalized by it, territoriality is transformed from a refuge to a trap, and the modalities of punishment are brought to bear upon the guiltless."[12]

The problem with this definition is that it is limited to the classical relation between a State and its citizen residing in its territory, leaving out other extraterritorial State-citizen relations and relations of a State with foreign citizens.[13] In addition, the definition does not account for non-State actors, at least not explicitly. One may replace "State" with "non-State actor" to accommodate the concept to the now-recognized standing of the latter as a potential perpetrator of CAH. Still, this would not be enough because there is clearly a difference between a State's obligation under international law to guarantee the rule of law and protect its citizens and a similar (emerging) duty of a non-State actor over the territory under its control. All in all, it is therefore more convincing to develop a concept of CAH without so much focusing on the entity behind these crimes. This does not deny the eminent political connotation of CAH; indeed it stresses the "distinctive perversion of politics"[14] underlying CAH; it takes up David Luban's idea of CAH as "politics gone horribly wrong,"[15] as "politics gone cancerous,"[16] launching a double assault on individuality (the individual and political "quality of being human," "humanness") and groups ("the set of individuals," "sociability," "humankind"):[17]

> First the phrase 'crimes against humanity' suggest offenses that aggrieve not only the victims and their own communities, but all human beings, regardless of their community. Second, the phrase suggests that these offences cut deep, violating the core humanity that we all share and that distinguishes us from other natural beings.[18]
>
> [T]he humanness that crimes against humanity violates lies in our status as political animals.... crimes against humanity offend against that status in two ways: by perverting politics, and by assaulting the individuality and socialibility of the victims in tandem.[19]
>
> [C]rimes against humanity ... represent an affront to our nature as political animals, our double character as unsociably social individuals who combine self-awareness and self-interest with a natural need for society of others.... Crimes against humanity assault our individuality by attacking us solely because of the groups to which we belong, and they assault our sociability by transforming political communities into death traps.[20]

[11] *Id.* at 242.
[12] *Id.* at 245.
[13] See the convincing critique of Luban, *supra* note 9, at 94 n. 28.
[14] *Id.*
[15] *Id.* at 108.
[16] *Id.* at 116.
[17] *Id.* at 86 et seq. Vernon, although critical of the element of humanness, shares the idea of an attack on humankind in the sense of entity and diversity, *id.* at 238 et seq.
[18] Luban, *supra* note 9, at 86 (footnote omitted).
[19] *Id.* at 120.
[20] *Id.* at 159–60.

CAH, so understood, provide for a penal protection against the transgression of the most basic laws protecting our individuality as political beings and our sociability as members of – again – political communities. The transgressor, that is, the criminal against humanity, becomes an enemy and legitimate target of all humankind,[21] a *hostis humani generis*, which, in principle, anyone ("the people") may bring to justice. Although this consequence gives rise to certain concerns,[22] the underlying concept of CAH is also convincing in that it explains the gist of CAH without invoking a mere positivist analysis, and in that it avoids overinclusiveness by criminalizing only violations of the most fundamental human rights. From a methodological perspective, such an approach is convincing because it makes clear that the quest for a correct and rational construction of the law ("right law") must take precedence over pure policy considerations.

Thus, there seems to be at least some common ground and understanding as to what amounts to a CAH and what the prosecutor has to prove. As such, article 7 serves as a good starting point for discussing a specialized convention on CAH.

II. STRUCTURE AND KEY ELEMENTS OF ARTICLE 7 OF THE ICC STATUTE

A. A *Twofold Structure: Context (Chapeau) and Individual Acts*

Article 7 of the ICC Statute has a similar structure to the respective provisions in the ICTY and ICTR Statutes (articles 5 and 3 respectively); they only differ as to the chapeau. Article 7 consists of a context element (chapeau, *Gesamttat*) and a list of inhumane acts that must be committed within the described context. In other words, the chapeau sets out the conditions under which the commission of the individual acts amounts to a crime against humanity.[23] The chapeau reads as follows: "For the

[21] *Id.* at 139, 160; for the same consequence see Vernon, *supra* note 10, at 234.

[22] The "civil lawyer" is first reminded of the polemical and controversial debate of a criminal law for enemies (*Feindstrafrecht, derecho penal del enemigo, diritto penal del nemico*) taking place in particular in continental Europe and Latin America and directed in particular at terrorist offenders. Such a special criminal law is to be rejected. For a more or less full account, see the two volumes DERECHO PENAL DEL ENEMIGO (Manuel Cancio & Carlos Gómez-Jara Diez eds., 2006); *see also* DIRITTO PENAL DEL NEMICO: UN DIBATTITO INTERNAZIONALE (Massimo Donini & Michele Papa eds., 2007). For my view see Kai Ambos, *Feindstrafrecht*, 124 SCHWEIZERISCHE ZEITSCHRIFT FÜR STRAFRECHT 1 (2006); in Spanish see Kai Ambos, *Derecho penal del enemigo*, *in* I DERECHO PENAL DEL ENIMIGO, *supra*, at 119; updated version in Kai Ambos, EL DERECHO PENAL FRENTE A AMENAZAS EXTREMAS 81–145 (2007); in Italian see Kai Ambos, *Il diritto penale del nemico*, *in* DIRITTO PENAL DEL NEMICO, *supra*, at 29. Secondly, such a CAH concept may give rise, as Luban himself acknowledged, to a dangerous people's (vigilante) justice and jurisdiction, Luban, *supra* note 9, at 140, 160; he proposes to counter potential abuses by delegating the *jus puniendi* to national and international tribunals which satisfy the minimum standards of "natural justice," *i.e.*, guarantee a fair trial, *id.* at 142–43, 145, 160.

[23] *Cf.* Herman von Hebel & Darryl Robinson, *Crimes within the Jurisdiction of the Court*, *in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE – ISSUES, NEGOTIATIONS, RESULTS 91 (Roy S. Lee ed., 1999).

purpose of this Statute, crimes against humanity means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."

Four key requirements follow from this chapeau, namely:

- the disjunctive widespread or systematic test;
- the "civilian population" element as to the object of the attack;
- a special mental requirement;
- the existence of individual acts to be committed within the framework of the attack.

It follows further from this chapeau that a nexus to an armed conflict and a special discriminatory intent is no longer required.

B. The Context Element

The historical development and rationale of the context element have been discussed elsewhere.[24] Summing up this discussion, it may be recalled that the context element has continued to change throughout its history, but some kind of context by means of a *link to an authority or power*, be it a State, organization or group, has always been required; although the reference to "organizational policy" in article 7(2) makes clear that the provision also applies to non-State actors,[25] these actors must be in a position to act like a State, that is, they must possess a similar capacity of organization and force.[26] The context element was thus converted into the "international element"[27] in CAH, which renders certain criminal conduct a matter of international concern.[28] The *rationale* of this "internationalization" of certain crimes was their special gravity, often accompanied by the unwillingness or inability

[24] Kai Ambos & Steffen Wirth, *The Current Law of Crimes against Humanity. An Analysis of UNTAET Regulation 15/2000*, 13 CRIM. L.F. 1, 3 et seq. (2002); KAI AMBOS, INTERNATIONALES STRAFRECHT. STRAFANWENDUNGSRECHT, VÖLKERSTRAFRECHT UND EUROPÄISCHES STRAFRECHT § 7 marginal numbers (mn.) 174 et seq. (2d ed. 2008).

[25] *But see* M. CHERIF BASSIOUNI, THE LEGISLATIVE HISTORY OF THE ICC: INTRODUCTION, ANALYSIS AND INTEGRATED TEXT 151–52 (2005). Convincingly against Bassiouni's view, see William A. Schabas, *Crimes against Humanity: The State Plan or Policy Element*, *in* THE THEORY AND PRACTICE OF INTERNATIONAL CRIMINAL LAW 358 et seq. (Leila Sadat & Michael Scharf eds., 2008). In any case, Bassiouni himself recognizes an "extension to non-state actors by analogy" if they act pursuant to a policy. BASSIOUNI, *supra* note 6, at 245.

[26] *See* Ambos, *supra* note 24, § 7 mn. 188 with further references; in a similar vein, see BASSIOUNI, THE LEGISLATIVE HISTORY OF THE ICC, *supra* note 25, at 245 (non-State actors "partake of the characteristics of state actors in that they exercise some dominion or control over territory and people, and carry out 'policy' which has similar characteristics of those of 'state action or policy'"); *see also* Schabas, *supra* note 25, at 359 ("state-like bodies").

[27] Prosecutor v. Tadić, Case No. IT-94-1-A and IT-94-1-A *bis*, Judgment in Sentencing Appeal, Separate Opinion of Judge Shahabuddeen (Jan. 26, 2000); BASSIOUNI, *supra* note 6, at 243 (cf. the title of Chapter 6: "The International or Jurisdictional Element").

[28] Claus Kress, *Der Jugoslawien-Strafgerichtshof im Grenzbereich zwischen internationalem bewaffneten Konflikt und Bürgerkrieg*, *in* VÖLKERRECHTLICHE VERBRECHEN VOR DEM JUGOSLAWIEN TRIBUNAL, NATIONALEN GERICHTEN UND DEM INTERNATIONALEN STRAFGERICHTSHOF 15, 53–55

of national criminal justice systems to prosecute them. Indeed, as discussed earlier, CAH may be understood as a State crime in the sense of the "systematic inversion" of the powers justifying the State's existence.

