

International Criminal Law II: International Crimes

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ABSTRACT

After a short recollection of the notion of International criminal law the author considers various doctrinal definitions of international crimes. Although there is not necessarily consensus on a definite list of crimes under international law, it is widely accepted that it would certainly include genocide, crimes against humanity, war crimes and the crime of aggression. In analysing the differences between international crimes and national crimes, several arguments highlight their origins in international customary or conventional law. The crimes of genocide, crimes against humanity, war crimes and finally the crime of aggression are presented by their definitions from the Rome Statute, doctrinal clarification and the case law of ad hoc tribunals as well as the International Criminal Court. The discussion surrounding accusations and institutes of international criminal law often reflects a variety of expert opinion and different case laws. In this chapter, aimed at students, the author emphasises the importance of maintaining a balanced perspective on definitive determinations.

KEYWORDS

international crimes, genocide, crimes against humanity, war crimes, the crime of aggression

1. Introduction, or How International Crimes Differ from National Crimes?

The aim of this chapter is to explain how international crimes differ from national crimes and to introduce basic information and elements of the crimes widely accepted as international crimes: genocide, crimes against humanity, war crimes and the crime of aggression. The structure of the chapter, as well as the depth of the analysis, was limited by the instructed volume. In following subchapters, the crimes are presented by their definition from the Rome Statute, doctrinal clarification and relevant case law (when possible).

International criminal law (ICL) is a complex body of law that evades simple classification. It can be understood as a direct outgrowth of international humanitarian law, while it can also be described as a hybrid body of law employing principles drawn

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from the civil and common law models of criminal adjudication.¹ Great significance in the development of contemporary ICL derives from the influences of domestic criminal law, human rights law, and transitional justice principles.² Not only do these three influences play an important role in the evolution of many doctrines of contemporary ICL, including joint criminal enterprise, but are also the cause of the unique gap between procedural rights and principles of substantive fairness.³

International crimes are breaches of international rules entailing the personal criminal liability of the individuals concerned.⁴ Cassese defines international crimes as violations of international customary rules which are intended to protect values considered important by the whole international community, and there is a universal interest in repressing these crimes.⁵ According to Borgh, although essentially there is no consensus on a definite list of crimes and under international law it is widely accepted that it would certainly include war crimes, crimes against humanity, genocide and torture.⁶ Genocide, crimes against humanity, war crimes and crime of aggression – as enumerated in Article 5 (1) (a)-(d) of the Rome Statute⁷ – are most commonly labelled as international crimes or as ones prominently laid down in the preamble of the same Statue as ‘the most serious crimes of concern to the international community as a whole’. These labels imply a powerful stigmatisation and rightfully recall their atrocious nature.⁸ It can be assumed that they shock the “conscience of humanity” or “universal conscience”.⁹

But what makes international crime distinctive from the national crime? O’Keefe negates the existence of a common understanding, or the common definition of an international crime.¹⁰ Similarly, Bassiouni assesses that the writings of scholars are uncertain, if not tenuous, as to what they deem to be the criteria justifying the establishment of crimes under international law.¹¹ On contrary, Heller states that in fact, nearly all scholars share a common understanding of what makes an international crime distinctive: namely, it involves an act that international law deems universally criminal.¹²

‘The international law requirement is what distinguishes an international crime from a domestic crime: although some acts that qualify as domestic crimes are universally criminal – murder, for example – their universality

1 Marston Danner, 2004, p. 186; Sluiter, 2007, p. 67; Fletcher, 2009, pp. 104–110.

2 Marston Danner and Martinez, 2005, p. 80.

3 Robinson, 2008, p. 927.

4 Cassese, 2003, p. 23.

5 Ibid., pp. 23–25.

6 Borgh, 2007, p. 87.

7 ICC, 2023, p. 3.

8 Ibid., p. 555.

9 Orentlicher, 2004, p. 1057.

10 O’Keefe, 2015, p. 47.

11 Bassiouni, 2008, p. 142.

12 Ibid., p. 142.

derives not from international law, but from the fact that every state in the world has independently decided to criminalise them. And the universality requirement is what distinguishes an international crime from a transnational crime: although the criminality of a transnational crime emanates from international law – a treaty requiring a particular act to be domestically criminalised – international law does not deem a transnational crime universally criminal, because it leaves the decision to criminalise to states themselves.¹³