1. The Widespread-Systematic Test

Article 7 turns the individual acts listed in the provision into CAH if they fulfill the widespread-systematic test. The very purpose of the test is to ensure that single, isolated, or random acts do not constitute CAH.[29] Whereas the term "widespread" implies, in a more quantitative sense, that an act be carried out on a large scale and involving a high number of victims,[30] "systematic" has a rather qualitative meaning, requiring that the act be carried out as a result of methodical planning.[31] The case law always opted for a disjunctive or alternative reading, that is, it held that the

(Horst Fischer & Sascha Rolf Lüder eds., 1999); Beth van Schaack, *The Definition of Crimes Against Humanity: Resolving the Incoherence*, 37 COLUM. J. TRANSNAT'L L. 787, 819 (1999); Matthew Lippman, *Crimes Against Humanity*, 17 B.C. THIRD WORLD L.J. 171, 173, 183 (1997) (quoting Robert H. Jackson, head of the United States delegation at the London Conference in 1945 where the Nuremberg Charter was negotiated); recently, see Cerone, *supra* note 1, at 195 ("nexus requirement"); in the same vein, see Stefan Kirsch, *Zweierlei Unrecht*, *in* FESTSCHRIFT FÜR RAINER HAMM 283, 285 et seq. (Regina Michalke et al. eds., 2008) considering the context element, however, as a mere jurisdictional element; in English, see Stefan Kirsch, *Two Kinds of Wrong: On the Context Element of Crimes against Humanity*, 22 LEIDEN J. INT'L L. 525 (2009) and for a more detailed discussion, see Stefan Kirsch, DER BEGEHUNGSZUSAMMENHANG DER VERBRECHEN GEGEN DIE MENSCHLICHKEIT 107 et seq. (2009).

[29] *See also* Prosecutor v. Milutinović et al., Case No. IT-05-87-T, Judgment, ¶ 150 (Feb. 26, 2009); Prosecutor v. Katanga & Ngudjolo, Doc. No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges, ¶ 394 (Sept. 30, 2008); conc. Prosecutor v. Al Bashir, No. ICC-02/05-01/09-3, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ¶ 81 (Mar. 4, 2009); thereto Robert Cryer, *The Definition of International Crimes in the Al Bashir Arrest Warrant*, 7 J. INT'L CRIM. L. 283 (2009); Prosecutor v. Bemba Gombo, Doc. No. ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶ 83 (June 15, 2009). *See also* Rodney Dixon, revised by Christopher Hall, *Crimes Against Humanity*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, OBSERVERS NOTES, ARTICLE BY ARTICLE Art. 7 mn. 4 (Otto Triffterer ed., 2d ed. 2008).

[30] The important definitional element is the number of victims, not the number of acts. *Katanga and Ngudjolo Confirmation of Charges*, *supra* note 29, ¶ 395. Thus, a single act may be sufficient if it is "of extraordinary magnitude." This is the (correct) view of the ICTY since the Rule 61 decision in the *Vucovar hospital* case. Prosecutor v. Mrkšić et al., Case No. IT-95-13-R61, Decision on Review of Indictment Pursuant to Rule 61 (Apr. 3, 1996). In a similar vein, see *Bemba Gombo Confirmation of Charges*, *supra* note 29, ¶ 83; for a discussion and further references, see Ambos & Wirth, *supra* note 24, at 20–21; Ambos, *supra* note 24, § 7 mn. 184 n.781; for a good recent discussion, see Chile Eboe-Osuji, *Crimes against Humanity: Directing Attacks against a Civilian Population*, 2 AFR. J. LEGAL STUD. 118, 120 (2008); *see also* Cerone, *supra* note 1, at 197. For another view ("repeated" acts), see the Iraqi High Tribunal in the Al-Dujail Judgment, see Kai Ambos & Said Pirmurat, *Das Todesurteil gegen Saddam Hussein*, 62 JURISTEN ZEITUNG 822, 824 (2007); Bernhard Kuschnik, *The Legal Findings of Crimes against Humanity in the Al-Dujail Judgments of the Iraqi High Tribunal: A Forerunner for the ICC?*, 7 CHINESE J. INT'L L. 459, 472 (2008), both with references.

[31] *See, e.g.*, Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 579 (Sept. 2, 1998) (defining "widespread" "as massive, frequent, large-scale action, carried out collectively with considerable

"attack" could either be widespread or systematic.[32] Yet, article 7 seems to obscure this apparently clear interpretation by defining the context element of paragraph 1 ("attack directed against any civilian population") in its paragraph 2 as "a course of conduct involving the multiple commission of acts ..., pursuant to or in furtherance of a State or organizational policy to commit such attack." This definition replaces "widespread" with "multiple commissions of acts" and "systematic" with "a State or organizational policy;" yet, more importantly, it no longer phrases these two elements in the alternative mode, but interconnects them insofar as the "multiple commission" must be based on a "policy." This means that the policy element is indispensable and its absence cannot be compensated, for example, by a particularly high number of acts and/or victims. In other words, sheer quantity does not convert a number of acts into CAH; otherwise, a serial killer would qualify as a criminal against humanity for the mere fact that he acted on a large scale. Instead, the decisive element is that of a policy: Only its existence turns multiple acts into CAH.[33] This is also confirmed by the concept of CAH as an eminently political crime defended earlier (*supra* Section I).

In fact, the policy element has developed out of the already mentioned requirement for a link to a State or a non-State authority and as such can already be found in the post–World War II case law and the ILC Draft Codes.[34] Although the case law of the ICTY and ICTR has denied several times that this element is required by customary international law,[35] its explicit inclusion in article 7(2) is

seriousness and directed against a multiplicity of victims;" and "systematic" "as thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources"). For a detailed analysis of the case law, see Ambos & Wirth, *supra* note 24, at 18 et seq. The Iraqi High Tribunal also used the terms "large scale" and "methodical" for widespread and systematic, see Kuschnik, *supra* note 30, at 471 with references. *See also Katanga and Ngudjolo Confirmation of Charges*, *supra* note 29, ¶ 397 with references to the relevant case law of the ad hoc Tribunals; conc. *Al Bashir Arrest Warrant*, *supra* note 29, ¶ 81.

[32] For one of the leading and first decisions, see *Akayesu Trial Judgment*, *supra* note 31, ¶ 579; most recently *Bemba Gombo Confirmation of Charges*, *supra* note 29, ¶ 82. For further references, see Kai Ambos, *Selected Issues Regarding the "Core Crimes" in International Criminal Law*, *in* INTERNATIONAL CRIMINAL LAW: QUO VADIS? (Nouvelles Etudes Penales 19) 219, 243 (AIDP ed., 2004); Ambos, *supra* note 24, § 7 mn. 185.

[33] *See also* Darryl Robinson, *The Elements of Crimes Against Humanity*, *in* THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 57, 63 (Roy S. Lee ed., 2001) ("[D]isjunctive test ... coupled with a ... conjunctive test (multiple and policy)."); *id.* at 64 ("[P]olicy element ... unites otherwise unrelated inhumane acts ....").

[34] For the respective references, see Ambos & Wirth, *supra* note 24, at 26.

[35] Prosecutor v. Kunarac et al., Case No. IT-96-23 & IT-96-23/1-A, Judgment, ¶ 98 (June 12, 2002); Prosecutor v. Vasiljević, Case No. IT-98-32-T, Judgment, ¶ 36 (Nov. 29, 2002); Prosecutor v. Limaj et al., Case No. IT-03-66-T, Judgment, ¶ 184 (Nov. 30, 2005); Prosecutor v. Krajisnik, Case No. IT-00-39-T, Judgment, ¶ 706 (Sept. 27, 2006); Prosecutor v. Muvunyi, Case No. ICTR-2000-55A-T, Judgment, ¶ 512 (Sept. 12, 2006) with further references in fn. 716. See on this case law the mostly critical literature GUÉNAËL METTRAUX, INTERNATIONAL CRIMES AND THE AD HOC TRIBUNALS 172 n.93 (2005); *see also* BASSIOUNI, *supra* note 6, at 243 et seq.; MACHTELD BOOT, GENOCIDE, CRIMES AGAINST HUMANITY, WAR CRIMES: NULLUM CRIMEN SINE LEGE AND THE SUBJECT MATTER JURISDICTION OF THE ICC, ¶ 458 et seq. (2002); Ambos & Wirth, *supra* note 24, at

sound. This element makes clear that some kind of link with a State or a de facto power and thus organization and planning, by means of a policy,[36] is necessary to categorize otherwise ordinary crimes as CAH. It thus offers an important guideline to delimitate ordinary crimes from CAH. Another question is what kind of policy is exactly required. The old debate between active conduct and mere inaction or toleration of atrocities, reflected in the contradictory wording of the Elements of Crimes and a corresponding footnote,[37] discussed elsewhere,[38] must be decided in favor of a broad interpretation of the policy concept.[39] Given its contested status in customary international law and the general meaning of "policy" inaction, toleration or acquiescence in the face of CAH must be considered sufficient. There is, however, a difference between a systematic and a widespread attack. Whereas in the former, a certain guidance of the individual perpetrators with regard to the prospective victims may be typical, a widespread attack that is not at the same time systematic will very often be accompanied by a policy only consisting of deliberate inaction, toleration, or acquiescence.

2. The Civilian Population as Object of the Attack

I have argued elsewhere that this element should be deleted from article 7 because it cannot be reconciled with an essentially humanitarian concept of CAH as defended in this work (*supra* Section I), namely to protect humanness and humankind and

28 et seq.; STEPHAN MESEKE, DER TATBESTAND DER VERBRECHEN GEGEN DIE MENSCHLICHKEIT NACH DEM RÖMISCHEN STATUT DES ISTGH 139 (2004); GERHARD WERLE, VÖLKERSTRAFRECHT mn. 768 (2d ed. 2007); ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 196–97 (2007); Cerone, *supra* note 1, at 198; Schabas, *supra* note 26, at 349 et seq. (demonstrating convincingly that a State plan or policy was always required). The European Parliament recently issued a resolution to recognize all sexual offenses as CAH, independent of a systematic context. EUR. PARL. DOC. RC-B6–0022/2008 (2008), *available at* http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+MOTION+P6-RC-2008–0022+0+DOC+PDF+V0//EN.

[36] *See Katanga & Ngudjolo Confirmation of Charges*, *supra* note 29, ¶ 396.

[37] The third paragraph of the Introduction to the Elements of Crimes concerning art. 7 reads: "It is understood that 'policy to commit such attack' requires that the State or organisation actively promote or encourage such an attack against a civilian population." Preparatory Comm'n of the Int'l Criminal Court, Draft Report of the Preparatory Commission for the International Criminal Court: Finalized Draft Text of the Elements of Crimes, 9, PCNICC/2000/INF/3/Add.2 (Sept. 9, 2002) [hereinafter Introduction to the Elements of Article 7]. However, footnote 6 attached to this sentence provides: "A policy which has a civilian population as the object of the attack would be implemented by State or organisational action. Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack. The existence of such a policy cannot be inferred solely from the absence of governmental or organisational action." *Id.* at 9 n.6 (emphasis added). On the difficult negotiations, see Robinson, *supra* note 33, at 75 et seq.

[38] *Cf.* Ambos & Wirth, *supra* note 24, at 28 et seq., 34; Ambos, *supra* note 32, at 244–45; Ambos, *supra* note 24, § 7 mn. 187.

[39] For apparently the same view, see Robinson, *supra* note 33, at 79 (referring to the Report of the Commission of Experts for the former Yugoslavia requiring "deliberate inaction to encourage the crimes").

thereby the fundamental human rights of *all* persons against widespread and systematic violations.[40] The ICTY recognized this problem previously in *Kupreškić et al.* when it stated:

> One fails to see why only civilians and not also combatants should be protected by these rules (in particular by the rule prohibiting persecution), given that these rules may be held to possess a broader humanitarian scope and purpose than those prohibiting war crimes.[41]

Nevertheless, the ICTY even held in some instances that the civilian population must be the "primary" rather than an incidental target of the attack, that is, it apparently further restricted CAH by overstating the civilian population ("directed at") element.[42] Yet, even a conservative reading of CAH does not require more than an intentional targeting of the civilian population.[43]

Be that as it may, the fact that the drafters of the ICC Statute maintained this requirement shows that they still do not recognize CAH as a crimes concept in its own right, but rather as an extension of war crimes into peace times only. Yet, apart from the inconsistency of such a conservative definition of CAH with its rationale, on a more technical level, a definition of "civilian" according to International Humanitarian Law (IHL) meets insurmountable difficulties if applied to peace time. Whereas the term can formally be defined with regard to an (international) armed conflict in a negative sense as referring to those persons who are *not* members of military organizations or groups as defined in article 4(a) of the Third Geneva Convention (article 50 of Additional Protocol I), in peace time, a recourse to this definition is not possible because IHL is not applicable during peace time. In fact, in peace time, all persons are civilians (i.e., non-combatants), and it is exactly during this time when CAH should fulfill the function of filling the gap left by armed-conflict crimes. The protection must therefore be extended to all persons, including soldiers.[44]

While the ad hoc tribunals in *Kupreškić et al.*, as shown earlier, have already recognized the dilemma generated by the civilian population requirement, they are, as the ICC, bound by the wording of their Statutes and thus cannot get around the problem. One may stress the term "population" arguing that the requirement focuses rather on the collective nature of the attack (against "a population") than on

[40] Ambos, *supra* note 32, at 245 et seq., 247; Ambos, *supra* note 24, § 7 mn. 189 et seq.; for a broad interpretation, see Ambos & Wirth, *supra* note 24, at 22 et seq.

[41] Prosecutor v. Kupreškić, Case No, IT-95-16-T, Judgment, ¶ 547 (Jan. 24, 2000).

[42] *Kunarac Appeals Judgment*, *supra* note 35, ¶ 91; Prosecutor v. Blaškić, Case No. IT-95-14-A, Judgment, ¶ 106 (July 29, 2004); Prosecutor v. Kordić & Čerkez, Case No. IT-95-14/2-A, Judgment, ¶ 96 (Dec. 17, 2004); Prosecutor v. M. Lukić & S. Lukić, Case No. IT-98-32/1-T, Judgment, ¶ 874 (July 20, 2009). This view has been adopted by the SCSL. Prosecutor v. Fofana & Kondewa, Case No. SCSL-04-14-T, Judgment, ¶ 114 (Aug. 2, 2007); Prosecutor v. Fofana & Kondewa, Case No. SCSL-04-14-A, Judgment, ¶ 299 (May 28, 2008).

[43] For a good discussion, see Eboe-Osuji, *supra* note 30, at 120 et seq.

[44] For the same result, see ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 122–23 (2d ed. 2008); ROBERT KOLB, DROIT INTERNATIONAL PENAL 97 (Helbing Lichtenhahn 2008); RICCARDO

the (civilian or military) individuals affected,[45] and thus confirms that there must be a multiplicity of victims (going against a strictly alternative reading of the "widespread or systematic" requirement),[46] but this does not make the term "civilian" disappear. Similarly, one may opt for a broad interpretation of "civilian," but this interpretation must not, in light of the principle of legality (article 22 (2)), be stretched beyond the reasonable meaning of the term.[47] Thus, the only clear solution is a legislative one, that is, to delete the civilian population requirement entirely.

3. The Knowledge Requirement

The chapeau of article 7 requires explicitly that the accused be aware of the attack of which his individual act forms part. This implies a twofold test: On the one hand, the perpetrator must know of the existence of the attack; on the other hand, he must know that his individual act forms part of this attack.[48] The knowledge requirement constitutes an additional mental element to be distinguished from the general *mens rea* requirement of article 30.[49] This follows both from the fact that "knowledge" is explicitly mentioned in article 7 and from the Elements of Crimes, where knowledge is also required separately in the Elements for each of the enumerated individual acts of CAH. If one were to understand the knowledge requirement as part of the general mental element, paragraph 3 of article 30 would have to be interpreted in the sense of a risk-based approach (see below).[50] This is another good reason to interpret the knowledge requirement as an additional mental element. In structural terms, the knowledge requirement connects the individual acts with the overall attack by means of the perpetrator's mind. It thus ensures that single, isolated acts that are only carried out on the occasion of an overall attack, "using the opportunity," do not qualify as CAH and therefore cannot be prosecuted under article 7.

The case law holds that the accused must be aware that his act forms part of the collective attack.[51] There is, however, certain controversy as to the specific *contents*

Borsari, Diritto Punitivo Sovranazionale come Sistema 73 (CEDAM 2007); *see also* Meseke, *supra* note 35, at 156.

45 In a similar vein, see Luban, *supra* note 9, at 104, who however does not renounce the civilian requirement.

46 Ambos & Wirth, *supra* note 24, at 21; against this view, see Luban, *supra* note 9, at 108 n.84, arguing for a broad interpretation of the population requirement in the sense of "any" population, *id.* at 105 et seq.

47 For the ICTY's broad interpretation, see Prosecutor v. Galić, Case No. IT-98-29-A, Judgment, ¶ 144 (Nov. 30, 2006); *Milutinović et al. Trial Judgment*, *supra* note 29, ¶ 147, both with further references. *But see* Alexander Zahar & Göran Sluiter, International Criminal Law 205 et seq. (2007).

48 Ambos, *supra* note 32, at 249. Against a mental requirement, see Kirsch, *supra* note 28, at 286.

49 Ambos & Wirth, *supra* note 24, at 39–40.

50 This is possible, Ambos, *supra* note 32, at 250; Ambos, *supra* note 24, § 7 mn. 197, but it will certainly generate controversy.

51 Prosecutor v. Kordić and Čerkez, Case No. IT-95-14/ 2-T, Judgment, ¶187 (Feb. 26, 2001); Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶ 248, 255 (July 15, 1999); *Kupreškić Trial*

of this knowledge and its *object of reference*.[52] As to the latter, the risk-orientated or risk-based approach proposed by the *Blaškić* Trial Chamber is convincing. According to this approach, knowledge also includes the conduct "of a person taking a deliberate risk in the hope that the risk does not cause injury."[53] This was confirmed by the *Kunarac* Appeals Chamber upholding the Trial Chamber's view that the perpetrator must, at least, have known "the risk that his acts were part of the attack."[54] This approach extends knowledge from "full" or "positive" knowledge well into the field of recklessness, and thus clarifies the obscure concept of "constructive knowledge" introduced by other Chambers.[55] Thus, a perpetrator has knowledge of the attack if he is aware of the risk that his conduct is objectively part of such a broader attack. As to the knowledge of the contents of the attack, it is sufficient that the perpetrator is aware of the existence of the attack in general without possessing detailed knowledge of its particularities and circumstances.[56] In other words, the perpetrator must (only) know the facts related to the attack that increase the dangerousness of his conduct for the victims or render this conduct a contribution to the crimes of others.[57] This standard corresponds to the risk-based approach.

The risk-based approach also shows its superiority in cases where the perpetrator carries out one of the underlying acts at a moment when the *attack* is only *imminent* or just *begins*. In such a situation, positive knowledge of an overall attack cannot exist because the attack does not exist in the first place. The Elements of Crimes

Judgment, *supra* note 41, ¶ 556; Prosecutor v. Vasiljević, Case No. IT-98-32-A, Judgment, ¶ 30 (Feb. 25, 2004); *Limaj et al. Trial Judgment*, *supra* note 35, ¶ 190; *Krajišnik Trial Judgment*, *supra* note 35, ¶ 706; Prosecutor v. Bisengimana, Case No. ICTR-00-60-T, Judgment, ¶ 57 (Apr. 13, 2006); *Bemba Gombo Confirmation of Charges*, *supra* note 29, ¶ 87.

[52] *See* Ambos & Wirth, *supra* note 24, at 37 et seq.

[53] Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgment, ¶ 254 (Mar. 3, 2000), referring to FRÉDÉRIC DESPORTES & FRANCIS LE GUNEHEC, LE NOUVEAU DROIT PÉNAL 445 (14th ed. 2007) ("[D]e la personne qui prend un risque de façon délibérée, tout en espérant que ce risque ne provoque aucun dommage.").

[54] *Kunarac Appeals Judgment*, *supra* note 35, ¶ 102 (quoting from the Trial Judgment, *infra* note 64, ¶ 434); conc. *Vasiljević Appeals Judgment*, *supra* note 51, ¶ 37; Prosecutor v. Martić, Case No. IT-95-11-T, Judgment, ¶ 49 (June 12, 2007); Prosecutor v. Mrkšić, Case No. IT-95-13/1-T, Judgment, ¶ 439 (Sept. 27, 2007); *see also M. Lukić and S. Lukić Trial Judgment*, *supra* note 42, ¶ 877.