In earlier literature Jescheck identified the following three criteria which are to be satisfied to attribute the label of “international crime”: (a) the criminal norm has to emanate directly from international (conventional or customary) law; (b) there have to be provisions allowing prosecution by international courts or third states (on the basis of universal jurisdiction); and (c) the international status requires bindingness from a wide majority of states.¹⁴ Cassese recalls that the recognition of international crimes as such will in general be achieved through the creation of customary international law since ratification of international conventions rarely achieves the necessary universality.¹⁵ On another occasion Cassese notes that the international crimes are ‘premised on the general notion that international legal prescriptions are capable of imposing obligations directly on individuals, without the intermediary of the state wielding authority over such individuals’.¹⁶ Cryer similarly notes that ‘the fundamental point to understand about these crimes’ is that ‘states have decided that international law, in exceptional circumstances, ought to bypass the domestic legal order, and criminalise behaviour directly’.¹⁷ According to Triffterer what is distinctive about international criminality is that ‘individuals can be punished even if there exists no corresponding punishability under their domestic law and jurisdiction or any other national legal system purporting to exercise jurisdiction’.¹⁸ The International Tribunal for Former Yugoslavia (ICTY) states precisely that international crimes are ‘universally condemned wherever they occur’,¹⁹ because they are ‘peremptory norms of international law or *jus cogens*’.²⁰ “*Jus cogens*” refers to a small class of fundamental norms of international law that are non-derogable — that prohibit states from assuming treaty obligations inconsistent with the norm.²¹

May points out the principles that transcend national borders and achieve universal binding force: ‘In international law, some crimes so clearly harm the international

13 Heller, 2017, p. 354.

14 Jescheck, 1992, pp. 1119–1120.

15 Cassese, 2008, p. 12.

16 Ibid., p. 9.

17 Cryer in Bassiouni 2008, p. 108.

18 Triffterer, 2008, p. 25.

19 ICTY, *Prosecutor v. Furundžija*, 1998, p. 156.

20 ICTY, *Prosecutor v. Kupreškić*, 2000, p. 520.

21 Malanczuk, 1977, pp. 57–58.

community that they must be proscribed in all societies.²² Cassese similarly argues that because international crimes involve violations of rules ‘intended to protect values considered important by the whole international community’, they are ‘consequently binding on all states and individuals’.²³ According to Gaeta, ICL

‘has its roots in the gradual emergence of a set of ‘supra-national’ values, proper to the international community as a whole that must be safeguarded against those states that – through their individual organs or their whole apparatus – disregard them.’²⁴

Freeland moreover affirms that the internationalisation of justice ‘recognises that there are certain norms of ICL that transcend national boundaries and, like fundamental human rights norms, are regarded as universal in acceptance and thus should be universal in application’.²⁵ Werle and Jessberger use the “universal nature of international crimes” to reason why states are permitted to exercise universal jurisdiction over them,²⁶ while Meron reaches the same conclusion based on the fact that international crimes are “recognised by the community of nations as of universal concern” and attract “universal condemnation”.²⁷ In Croatian literature, ICL is defined as a relatively new branch of law that encompasses the totality of norms of international law defining certain individual behaviours as international criminal offenses and that regulate the conditions of liability for them independently of national law.²⁸ It is supranational law that international community applies directly through its courts regardless whether it has been transformed into national law.²⁹ International crimes *stricto sensu* are only those crimes that violate the rules of customary international law and are therefore considered international crimes by the entire international community.³⁰ Finally, it can be concluded that international crimes attack the fundamental values of the international community: international peace, security and well-being; they are committed in a context of systematic or widespread use of force; organised, collective violence usually involves holders of state power; there is a universal interest in their repression; the jurisdiction of international courts is linked to them; they are not subject to a statute of limitations; perpetrators do not enjoy immunity; the attempt and preparation of all international crimes are punishable.³¹

As referred to earlier, the initial acquittance with international crimes in the following subchapters is perceived by the relevant articles of the Rome Statute.