[55] Prosecutor v. Tadić, Case No. IT-94-1-T, Judgment, ¶ 656–59 (May 7, 1997); *Tadić Appeals Judgment*, *supra* note 51, ¶ 248 (does not mention constructive knowledge); Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-T, Judgment, ¶¶ 133–34 (May 21, 1999); Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgment, ¶ 71 (Dec. 6, 1999); *Kupreškić Trial Judgment*, *supra* note 41, ¶¶ 556–57; Prosecutor v. Musema, Case No. ICTR-96-13, Judgment, ¶ 206 (Jan. 27, 2000); Prosecutor v. Ruggiu, Case No. ICTR-97-32-I, Judgment, ¶ 20 (June 1, 2000); *Kordić Trial Judgment*, *supra* note 51, ¶ 185. For a critical discussion of this concept, see Ambos & Wirth, *supra* note 24, at 38–39; Ambos, *supra* note 32, at 250; Ambos, *supra* note 24, § 7 mn. 198.

[56] *See, e.g.*, *Kunarac Appeals Judgment*, *supra* note 35, ¶ 102; Prosecutor v. Simba, Case No. ICTR-01-76-T, Judgment, ¶ 421 (Dec. 13, 2005); *Katanga and Ngudjolo Confirmation of Charges*, *supra* note 29, ¶ 401; *Arrest Warrant Al Bashir*, *supra* note 29, ¶ 87. See also Introduction to the Elements of Crime, *supra* note 37, ¶ 2 (Ambos & Wirth, *supra* note 37) on CAH: "should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack ... ;" on the negotiations, see Robinson, *supra* note 33, at 72.

[57] Ambos & Wirth, *supra* note 24, at 41.

provide that in such a situation, it is sufficient that the perpetrator intends "to further such an attack"[58] or intends "the conduct to be part of a[n] attack." The drafters obviously intended that in such situations, the requirement for knowledge should be replaced by the perpetrator's desire to bring about the relevant facts. Yet, although it is true that future events (*in casu* the development of an incipient into a full-fledged attack) cannot be known but only hoped for or desired, one can be aware of the risk that a certain conduct will lead to a certain result.[59] In other words, a participant in an incipient attack cannot know for certain that the attack will develop into a full-fledged attack, but he can certainly be aware of a risk to that effect.[60]

4. The Individual Acts and the Context Element

The list of individual crimes forming part of a crime against humanity has gradually increased. Whereas the ICTY Statute included acts such as deportation, imprisonment, torture and rape, the International Law Commission went a step further and included discrimination based on racial, ethnic or religious grounds, forcible transfer, forced disappearance, enforced prostitution, and other forms of sexual violence.[61] Article 7 of the ICC Statute further extends the list, including sexual crimes such as forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity. A detailed analysis of these acts and their general mental element (article 30) has been done elsewhere.[62] Here it suffices to say that article 7 represents clear progress compared to the codifications so far, if only for the fact that it provides for more or less precise definitions in its paragraph 2.

As to the relationship between the individual acts and the context element, one has to start from the wording of article 7. Paragraph 1 provides that the enumerated criminal acts must be "committed *as part of* a widespread or systematic attack" (emphasis added). From this follows, first, the material or objective requirement that "the crimes must be committed in the context of widespread or systematic crimes ...."[63] Yet, the underlying acts need not constitute the attack itself;[64] they

[58] Elements of Crimes, *supra* note 37, Introduction to the Elements of article 7, ¶ 2; *see also* Robinson, *supra* note 33, at 73.

[59] WOLFGANG FRISCH, VORSATZ UND RISIKO 341 et seq. (1983): "Notwendig ist das Wissen um das der Handlung eignende und (normative) ihre Tatbestandsmäßigkeit begründende Risiko ...". *Id.* at 341.

[60] For the same result, see Ambos & Wirth, *supra* note 24, at 40.

[61] *Draft Code of Crimes against Peace and Security of Mankind*, Report of the International Law Commission on Its Forty-Eighth Session, art. 18, U.N. GAOR, 51st Sess., Supp. No. 10, at 9, U.N. Doc. A/51/10 (1996).

[62] Ambos & Wirth, *supra* note 24, at 43 et seq., 46 et seq.; Ambos, *supra* note 32, at 251 et seq.; Ambos, *supra* note 24, § 7 mn. 199 et seq.

[63] *Tadić Appeals Judgment*, *supra* note 51, ¶ 248, 255; *Kordić Trial Judgment*, *supra* note 51, ¶ 187; *Kupreskic Trial Judgment*, *supra* note 41, ¶ 556; *Decision on the Confirmation of the Charges against Bemba Gombo*, *supra* note 29, ¶ 84; *see also* Dixon (revised by Hall), *supra* note 29, art. 7 mn. 10; Mettraux, *supra* note 35, at 161–62; Ambos & Wirth, *supra* note 24, at 35–36.

[64] Prosecutor v. Kunarac, Case No. IT-96-23-T and IT-96-23/1-T, Judgment, ¶ 417 (Feb. 22, 2001); *Kunarac Appeals Judgment*, *supra* note 35, ¶ 85; *Tadić Appeals Judgment*, *supra* note 51, ¶ 248;

must only "form part of such an attack"[65] or take place "in the context of" such an attack.[66] Relevant criteria for determining if the required nexus exists are the characteristics, the aims, the nature, or the consequences of the act.[67] Second, as a consequence of the (subjective) knowledge element just discussed, "the accused must have *known* that his acts, 'fitted into such a pattern.'"[68] If one follows the convincing risk-based approach, it is sufficient that the perpetrator is aware of the risk of acting in the context of an attack. Further, as the "attack" always entails a policy element, as already shown above, the perpetrator must also be aware, at least of the risk, of acting pursuant to such a policy but not knowing the details of this policy.[69]

A more precise definition of the link required between the individual acts and the context may be derived from the *rationale* of CAH. If it consists, as already argued earlier, of the protection against the particular dangers of the multiple or repeated commission of crimes, actively supported or at least tolerated by a (de facto) authority, this very policy of support or toleration – that is, the context of an overall attack – increases the destructive effect of the individual act and the risk or danger for the victim. Compare, for example, the case of an ordinary killing in the course of a robbery and a killing of a political opponent. In the former case, there is no official support or toleration for the killing. In the latter case, this very support or toleration increases the risk for the potential victim, shields the perpetrators from prosecution, and may transform the otherwise ordinary killing into a CAH. Thus, an adequate test to determine whether a certain act was part of the attack, and therefore amounts to a CAH, is to ask whether the act would have produced a less destructive and dangerous effect for the victim if it had not taken place within the framework of an attack and pursuant to a policy.[70]

5. Renunciation of Armed Conflict Nexus and Discriminatory Motive

Although article 7 maintains the element of a civilian population, and thus stops short of a (complete) emancipation from IHL, at least it renounces the requirement of a

Kayishema Trial Judgment, *supra* note 55, ¶ 135; Prosecutor v. Bagilishema, Case No. ICTR-95-1A-T, Judgment, ¶ 82. (June 7, 2001).

65 *Kunarac Trial Judgment*, *supra* note 64, ¶ 417; *see also Kayishema Trial Judgment*, *supra* note 55, ¶ 135.

66 *Kunarac Trial Judgment*, *supra* note 64, ¶ 419.

67 *Decision on the Confirmation of the Charges against Bemba Gombo*, *supra* note 29, ¶ 86.

68 *Tadić Appeals Judgment*, *supra* note 51, ¶¶ 248, 255; *Kordić Trial Judgment*, *supra* note 51, ¶ 187; *Kupreskic Trial Judgment*, *supra* note 41, ¶ 556. On this mental element, see also Cerone, *supra* note 1, at 200 (without, however, clearly distinguishing between the general mental element and the special knowledge requirement).

69 *See also* Introduction to the Elements, *supra* note 37, ¶ 2, on CAH: "should not be interpreted as requiring proof that the perpetrator had knowledge of ... the precise details of the plan or policy of the State or organization." On the negotiations, see Robinson, *supra* note 33, at 73. *See also* Ambos & Wirth, *supra* note 24, at 42.

70 *See* Ambos & Wirth, *supra* note 24, at 36; *see also* Pablo Parenti, *Los Crímenes Contra la Humanidad y el Genocidio en el Derecho Internacional*, *in* LOS CRÍMENES CONTRA LA HUMANIDAD Y EL GENOCIDIO EN EL DERECHO INTERNACIONAL: ORIGEN Y EVOLUCIÓN DE LAS FIGURAS, ELEMENTOS TÍPICOS, JURISPRUDENCIA INTERNACIONAL 59–60 (Pablo Parenti et al. eds., 2007). *See contra* Mettraux, *supra* note 35, at 251, 252.

nexus with an armed conflict. This requirement dates back to the Nuremberg precedent and gave CAH – apart from protecting the drafters from their own prosecution[71] – the legitimacy they could otherwise not have had at that time.[72] In current ICL, this requirement is, however, out of place, as correctly held by the *Tadić* Appeals Chamber, despite its inclusion in article 5 of the ICTY Statute in the early days of the ICTY.[73]

Article 7 of the ICC Statute, contrary to article 3 of the ICTR Statute, no longer requires a special discriminatory intent or motive, namely that the act must have been committed on national, political, ethnic, racial, or religious grounds. Apart from the confusion between intent and motive,[74] it is, since the *Tadić Appeals Judgment*, clear that such a discriminatory intent is only required for persecution as a CAH.[75] This is confirmed by the wording of article 7(1)(h) of the ICC Statute referring to certain (albeit in fact unlimited)[76] grounds as the basis for the conduct.[77]

III. THE ICC, ARTICLE 7 OF THE ICC STATUTE, AND A SPECIAL CONVENTION

A. *The Proposed Article 3 Compared to Article 7 of the ICC Statute*

Whereas article 2 in the original draft of the proposed CAH convention substantially deviated from the CAH definition of article 7 of the ICC Statute,[78] article

[71] *See* Schabas, *supra* note 26, at 349 (referring to Robert Jackson's statement at the London conference).

[72] For the history and rationale of this requirement, see Ambos & Wirth, *supra* note 24, at 3 et seq.

[73] Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 140 (Oct. 2, 1995) [hereinafter *Tadić Jurisdiction Decision*]. "[T]here is no logical or legal basis for [a war nexus] and it has been abandoned in subsequent State practice with respect to crimes against humanity." *Id.* at ¶ 141. "[A] settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed ... customary international law may not require a connection between crimes against humanity and any conflict at all ...." *Id.*

[74] Intent and motive must be distinguished. The principle of culpability requires that the perpetrator acts with a certain state of mind, normally with intent; his possible motives (the reason for his action) are irrelevant in this respect. The distinction has, in the meantime, also been recognized by the Appeals Chamber of the ICTY and ICTR. *See Tadić Appeals Judgment*, *supra* note 51, ¶¶ 270, 272; Prosecutor v. Jelisić, Case No. IT-95-10-A, Judgment, ¶ 49 (July 5, 2001); Prosecutor v. Niyitegeka, Case No. ICTR-96-14-A, Judgment, ¶ 52 (July 9, 2004); Prosecutor v. Kvočka et al., Case No. IT-98-30/1-A, Judgment, ¶ 106 (Feb. 26, 2005); Prosecutor v. Limaj et al., Case No. IT-03-66-A, Judgment, ¶ 109 (Sept. 17, 2007); *see also* Mettraux, *supra* note 35, at 211; Zahar & Sluiter, *supra* note 47, at 180; José Manuel Gómez-Benítez, *El Exterminio de Grupos Políticos en el Derecho Penal Internacional etc.*, 4 Revista de Derecho y Proceso Penal 147, 151 (2000); Ambos & Wirth, *supra* note 24, at 45.

[75] *Tadić Appeals Judgment*, *supra* note 51, ¶ 284, 288 et seq. For a discussion, see Ambos & Wirth, *supra* note 24, at 44.

[76] This is not a closed list, because the grounds must only be "universally recognized as impermissible under international law." This broad formulation causes Luban, *supra* note 9, at 107, to argue that the discriminatory intent requirement has been brought "into parity with the population requirement" (which he also interprets broadly, *supra* note 46).

[77] *Cf.* Ambos, *supra* note 32, at 259.

[78] The original draft article 2, compared with the chapeau of article 7 of the ICC Statute, added the term "intentionally" between "committed" and "as part ..." and finished the chapeau (after

3 of the September 2009 draft of the proposed convention essentially tracks the "official" definition.[79] Thus, on the one hand, my earlier criticism of the definition of CAH remains valid as it is directed against the wording of article 7 of the ICC Statute; on the other hand, however, it is striking that the drafters of the *Proposed Convention*, with their all-too-conservative approach, gave up certain clarifications they had achieved with the prior definition:

a) As to the *civilian population requirement* retained by the *Proposed Convention*, it is, because of the rationale of CAH as explained earlier (*supra* Section I), more convincing to delete this requirement. To retain it is particularly confusing in light of the purpose of the *Proposed Convention*, namely to complement the ICC regime. Why do the drafters want to retain a serious restriction of the traditional offense definition instead of using the opportunity to enlarge CAH by abolishing this controversial restriction?

b) It is to be welcomed that the drafters have now deleted their original reference to "a conflict of an international or non-international character ...."[80] For with this reference the drafters ran the risk of reintroducing the *(armed) conflict requirement*. Admittedly, the respective part was open to at least two, albeit contradictory, interpretations. A conservative reading would be that the part "conflict of ..." refers to the State and non-State actors mentioned and thus reintroduces the traditional war requirement. A modern interpretation, in line with the renunciation of this requirement, would limit the conflict reference to non-State actors, that is, it would serve to accord these actors a certain weight. This interpretation was confirmed by paragraph 2(a) of the older draft article 2 where it was made clear that CAH may be committed "in times of war or peace." In any case, it is a wise decision and avoids confusion that now any reference to an (armed) conflict in paragraph (1) of article 3 has been deleted.

c) It is equally to be welcomed that the new article 3 deletes the terms "intentionally" or "knowingly" in the chapeau.[81] Apparently, the purpose of this reference was to define the *general mens rea requirement* of the underlying acts. Yet, it was superfluous, since the general mental element was provided for in article 3–1 last clause and in article 4–2 ("knowingly or intentionally") of the original draft (no longer contained in the September draft

"civilian population") with the following text: "or knowingly by agents of a state or state organization, or by members of a non-state actor group engaging in a conflict of an international or non-international character...".

[79] Editor's Note: The final text of the *Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity*, in this volume, App. I, is virtually identical to the September Draft referred to by the author with respect to the text of article 3 (definition of the crime).

[80] *See supra* note 78.

[81] For the original draft article 2, see *supra* note 78.

or later iterations of the Convention!) – in an identical fashion to article 30 (1) of the ICC Statute. In addition, the use of the term "intentional" entailed another problem as to its concrete meaning. The drafters apparently understood it in a volitional sense. Even though this corresponds to the core meaning of this term, it must not be overlooked that, in traditional common law, intent or intention was always understood in both a volitional and cognitive sense.[82] Modern English law still includes in the definition of intention, apart from purpose, "foresight of certainty," that is, only the core meaning of intent or intention is reserved to desire, purpose, and so on.[83] Also, the U.S. Model Penal Code, which served as a reference for the ICC Statute in many regards, while distinguishing between "purpose" and "knowledge" (section 2.02 (a)), defines the former in a cognitive sense by referring to the perpetrator's "conscious object" with regard to conduct and result.[84] Last, but not least, article 30 of the ICC Statute itself recognizes a cognitive side of intent when it defines it in paragraph 2(b) as being aware (in relation to a consequence) "that it will occur in the ordinary course of events." All these issues are no longer relevant with a view to the new September draft, but it is surprising that the drafters *totally renounced a (general) definition of the mental element* required for CAH.

d) The September draft, relying on article 7 of the ICC Statute, also contains the *special knowledge requirement* with regard to the overall attack. It was not clear whether the omission of this requirement in the original draft of the proposed convention was deliberate or based on a misunderstanding of the meaning of this special mental element as opposed to the general mental element. In any case, the absence of this requirement would sever the link between the individual acts and the overall attack or policy; it is therefore correct, that the drafters reintroduced it.

[82] *See* GLANVILLE WILLIAMS, THE MENTAL ELEMENT IN CRIME 20 (1965) ("Intention is a state of mind consisting of knowledge of any requisite circumstances plus desire that any requisite result shall follow from one's conduct, or else of foresight that the result will certainly follow."). *See also* GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 440 (2000) (1978) (tracing this doctrinal tradition to the nineteenth-century utilitarian John Austin).

[83] ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 170 et seq. (171) (6th ed. 2009); ANDREW P. SIMESTER & G. ROBERT SULLIVAN, CRIMINAL LAW: THEORY AND DOCTRINE 120 et seq. (3d ed. 2007). See also *R. v. Woollin*, where the House of Lords, with regard to a murder charge, defined intention referring to "virtual certainty" as to the consequence of the defendant's actions. R. v. Woollin [1999] 1 Crim. App. 8, 20–21 (H.L.) (U.K.) ("[T]he jury should be directed that they are not entitled to find the necessary intention unless they feel sure that death or serious bodily harm was a virtual certainty (barring some unforeseen intervention) as a result of the defendant's actions ...".). *See also* Judicial Studies Board, *Specimen Directions*, § 12, *available at* www.jsboard.co.uk/criminal_law/cbb/index.htm (last visited September 10, 2009).

[84] The respective part of section 2.02(a) reads: "A person acts purposely with respect to a material element of an offense when ... if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result ..." (emphasis added). *See also* FLETCHER, *supra* note 82, at 440 et seq.

e) The *Proposed Convention* no longer contains the clarification that the acts can be committed by both *State and non-State actors*.[85] Whereas this clarification is not strictly necessary because paragraph 1 of the original draft already referred explicitly to non-State actors and the reference to an "organizational" policy must also be interpreted to that effect, it is certainly useful, especially in light of the continuing resistance of certain non-State actors to comply with ICL. Further, paragraph 2(a) of the original draft omitted the qualifier "multiple" before commission and thus reduced the *quantitative element* in CAH ("widespread") to even one act. This has correctly been changed because it entails an expansion of the offense definition that, albeit sound for policy reasons, is inconsistent with the "widespread" requirement of CAH. It is deplorable, however, that the September draft deleted the definition of "*organizational policy*" in paragraph 2(b) of the original draft, considering that it provided a very useful clarification of a highly controversial term.

In sum, although the *Proposed Convention's* adoption of the ICC definition is certainly to be welcomed as far as it deletes the unnecessary and confusing changes of the original draft, it misses the chance of improving and clarifying the definition of CAH with a view to its rationale as explained above (*supra* Section I). It is especially unfortunate that the drafters, apparently in an all-too-conservative and diplomatic mood, did not take issue with the civilian population requirement. Thus, as a result, the offense definition proposed, by essentially repeating article 7 of the ICC Statute, does not offer broader protection than the ICC's legal regime.

B. *The Limited Role of the ICC in the Prevention and Repression of CAH*

Apart from the mere normative limitation due to a narrow offense definition as just discussed, there are various other limitations that may speak in favor of a specialized CAH Convention. The first and most obvious one is that the ICC has a *jurisdiction* that is basically limited to the territory and nationals of its State Parties (article 12(2)), unless there is an ad hoc acceptance of jurisdiction under article 12(3) or a UN Security Council referral (article 13(b)). The *Proposed Convention*, like any other specialized convention on international crimes, offers the States the possibility to commit themselves to the fight against CAH without having to accept, at the same time, the jurisdiction of the ICC. On the other hand, its ratification could be the first step toward ratification of the ICC Statute.

Another limitation follows from the principle of *complementarity* and the ICC's subsidiarity toward national jurisdictions. It provides States with a strong tool to

[85] Article 2(2)(a) of the original draft defining "attack" as a "course of conduct ... whether by a State or non-State actor."

impede the ICC's exercise of jurisdiction, as long as they are willing and able to prosecute CAH themselves. The implicit pressure on national jurisdictions could be increased by a specialized Convention because it would create an additional normative obligation whose force would increase with time. Ultimately, such a Convention could serve as a trigger, similar to the Genocide Convention, for the intervention of the international community in the face of CAH.[86] In addition, the complementarity regime explicitly requires "*sufficient gravity*" for a case to be admissible before the ICC (article 17(4); *see also* article 53(1)(b) and (2)(b)). This special gravity threshold establishes an *additional* threshold, that is, it operates independently of the gravity of ICC crimes as such.[87] As a result, there may be CAH that do not pass the gravity test of article 17(4) but that would be covered by the *Proposed Convention*.