22 May, 2004, p. 24.

23 Cassese, 2005, p. 436.

24 Gaeta, 2010, p. 259.

25 Freeland, 2007, p. 45.

26 Werle and Jessberger, 2014, p. 73.

27 Meron, 1995, p. 554.

28 Novoselec, 2016, p. 14.

29 Ibid., p. 14.

30 Munivrana Vajda, 2018, p. 4.

31 Ibid., pp. 3–4.

It should be noted here that according to Article 9 of the Statute in the interpretation and application of Articles 6 (genocide), 7 (crimes against humanity), 8 (war crimes) and 8 *bis* (the crime of aggression) the Elements of Crimes, adopted at the Assembly of States Parties to the Rome Statute of the International Criminal Court (ICC) in 2002 and the Review Conference in Kampala in 2010, shall assist the Court. Article 9 clearly indicates that the elements themselves are to be used as an interpretative aid and are not binding upon the judges, they must be consistent with the Statute and this consistency must be determined by the Court.³² So when deciding a case of war crimes for example, judges still need to look at the relevant legal instruments of international humanitarian law and to analyse the state practice and *opinio iuris* in order to determine existing rules of customary international law.³³

2. Genocide

Genocide is deliberate commission of certain acts against members of a national, ethnic, racial or religious group with the aim of its complete or partial physical or biological destruction.³⁴ The term “genocide” was introduced by the Polish-Jewish American lawyer Raphael Lemkin in his book “Axis Rule In Occupied Europe: Laws of Occupation, Analysis of Government, Proposals For Redress” as a coin of the Greek word *genos* (race, genus) and the Latin word *occidere* (to kill).³⁵ The book was published in Washington in November 1944 with the support of the Carnegie Endowment for International Development.³⁶ The first official document to mention the term genocide was the Nuremberg Tribunal indictment of 18th October 1945 stating that the accused committed deliberate and systematic genocide – the extermination of racial and ethnic groups, the destruction of the civilian population of the occupied territories for liquidation of certain nations and classes, some national, ethnic and religious groups, particularly Jews, Poles, Gypsies and other peoples.³⁷

Article 6 of the Rome Statute defines the crime of genocide as:

‘any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.’

32 Dörmann et al., 2003, p. 8.

33 Dörmann, 2003, p. 402.

34 Turković, 2007, p. 105.

35 Holovchenko, 2017, p. 52.

36 Ibid., p. 52.

37 Turković, 2007, p. 105; Holovchenko, 2017, p. 52.

It reproduces the text of Article II of the Convention for the Prevention and Punishment of the Crime of Genocide,³⁸ which was adopted by the United Nations General Assembly on 9 December 1948. The first important ruling by one of the *ad hoc* tribunals, the 2 September 1998 judgement of the Trial Chamber of the International Criminal Tribunal for Rwanda (ICTR) in *Prosecutor v. Akayesu*, was issued several weeks after the adoption of the Rome Statute.³⁹

2.1. Special Intent

Special intent inherent to the crime of genocide is the intent to destroy, in whole or in part, a particular group. It is specially outlined in the case law of ICC, ICTR and ICTY. ICC has confirmed the significance of a subjective element or *dolus specialis*, according to which any genocidal acts must be carried out with the intent to destroy in whole or in part the targeted group.⁴⁰ An ICTR Trial Chamber noted that the special intent of a crime

‘is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged. Thus, the special intent in the crime of genocide lies in the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.’⁴¹

Similarly, an ICTY Trial Chamber reasoned:

‘An examination of theories of intent is unnecessary in construing the requirement of intent in Article 4 paragraph 2. What is needed is an empirical assessment of all the evidence to ascertain whether the very specific intent required by Article 4 paragraph 2 is established, that is, the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.’⁴²

The ICTR Appeals Chamber has confirmed that genocide is a crime of specific intent.⁴³ According to the ICTY Appeals Chamber, special intent may be directed to destroy a substantial part of the group:

‘The determination of when the targeted part is substantial enough to meet this requirement may involve a number of considerations. The numeric size of the targeted part of the group is the necessary and important starting point, though not in all cases the ending point of the inquiry. The number of individuals targeted should be evaluated not only in absolute terms, but also in

38 UN, 1948.

39 ICTR, *Prosecutor v. Akayesu*, 1998.

40 ICC, *Prosecutor v. Bashir*, 2009, p. 139.

41 ICTR, *Prosecutor v. Akayesu*, 1998, p. 188.

42 ICTY, *Prosecutor v. Sikirica et al.*, 2001, pp. 58–59.

43 ICTR, *Prosecutor v. Ntakirutimana et al.*, 2004, p. 364.

relation to the overall size of the entire group. In addition to the numeric size of the targeted portion, its prominence within the group can be a useful consideration. If a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial.⁴⁴

In addition, a Trial Chamber of the ICTY concluded that it might be possible to infer the requisite genocidal intent from the ‘desired destruction of a more limited number of persons selected for the impact that their disappearance would have upon the survival of the group as such’.⁴⁵

Four groups are enumerated as possible targets of the crime of genocide. Groups must be defined by positive characteristics, and not their absence.⁴⁶ The drafters rejected proposals aimed at enlarging the scope of the list, but political, economic and social groups were quite intentionally excluded, because the drafters did not believe they should be protected by the terms of the Convention.⁴⁷

2.2. Acts of Genocide

Acts of genocide encompass forms of physical and biological genocide, but not cultural genocide, which was intentionally omitted by the drafters in 1948.⁴⁸ The term “killed” is interchangeable with the term “caused death” according to the Elements of Crimes.⁴⁹ In the *Akayesu* judgement, an ICTR Trial Chamber found the term killing to be too general, in that it might include involuntary homicide as well as intentional killing.⁵⁰ “Causing serious bodily or mental harm” may include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment.⁵¹ The ICTR has stated that causing serious bodily or mental harm to members of the group does not necessarily mean that the harm is permanent and irremediable.⁵² The ICTR made a particularly useful contribution in extending the notion of bodily and mental harm to cover rape and other forms of sexual violence, although this does not mean that every rape committed while genocide is underway can be prosecuted as a genocidal act.⁵³ ‘Inflicting ... conditions of life’ include the case of deportation, placing a group of people on a subsistence diet, reducing required medical services below a minimum and withholding sufficient living accommodations, but only to the

44 ICTY, *Prosecutor v. Krstić*, 2001, p. 12.

45 ICTY, *Prosecutor v. Jelisić*, 1999, p. 82.

46 Schabas, 2016, p. 135.

47 Ibid.

48 Ibid., p. 136.

49 ICC, 2013, p. 2.

50 Schabas, 2016, p. 138.

51 ICC, 2013, p. 2.

52 ICTR, *Rukundo v. Prosecutor*, 2010, p. 263.

53 Ibid.

extent that such measures are imposed with the intent to destroy the group in whole or in part.⁵⁴

‘The means of deliberate inflicting on the group conditions of life calculated to bring about its physical destruction, in whole or part, include, inter alia, subjecting a group of people to a subsistence diet, systematic expulsion from homes and the reduction of essential medical services below minimum requirement.’⁵⁵

Imposing measures intended to prevent births within the group is one of two forms of biological genocide contemplated by Article 6. ‘*The travaux préparatoires* of Article II paragraph d of the 1948 Convention suggest that such measures could include sterilisation, compulsory abortion, segregation of the sexes and obstacles to marriage’.⁵⁶ The ICTR Trial Chamber outlined in that context:

‘In patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother’s group. Furthermore, the Chamber notes that measures intended to prevent births within the group may be physical, but can also be mental. For instance, rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate.’⁵⁷

Concerning “forcibly transferring children” the term “forcibly” is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment.⁵⁸

2.3. Concurrency with Crimes Against Humanity

There is an obvious overlap between the definitions of genocide and crimes against humanity, set out in Articles 6 and 7, respectively, of the Rome Statute.⁵⁹ In that context, the question arises whether cumulative convictions are allowed in the case when charges proceed based on both provisions. At the *ad hoc* tribunals, cumulative