Last but not least, it is quite clear that the ICC does not have the *capacity* to prosecute all CAH, perhaps not even the sufficiently grave ones in the sense of article 17(4).[88] In fact, at the time of this writing the ICC has, in only four situations (the Democratic Republic of the Congo, Uganda, the Central African Republic, and Sudan) initiated formal investigations (article 53) dealing with CAH (see the list in the annex to this chapter). In many other situations, where the commission of CAH is of general knowledge and the ICC has jurisdiction, no formal investigations have been initiated. One of the most dramatic examples is perhaps the case of Colombia, where the Court's jurisdiction has existed since November 1, 2002 (article 126(2), date of ratification: August 5, 2002). Thus, it is clear that an effective prevention and prosecution of CAH is impossible without the active contribution and enforcement of national jurisdictions.

C. *Deterrence and ICL*

Clearly, the argument in favor of a new CAH Convention rests on the premise that the sheer existence of (international) criminal law norms has a deterrent effect. Indeed, the proponents of a specialized Convention display a great trust in the deterrence capacity of (international) criminal law norms. For them, the absence of a specialized convention leaves millions of victims "outside the protection of international criminal law" and "beyond the reach of international criminal law."[89] In light

[86] For the related discussion on the "responsibility to protect," see David Scheffer, in this volume.

[87] *Cf.* Prosecutor v. Lubanga, Doc. No. ICC-01/04-01/06-8, Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, ¶ 41 (Feb. 24, 2006) ("[T]his gravity threshold is in addition to ... the crimes included in articles 6 to 8 of the Statute ..."). For a discussion and further references, see MOHAMMED EL ZEIDY, THE PRINCIPLE OF COMPLEMENTARITY IN THE INTERNATIONAL CRIMINAL LAW 36 et seq. (2008) and Kai Ambos, *The Legal Framework of Transitional Justice: A Systematic Study with a Special Focus on the Role of the ICC*, *in* BUILDING A FUTURE ON PEACE AND JUSTICE 19, 73–74 (Kai Ambos et al. eds., 2009).

[88] On the limitations, see also Kai Ambos, *Prosecuting International Crimes at the National and International Level: Between Justice and Realpolitik*, *in* INTERNATIONAL PROSECUTION OF HUMAN RIGHTS CRIMES 55 (Wolfgang Kaleck et al. eds., 2006).

[89] Background paper of July 31, 2008, circulated before the Crimes Against Humanity Initiative's April Experts' Meeting, April 12–15, 2009, St. Louis, MO.

of such apodictic affirmations, some critical questions seem warranted: Will the mere drafting and adoption of yet another convention change the situation of the potential victims of CAH? Do these kinds of conventions and norms have any deterrent effect on the potential perpetrators at all? Do we have any reliable information as to the possible deterrent effect of the ICC?

The deterrent effects of criminal law have to be assessed in the overall context of the possible preventive effects of criminal law. Deterrence forms, in this context, part of the theories of negative general prevention and, as such, has three dimensions referring to the conditions of a given society to prevent crimes, to the individual circumstances of prevention with a view to the perpetrator and victims, and last but not least, to the prevention of recidivistic offenders.[90] Empirical research on deterrence has been the object of criminal law theory and, more recently, criminological research for centuries. Yet, the results of this research only have a limited value, because human behavior is influenced by various psychological and social factors that make it difficult, if not impossible, to consider law-abiding behavior as the consequence of the deterrent effect of criminal law. In fact, we know little about the deterrent effects of criminal law, and research results are contradictory.[91] The only thing we know with relative certainty is that the most important deterrence factor is the existence of a (more or less) functioning criminal justice system,[92] which entails the risk of detection and prosecution.[93] Whereas the gravity of a sanction (period and nature of punishment) is less, if at all, important,[94] the probability of punishment is of crucial importance.[95]

These general considerations also apply to ICL and its tribunals, but there are some additional factors to be taken into account. First of all, the existence of international criminal tribunals – as a direct enforcement mechanism of ICL – is still a quite recent phenomenon, and sustainable deterrence results may only be seen in the mid- or long term.[96] In any case, most authors believe, despite the absence of

[90] Arthur Kreuzer, *Prävention durch Repression, in* ANGEWANDTE KRIMINOLOGIE ZWISCHEN FREIHEIT UND SICHERHEIT 205, 205 (Heinz Schöch & Jörg-Marin Jehle eds., 2004).

[91] Dieter Dölling & Dieter Hermann, *Befragungsstudien zur negativen Generalprävention: Eine Bestandsaufnahme, in* KRIMINALITÄT, ÖKONOMIE UND EUROPÄISCHER SOZIALSTAAT 133, 162 (Hans-Jörg Albrecht & Horst Entorf eds., 2003); Kreuzer, *supra* note 90, at 207 et seq. In a meta-analysis of twenty-eight studies on deterrence Hermann Eisele, Die general- und spezialpräventive Wirkung strafrechtlicher Sanktionen. Methoden, Ergebnisse, Metaanalyse (Ph.D. dissertation, University of Heidelberg 1999) shows that nine of the studies confirm the deterrent effects, nine negate such effects, and ten present differentiated answers.

[92] FRANZ STRENG, STRAFRECHTLICHE SANKTION 31 (2d ed. 2002).

[93] ANDREW VON HIRSCH ET AL., CRIMINAL DETERRENCE AND SENTENCE SEVERITY 1 (1999); Kreuzer, *supra* note 90, at 216; *see also* Mark Drumbl, *A Hard Look at the Soft Theory of International Criminal Law, in* Sadat & Scharf, *supra* note 25, at 1, 14 ("likelihood of getting caught").

[94] VON HIRSCH ET AL., *supra* note 93, at 40–47; BERND-DIETER MEIER, KRIMINOLOGIE 262 (2003); Kreuzer, *supra* note 90, at 216–17.

[95] Jürgen Antony & Horst Entorf, *Zur Gültigkeit der Abschreckung im Sinne der ökonomischen Theorie der Kriminalität: Grundzüge einer Meta-Studie, in* KRIMINALITÄT, ÖKONOMIE UND EUROPÄISCHER SOZIALSTAAT 167, 170 (Hans-Jörg Albrecht & Horst Entorf eds., 2003).

[96] For criticism on short-term effects, see Herbert Jäger, *Hört das Kriminalitätskonzept vor der Makrokriminalität auf? – Offene Fragen und Denkansätze, in* VOM RECHT DER MACHT ZUR

hard empirical data,[97] in an (albeit limited) deterrent effect of ICL and international criminal tribunals on the condition that their decisions are promptly and consequently enforced and exemptions from prosecution and punishment – for example, in the course of national peace processes – are excluded.[98] This view is supported by

MACHT DES RECHTS – INTERDISZIPLINÄRE BEITRÄGE ZUR ZUKUNFT INTERNATIONALER STRAFGERICHTSBARKEIT 45, 57 (Frank Neubacher & Anne Klein eds., 2006).

97 Julian G. Ku & Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?*, 84 WASH. U. L. REV. 777, 790 (2006); David Koller, *The Faith of the International Criminal Lawyer*, 40 N.Y.U. J. INT'L L. & POL. 1019, 1029 (2008); Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT'L L. 7, 9 (2001); Leila Sadat, *Exile, Amnesty and International Law*, 81 NOTRE DAME L. REV. 955, 998 (2006).

98 Pierre Hazan, *Measuring the Impact of Punishment and Forgiveness: A Framework for Evaluating Transitional Justice*, 88 ICRC INT'L REV. 19, 35 (2006), finds that "warring parties take the risk of prosecution into account" but the "deterrent effect soon diminishes without prompt indictments and arrests." William Whitney Burke-White, *Complementarity in Practice: The International Criminal Court as Part of a System of Multi-Level Global Governance in the Democratic Republic of Congo*, 18 LEIDEN J. INT'L L. 559, 58 (2005) (affirming that the ICC investigation provides some deterrent effect on rebel leaders in the DRC); *see also* Paul Seils & Marieke Wierda, Int'l Ctr. for Transitional Justice, The International Criminal Court and Conflict Mediation 19 (2005), www.ictj.org/en/news/pubs/index.html (last visited Sept. 10, 2009); Thomas Unger & Marieke Wierda, *Pursuing Justice in Ongoing Conflict: A Discussion of Current Practice*, *in* AMBOS ET AL., *supra* note 87, at 269 n.15 (explaining that the ICC has a deterrent effect by the likelihood "that there will be consequences" just as in national criminal law). According to Richard Goldstone, *Historical Evolution – From Nuremberg to the International Criminal Court*, 25 PENN ST. INT'L L. REV. 763, 767–68 (2007), the ICTY's supervision of military actions contributed to the fact that only a relatively small number of civilians were hit by NATO bombs during the Kosovo conflict. *See also* Jan Klabbers, *Just Revenge? The Deterrence Argument in International Criminal Law*, 12 FINNISH Y.B. INT'L L. 249 et seq. (2001); Daniel Ntanda Nsereko, *The Role of the International Criminal Tribunals in the Promotion of Peace and Justice: The Case of the ICC*, 19 CRIM. L.F. 373, 376–77, 392 (2008). According to Cryer et al., *supra* note 35, at 30, "deterrence is unlikely to be possible if potential offenders take the view that they may be able to obtain exemption from prosecution." Graham T. Blewitt, *The Importance of a Retributive Approach to Justice*, *in* THE LEGACY OF NUREMBERG: CIVILISING INFLUENCE OR INSTITUTIONALIZED VENGEANCE 39, 45 et seq. (David A. Blumenthal & Timothy McCormack eds., 2008) admits that "the mere existence of courts ... will never bring a complete end to widespread atrocities" but still believes that courts do act as a deterrent and prevent the commission of crime. Sadat, *supra* note 97, at 998–99, sees some "deterrent value" in "sporadic enforcement of international humanitarian law" but also states "that the international criminal justice system has not yet reached the stage at which its deterrent value may be fairly assumed." Recently, Jens David Ohlin, *Peace, Security, and Prosecutorial Discretion*, *in* THE EMERGING PRACTICE OF THE ICC 185, 202 et seq. (Carsten Stahn & Göran Sluiter eds., 2008), sees deterrence as consequentialist justifications of international criminal law. On the other hand, Nick Grono & Adam O'Brien, *Justice in Conflict? The ICC and Peace Processes*, *in* COURTING CONFLICT? JUSTICE, PEACE AND THE ICC IN AFRICA 13, 17 (Nicholas Waddell & Phil Clark eds., 2008), emphasize the negative effects of the deterrent power, *i.e.*, that government officials "cling to power at all costs." Rama Mani, *Reparation as a Component of Transitional Justice: Pursuing 'Reparative Justice' in the Aftermath of Violent Conflict*, *in* OUT OF THE ASHES 53, 76 (Koen de Feyter et al. eds., 2005), argues that reparations have a larger deterrent effect than penal sanctions. For the argument that nonprosecution would undermine the effectiveness of deterrence, see also David A. Crocker, *Punishment, Reconciliation, and Democratic Deliberation*, 5 BUFF. CRIM. L. REV. 509, 536–37 (2002); Darryl Robinson, *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court*, 14 EUR. J. INT'L L. 481, 489 (2003); Rodrigo Uprimny & Maria Paula Saffon, *Justicia transicional y justicia restaurativa: tensiones y complementariedades*, *in* ENTRE EL PERDÓN

the prevailing case law of the ad hoc tribunals, which generally identifies deterrence as an important, if not the primary, purpose of sentencing in international criminal law.[99] Thus, clearly, the deterrent effect of an international criminal tribunal,

Y EL PAREDÓN. PREGUNTAS Y DILEMAS DE LA JUSTICIA TRANSICIONAL 211, 225–26 (Angelika Rettberg ed., 2005); Laura M. Olson, *Provoking the Dragon on the Patio: Matters of Transitional Justice: Penal Repression vs. Amnesties*, 88 ICRC INT'L REV. 275, 291 (2006); for a critique of this argument, see Jaime Malamud-Goti, *Transitional Government in the Breach: Why Punish State Criminals?*, *in* I TRANSITIONAL JUSTICE: GENERAL CONSIDERATIONS 189, 196 (Neil J. Kritz ed., 1995); Juan E. Méndez, *National Reconciliation, Transnational Justice and the International Criminal Court*, 15 ETHICS INT'L AFF. 25, 30–31 (2001). For Danilo Zolo, *Peace through Criminal Law?*, 2 J. INT'L CRIM. JUST. 727, 732 (2004), there is "little or no deterrent power;" for a similar critical view with regard to the ICTY, see Mary Penrose, *Lest We Fail: The Importance of Enforcement in International Criminal Law*, 15 AM. U. INT'L L. REV. 321, 325 (2000); Michael Smidt, *The International Criminal Court: An Effective Means of Deterrence?*, 167 MIL. L. REV. 156, 188 (2001); Oliver Tolmein, *Strafrecht als Instrument zur Schaffung von Frieden: Das Beispiel des ICTY*, *in* HUMANITÄRES VÖLKERRECHT 493, 507 (Jana Hasse et al. eds., 2001); CHRISTINA MÖLLER, VÖLKERSTRAFRECHT UND INTERNATIONALER STRAFGERICHTSHOF – KRIMINOLOGISCHE, STRAFTHEORETISCHE UND RECHTSPOLITISCHE ASPEKTE 501 (2003); Drumbl, *supra* note 93, at 14–15 (stressing the "unproven assumption of perpetrator rationality in the context of mass violence" and the selective enforcement of ICL); for a very positive evaluation of the ICTY and ICTR, see Akhavan, *supra* note 98, arguing that these tribunals "raised accountability," *id.* at 9, and had "relative success," *id.* at 31, so that even "diehard cynics" can no longer "deny the preventive effects of prosecuting murderous rulers," *id.* at 30.

99 Prosecutor v. Delalić, Case No. IT-96-21-A, Judgment, ¶ 800 (Feb. 20, 2001); Prosecutor v. Kordić & Čerkez, Case No. IT-95-14/2-A, Judgment, ¶ 1076 (Dec. 17, 2004); Prosecutor v. Krajišnik, Case No. IT-00-39-A, Judgment, ¶ 775 (Mar. 17, 2009); Prosecutor v. Mrkšić & Šljivančanin, Case No. IT-95-13/1-A, Judgment, ¶ 415 (May 5, 2009); Prosecutor v. Delalić, Case No. IT-96-21-T, Judgment, ¶ 1234 (Nov. 16, 1998); Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶ 288 (Dec. 10, 1998); Prosecutor v. Tadić, Case No. IT-94-1-T*bis*-R117, Judgment, ¶ 9 (Nov. 11, 1999); Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgment, ¶ 116 (Dec. 14, 1999); *Kupreškić Trial Judgment*, *supra* note 41, ¶ 848; *Blaškić Trial Judgment*, *supra* note 53, ¶ 761; *Kordić and Čerkez Trial Judgment*, *supra* note 51, ¶ 847; Prosecutor v. Todorović, Case No. IT-95-9/1-S, Judgment, ¶ 30 (July 31, 2001); *Vasiljević Trial Judgment*, *supra* note 35, ¶ 273; Prosecutor v. Naletilić & Martinović, Case No. IT-98-34-T, Judgment, ¶ 739 (Mar. 31, 2003); Prosecutor v. Simić, Case No. IT-95-9-T, Judgment, ¶ 1059 (Oct. 17, 2003); Prosecutor v. Nikolic, Case No. IT-02-60/1-S, Judgment, ¶ 88 et seq. (Dec. 2, 2003); Prosecutor v. Galić, Case No. IT-98-29-T, Judgment, ¶ 757 (Dec. 5, 2003); Prosecutor v. Brđjanin, Case No. IT-99-36-T, Trial Judgment, ¶¶ 1090-91 (Sept. 1, 2004); Prosecutor v. Strugar, Case No. IT-01-42-T, Judgment, ¶ 458 (Jan. 31, 2005); *Limaj et al. Trial Judgment*, *supra* note 35, ¶ 723; Prosecutor v. Hadžihasanoviç & Kubura, Case No. IT-01-47-T, Judgment, ¶ 2072 (Mar. 15, 2006); Prosecutor v. Zelenović, Case No. IT-96-23/2-S, Judgment, ¶ 33 (Apr. 4, 2007); *Martić Trial Judgment*, *supra* note 54, ¶ 484; *Mrkšić Trial Judgment*, *supra* note 54, ¶ 683; Prosecutor v. Haradinaj, Case No. IT-04-84-T, Judgment, ¶ 484 (Apr. 3, 2008); Prosecutor v. Boškoski & Tarčulovski, Case No. IT-04-82-T, Judgment, ¶ 587 (July 10, 2008); *Milutinović et al. Trial Judgment*, *supra* note 29, ¶ 1144; *M. Lukić and S. Lukić Trial Judgment*, *supra* note 42, ¶ 1049; *Rutaganda Trial Judgment*, *supra* note 55, ¶ 456; *Musema Trial Judgment*, *supra* note 55, ¶ 986; Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-T, Judgment, ¶ 945 (Dec. 1, 2003); Prosecutor v. Ntakirutimana, Case No. ICTR-96-10 & ICTR-96-17-T, Judgment, ¶ 882 (Feb. 21, 2003); Prosecutor v. Niyitegeka, Case No. ICTR-96-14-T, Judgment, ¶ 484 (May, 16 2003); Prosecutor v. Kamuhanda, Case No. ICTR-95-54A-T, Judgment, ¶ 754 (Jan. 22, 2004); Prosecutor v. Ndindabahizi, Case No. ICTR-2001-71-I, Judgment, ¶ 498 (July 15, 2004); Prosecutor v. Rutaganira, Case No. ICTR-95-1-C, Judgment, ¶ 110 (Mar. 14, 2005); Prosecutor v. Karera, Case No. ICTR-01-74-T, Judgment, ¶ 571 (Dec. 7, 2007); Prosecutor v. Kalimanzira, Case No. ICTR-05-88-T, Judgment, ¶ 741 (June 22, 2009); Prosecutor v. Renzaho, Case No. ICTR-97-31-T, Judgment, ¶ 814 (July 14, 2009). *See also* Prosecutor v. Tadić, Case No.

especially a permanent one such as the ICC, ultimately depends on its capacity to enforce its judgments.[100] Although the relatively poor track record of the ad hoc tribunals – in more than 14 years, the ICTY has completed only 86 cases with 120 accused,[101] and the ICTR has delivered final judgments for no more than 36 accused so far[102] – seems to demonstrate a limited enforcement capacity and sheds some doubt on their overall deterrence effect,[103] it can hardly be denied that the very existence of international criminal tribunals, especially the ICC as a permanent and forward-looking one, sends the clear signal to the perpetrators of international core crimes that they are not beyond the reach of the law and may ultimately be held accountable for their acts.[104] In fact, the establishment of these tribunals has considerably increased the risk of punishment of the responsible,[105] especially of high-level perpetrators, because they normally act rationally and therefore take into account the possibility of punishment as an important factor in their decision making.[106]

As to the ICC in particular, U.S. economist Daniel Sutter, one of the followers of the economics of crime movement, has argued that it "is unlikely to have a very *dramatic* deterrent effect" and "to affect *greatly* a desperate regime's political calculus."[107] Yet, Sutter fails to explain what he means by a "dramatic" as opposed to a "normal" or "ordinary" effect. Neither does he explain when a certain cause has a "great" as opposed to "little" effect. At any rate, would it not be sufficient if the ICC would have *any* deterrent effect at all, if it would affect a regime's calculus *at all*? In fact, given the restrictions built into the ICC's legal regime and its obvious capacity problems, most international criminal lawyers would be more than happy if the

IT-94-1-A and IT-94-1-A *bis*, Judgment in Sentencing Appeals, ¶ 48 (Jan. 26, 2000); Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Judgment, ¶ 185 (Mar. 24, 2000); Prosecutor v. Blaškić, Case No. IT-95-14-A, Judgment, ¶ 678 (July 29, 2004); Prosecutor v. Plavšić, Case No. IT-00-39&40/1-S, Judgment, ¶ 22 (Feb. 27, 2003); *Kayishema & Ruzindana Trial Judgment*, *supra* note 55, sentence ¶ 2; *Simba Trial Judgment*, *supra* note 56, ¶ 429; *Muvunyi Trial Judgment*, *supra* note 35, ¶ 532; Prosecutor v. Seromba, Case No. ICTR-2001-66-I, Judgment, ¶ 376 (Dec. 13, 2006); Prosecutor v. Nchamihigo, Case No. ICTR-01-63-T, Judgment, ¶ 383 (Nov. 12, 2008); Prosecutor v. Bagosora, Case No. ICTR-98-41-T, Judgment, ¶ 2260 (Dec. 18, 2008); Prosecutor v. Bikindi, Case No. ICTR-01-72-T, Judgment, ¶ 443 (Dec. 2, 2008).