54 Schabas, 2016, p. 139.

55 ICTR, *Prosecutor v. Akayesu*, 1998, p. 247.

56 Schabas, 2016, p. 139.

57 ICTR, *Prosecutor v. Akayesu*, 1998, p. 248.

58 ICC, 2013, p. 3.

59 Schabas, 2016, p. 142.

charging, in some cases for both genocide and crimes against humanity, has been allowed.⁶⁰ The ICTR Appeals Chamber confirmed that

‘reasons of fairness to the accused and the consideration that only distinct crimes may justify multiple convictions, lead to the conclusion that multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other.’⁶¹

‘An element is considered to be “materially distinct” if it requires proof of a fact not required by the other offence. In articulating the approach, the ad hoc tribunals have relied heavily on the Blockburger decision of the Supreme Court of the United States.’⁶²

Schabas states that with respect to cumulative convictions for genocide and crimes against humanity, there is much authority for the proposition that genocide is an aggravated form of crimes against humanity.⁶³ The ICTR Appeals Chamber held that convictions for genocide and for extermination as a crime against humanity, based on the same set of facts, are permissible.⁶⁴

‘Genocide requires proof of intent to destroy, in whole or in part, a national, ethnic, racial or religious group, whereas the crime against humanity of extermination requires proof that the crime was committed as part of a widespread or systematic attack on a civilian population.’⁶⁵

3. Crimes Against Humanity

The concept of crimes against humanity first received explicit international legal recognition in the St. Petersburg Declaration of 1868 limiting the use of explosive or incendiary projectiles as contrary to the laws of humanity.⁶⁶ Further recognition was accomplished when the First Hague Peace Conference in 1899 unanimously adopted the Martens Clause as part of the Preamble to the Hague Convention respecting the laws and customs of war on land.⁶⁷ The Martens Clause has been incorporated vir-

60 Ibid.

61 ICTR, *Prosecutor v. Musema*, 2001, pp. 369–370.

62 Schabas, 2016, p. 142.

63 Ibid.

64 ICTR, *Prosecutor v. Musema*, 2001, pp. 369–370.

65 ICTR, *Prosecutor v. Musema*, 2001, p. 366.

66 Hall and Ambos, 2016, p. 152.

67 Ibid., p. 153.

tually unchanged in most subsequent humanitarian law treaties.⁶⁸ The first formal reference to some of the crimes which would be included in the concept of crimes against humanity was given in the Declaration of France, Great Britain and Russia on 24 May 1915 denouncing the massacres by the Ottoman Empire of Armenians in Turkey as ‘crimes against humanity and civilisation for which all the members of the Turkish Government will be held responsible together with its agents implicated in the massacres’.⁶⁹ The London Charter of 1945, which established the International Military Tribunal of Nuremberg, is the first international instrument to define the concept of crimes against humanity explicitly.⁷⁰ The International Law Commission adopted a Draft Code of Crimes against the Peace and Security of Mankind in 1996.⁷¹

According to Article 7 of the Rome Statute 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 any crime within the jurisdiction of the Court; (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.’

3.1. *Qualifications of the Attack*

The term “widespread” has mainly a quantitative meaning referring to the scale of the attack or, equivalently, to the (large) number of victims.⁷² The ICTY Appeals Chamber has interpreted the term expansively to refer ‘to the large-scale nature of the attack and the number of targeted persons’.⁷³ According to the jurisprudence of ICTY Appeals Chambers and ICTR Trial Chambers the term systematic entails: ‘The organised nature of the acts of violence and the improbability of their random

68 Ibid.

69 Ibid.

70 Pillai et al., 2024, p. 6.

71 Ibid.

72 Hall and Ambos, 2016, p. 168.

73 ICTY, *Prosecutor v. Krnojelac and others*, 2002, p. 57; *Prosecutor v. Kunarac*, 2001, p. 428; *Prosecutor v. Blaškić*, 2000, p. 202.

occurrence.⁷⁴ In addition, the patterns of crimes, in the sense of the non-accidental repetition of similar criminal conduct on a regular basis, are a common expression of such systematic occurrence.⁷⁵ It is important to note that only the attack, not the individual acts of the accused, must be widespread or systematic.⁷⁶ Indeed,

‘the acts of the accused need only be a part of this attack, and all other conditions being met, a single or limited number of acts on his or her part would qualify as a crime against humanity, unless those acts may be said to be isolated or random.’⁷⁷

“Population” refers to a multiplicity of persons sharing common attributes, but this requirement does not mean, however, that the entire population of a state, entity, or territory must be subjected to the attack, it implies the collective nature of the crimes to the exclusion of single acts.⁷⁸ Civilian population comprises all persons who are civilians.⁷⁹ Early judgements of the ICTY and ICTR Trial Chambers had adopted a narrower concept of the term “civilian” based on common Article 3 of the Geneva Conventions as including all persons who have taken no active part in hostilities, or are no longer doing so, including members of armed forces who laid down their arms and persons placed *hors de combat* by sickness, wounds, detention or any other reason.⁸⁰ The use of the word any in Article 7 paragraph 1 indicates that the civilian population includes people of any nationality.⁸¹ Crimes against humanity can, thus, be committed against civilians of the same nationality as the perpetrator, and stateless persons.⁸² ICTY Trial Chamber stated that in ‘determining the existence of a civilian population, a court must consider the specific situation of the victim at the moment the crimes were committed, rather than his status’.⁸³ This approach is in line with the humanitarian purpose of crimes against humanity, since everyone, except an active combatant of a hostile armed force, is in a specific situation requiring protection.⁸⁴ 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.⁸⁵ The attack may be directed against a sufficient number of individuals, not against the

74 ICTY, *Prosecutor v. Kordić*, 2004, p. 94; *Prosecutor v. Blaškić*, 2004, p. 101; ICTR, *Prosecutor v. Muvunyi*, 2006, p. 512; *Prosecutor v. Musema*, 2000, pp. 203–204.

75 Ibid.

76 ICTY, *Prosecutor v. Kordić*, 2004, p. 94; *Prosecutor v. Blaškić*, 2004, p. 101.

77 Ibid.

78 Hall and Ambos, 2016, p. 172.

79 Additional Protocol I, art. 50. para. 2; Sukanović, 2021, pp. 183–184.

80 ICTY, *Prosecutor v. Tadić*, 1999, pp. 637–638; *Prosecutor v. Blaškić*, 2004, p. 114; ICTR *Prosecutor v. Akayesu*, 1998, p. 582.

81 Hall and Ambos, 2016, p. 174.

82 Ibid.

83 ICTY, *Prosecutor v. Blaškić*, 2000, p. 214.

84 Hall and Ambos, 2016, p. 174.

85 Additional Protocol I, art. 50. para. 3.

civilian population as a whole.⁸⁶ Article 7 explicitly requires that the perpetrator must commit the acts with knowledge of the broader widespread or systematic attack on the civilian population. In addition, the second contextual element in the Elements of Crimes, common to all the individual acts of crimes against humanity of Article 7, requires that 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.⁸⁷ This requirement is consistent with the jurisprudence of the ICTY and ICTR, which has concluded that the perpetrator must know that there is an attack on a civilian population and that he knows that his acts are part of that attack.⁸⁸ The knowledge requirement constitutes an additional mental element to be distinguished from the general *mens rea* requirement of Article 30.⁸⁹ In structural terms, the knowledge requirement provides the necessary connection between the perpetrator's individual acts and the overall attack by means of the perpetrator's mindset, and ensures that single, isolated acts, which only happen to have been carried out contemporaneously with an overall attack, so-called opportunistic acts do not qualify as crimes against humanity and, therefore, cannot be prosecuted under Article 7.⁹⁰ While the perpetrators must be aware that their acts form part of the collective attack, this does not mean that they must have knowledge of the entire attack in all of its detail.⁹¹ It has long been settled that under customary international law the acts need not be committed with a discriminatory intent on any particular ground, except for persecution.⁹²