100 For the same view, see some of the authors quoted in *supra* note 98.

101 *See* http://www.icty.org/sections/TheCases/KeyFigures (last visited Sept. 10, 2009).

102 *See* http://69.94.11.53/default.htm (last visited Sept. 10, 2009).

103 Crit. in this sense, see Tolmein, *supra* note 98, at 507; Ku & Nzelibe, *supra* note 97, at 808; Koller, *supra* note 97, at 1027–28.

104 *Kordić and Čerkez Appeals Judgment*, *supra* note 99, ¶ 1078; *Krajišnik Trial Judgment*, *supra* note 35, ¶ 1137; *Zelenović Trial Judgment*, *supra* note 99, ¶ 34.

105 Frank Neubacher, Kriminologische Grundlagen einer internationalen Strafgerichtsbarkeit 424 (2005); Frank Neubacher, *Strafzwecke und Völkerstrafrecht*, 59 Neue Juristische Wochenschrift 966, 968 (2006). In a similar vein, see *Prosecutor v. Nikolić*, *supra* note 99, ¶ 88.

106 Neubacher, *Strafzwecke*, *supra* note 105, at 968–69. *See also* Ron Sievert, *A New Perspective on the International Criminal Court: Why the Right Should Embrace the ICC and How America Can Use It*, 68 U. Pitt. L. Rev. 77, 99 (2006). In a similar vein, see *Delalić Trial Judgment*, *supra* note 99, ¶ 1234. For a critical view, see Jäger, *supra* note 96, at 57; Ku & Nzelibe, *supra* note 97, at 807.

107 Daniel Sutter, *The Deterrent Effects of the International Criminal Court*, *in* International Conflict Resolution 9, 23 (Stefan Voigt et al. eds., Mohr Siebeck 2006) (emphasis added).

Court were able "to deter kleptocrats seeking to loot their country, yet still interested in spending their ill-gotten riches abroad ...."[108]

In any case, to get the whole picture, one should not view the ICC as an isolated tool to fight impunity but, as already argued above (*supra* Section II), as an integral part of the international criminal justice system. The ICC is, above all, a complement to national jurisdictions, especially to the jurisdiction of the territorial State. The ICC is a criminal court with very limited powers, dependent on the cooperation of States and worldwide accession to its Statute. Thus, its capacity for enforcement, and with it its deterrent effect, depends on the cooperation of the international community. More concretely, the ICC's enforcement capacity depends on the cooperation of the territorial State or, if this State is unwilling to cooperate, on a regime change through internal or external pressure.

Given the limited powers and functions of the ICC, its objectives and goals are also limited. Nobody familiar with international criminal justice and the ICC expects "dramatic" or "great" effects; limited effects and deterrence, if only of some of those most responsible, would indeed mean a considerable improvement compared to the *status quo ex ante* without an ICC. In any case, prosecution by the ICC, respecting internationally recognized standards for fair trials and the presumption of innocence, serves the idea of justice and truth about past crimes better than on-the-spot extrajudicial killings, let alone Iraq-style military invasions. Criminal law is, above all, about the confirmation of certain moral values, and if these values are internalized by the addressees of the norms (as a consequence of primary prevention),[109] deterrence may work indirectly.

Summing up these considerations, a specialized CAH Convention may have a positive impact on compliance and may deter future criminals. While CAH may not entirely disappear as a result of the Convention's adoption, it is realistic to expect that the signal such a Convention sends would not remain unheard among potential criminals against humanity.

ANNEX: CAH IN THE CURRENT FORMAL INVESTIGATIONS (ART. 53) OF THE ICC (AS OF OCTOBER 1, 2009)

I. Situation in the Democratic Republic of the Congo

Prosecutor v. Katanga and Ngudjolo, Doc. No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges (Sept. 30, 2008)

- widespread or systematic attack, ¶¶ 389 et seq.
- murder, ¶¶ 240 et seq. (charge confirmed at pp. 209–10)
- sexual slavery, ¶¶ 428 et seq. (charge confirmed at p. 211)
- rape, ¶¶ 437 et seq. (charge confirmed at p. 212)
- other inhumane acts, ¶¶ 445 et seq. (charge declined at p. 212)

[108] *Id.*, at 23.

[109] Kreuzer, *supra* note 90, at 215.

II. Situation in Uganda

Warrant of Arrest for Joseph Kony issued on 8 July, 2005, as amended on 27 September 2005, Doc. No. ICC-02/04-01/05-53 (Sept. 27, 2005)

- count 1 (p. 12), sexual enslavement
- count 2 (p. 12), rape
- count 6 (p. 13), enslavement
- count 10 (p. 14), murder
- count 11 (p. 14), enslavement
- count 16 (p. 15), murder
- count 20 (p. 16), murder
- count 21 (p. 16), enslavement
- count 22 (p. 17), inhumane acts
- count 27 (p. 18), murder
- count 28 (p. 18), enslavement
- count 29 (p. 18), inhumane acts

Warrant of Arrest for Vincent Otti, Doc. No. ICC-02/04-01/05-54 (July 8, 2005)

- count 1 (p. 12), sexual enslavement
- count 3 (p. 13), rape
- count 6 (p. 13), enslavement
- count 10 (p. 14), murder
- count 11 (pp. 14–15), enslavement
- count 16 (p. 16), murder
- count 20 (p. 17), murder
- count 21 (p. 17), enslavement
- count 22 (p. 17), inhumane acts
- count 27 (p. 18), murder
- count 28 (p. 19), enslavement
- count 29 (p. 19), inhumane acts

Warrant of Arrest for Okot Odhiambo, Doc. No. ICC-02/04-01/05-56 (July 8, 2005)

- count 11 (p. 10), enslavement
- count 16 (p. 11), murder

Warrant of Arrest for Dominic Ongwen, Doc. No. ICC-02/04-01/05-57 (July 8, 2005)

- count 27 (p. 9), murder
- count 28 (p. 9), enslavement
- count 29 (p. 9), inhumane acts

Warrant of Arrest for Raska Lukwiya, Doc. No. ICC-02/04-01/05-55 (July 8, 2005)[110]

- count 6 (p. 9), enslavement

III. Situation in Darfur, Sudan

Warrant of Arrest for Ahmad Harun, Doc. No. ICC-02/05-01/07-2 (Apr. 25, 2007)

- count 1 (p. 6), persecution
- count 2 (p. 6), murder
- count 4 (pp. 6–7), murder
- count 9 (pp. 7–8), forcible transfer
- count 10 (p. 8), persecution
- count 11 (p. 8), murder
- count 13 (p. 8), rape
- count 17 (p. 9), inhumane acts
- count 20 (p. 10), forcible transfer
- count 21 (p.10), persecution
- count 22 (p. 10), murder
- count 24 (p. 11), murder
- count 28 (p. 11), murder
- count 34 (p. 12), imprisonment or severe deprivation of liberty
- count 35 (p. 12), torture
- count 39 (p. 13), persecution
- count 40 (p. 13), murder
- count 42 (pp. 13–14), rape
- count 48 (pp. 14–15), inhumane acts
- count 51 (p. 15), forcible transfer

Warrant for Arrest for Ali Kushayb, Doc. No. ICC-02/05-01/07-3 (Apr. 27, 2007)

- count 1 (p. 6), persecution
- count 2 (p. 6), murder
- count 4 (p. 7), murder
- count 9 (p. 8), forcible transfer
- count 10 (p. 8), persecution
- count 11 (p. 8), murder
- count 13 (pp. 8–9), rape
- count 17 (p. 9), inhumane acts
- count 20 (p. 10), forcible transfer
- count 21 (p.10), persecution

[110] The proceedings were terminated because of the death of the suspect. Prosecutor v. Kony et al., Doc. No. ICC-02/04-01/05-248, *Decision to Terminate the Proceedings against Raska Lukwiya* (July 11, 2007).

- count 22 (p. 10), murder
- count 24 (p. 11), murder
- count 25 (p. 11), murder
- count 28 (pp. 11–12), murder
- count 29 (p. 12), murder
- count 34 (p. 13), imprisonment or severe deprivation of liberty
- count 35 (p. 13), torture
- count 39 (p. 14), persecution
- count 40 (p. 14), murder
- count 42 (p. 14), rape
- count 48 (pp. 15–16), inhumane acts
- count 51 (p. 16), forcible transfer

Warrant of Arrest for Omar Hassan Ahmad Al Bashir, Doc. No. ICC-02/05-01/09-1 (Mar. 4, 2009)

- count 3 (p. 7), murder
- count 4 (p. 7), extermination
- count 5 (p. 7), forcible transfer
- count 6 (p. 8), torture
- count 7 (p. 8), rape

IV. Situation in the Central African Republic

Prosecutor v. Bemba Gombo, Doc. No. ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo (June 15, 2009)

- widespread or systematic attack, ¶¶ 73 et seq.
- murder, ¶¶ 128 et seq. (charge confirmed at p. 185)
- rape, ¶¶ 159 et seq. (charge confirmed at p. 185)
- torture, ¶¶ 189 et seq. (charge declined at p. 185)