3.2. Acts of Commission

ICTR Trial Chamber in *Akayesu* established that the *actus reus* for “murder” as a crime against humanity requires that the victim to be dead and that the death resulted from an unlawful act or omission of the accused or a subordinate.⁹³ The same conclusion was established by ICTY.⁹⁴ The first fundamental split in the jurisprudence of the international criminal courts with regard to the mental element of murder as a crime against humanity is whether as part of the *mens rea* the perpetrator has premeditated the murder.⁹⁵

‘The Trial Chamber in *Akayesu* did not require premeditation under Article 3 of the ICTR Statute and this view has been followed by some other ICTR Trial Chambers.⁹⁶ However, other ICTR Trial Chambers have insisted that

86 ICC, *Prosecutor v. Katanga*, 2014, p. 1105.

87 ICC, 2013, p. 4.

88 ICTY, *Prosecutor v. Kordić*, 2004, p. 99; *Prosecutor v. Blaškić*, 2004, p. 124.

89 Hall and Ambos, 2016, p. 176.

90 Ibid.

91 Ibid.

92 Ibid.

93 ICTR, *Prosecutor v. Akayesu*, 1998, p. 589.

94 ICTY, *Prosecutor v. Blaškić*, 2000, p. 217.

95 Hall and Stahn, 2016, p. 181.

96 ICTR, *Prosecutor v. Musema* 2000, pp. 214-216; *Prosecutor v. Akayesu*, 1998, p. 588.

premeditation is required under the ICTR Statute, although not under customary international law.⁹⁷ Such premeditation need not be an intent to kill a particular individual; it is sufficient that the accused had a premeditated intention to murder civilians as part of the widespread or systematic attack on discriminatory grounds.⁹⁸

In contrast, several ICTY Trial Chambers have concluded that premeditation is not required.⁹⁹ In *Akayesu*, the ICTR Trial Chamber stated that the crime of murder as a crime against humanity under Article 3 of its Statute

‘was the unlawful, intentional killing of a human being, when at the time of the killing the accused or a subordinate had the intention to kill or inflict bodily harm on the deceased having known that such bodily harm is likely to cause the victim’s death, and is reckless whether death ensues or not.’¹⁰⁰

ICC held in the *Katanga and Ngudjolo Chui* that the offence of murder ‘encompasses, first and foremost, cases of *dolus directus* of the first and second degree’.¹⁰¹ “Extermination” includes according to Article 7 paragraph 2 (b) 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. Extermination differs from murder by the element of mass killing and as a type of criminality may, in particular, require a substantial degree of preparation and organisation.¹⁰² “Enslavement” was established in the *Katanga* Judgement in connection with the right of ownership over the victim with the creation of a situation of dependence that deprives the victim of all autonomy.¹⁰³ The victim’s own subjective perception of the situation was particularly assessed.¹⁰⁴ The exercise of ownership can be shown by a combination of factors such as,

‘the detention or captivity in which the victim was held and its duration, the limitations to the victim’s free movement, measures taken to prevent or deter escape, the use of force, threat of force or coercion, and the personal circumstances of the victim, including his/her vulnerability.’¹⁰⁵

97 ICTR, *Prosecutor v. Kayishema and Ruzindana*, 1999, p. 588; *Prosecutor v. Bagilishema*, 2001, p. 84.

98 Hall and Stahn, 2016, p. 181.

99 ICTY, *Prosecutor v. Kordić and Čerkez*, 2001, p. 235; *Prosecutor v. Jelisić*, 1999, p. 51; *Prosecutor v. Blaškić*, 2000, p. 216.

100 ICTR, *Prosecutor v. Akayesu*, 1998, p. 589.

101 ICC, *Prosecutor v. Katanga and Ngudjolo Chui*, 2008, p. 423.

102 Hall and Stahn, 2016, p. 181.

103 ICC, *Prosecutor v. Katanga*, 2014, p. 976.

104 Ibid.

105 ICC, *Prosecutor v. Ntaganda*, 2014, p. 209.

Article 7 paragraph 1 (d) protects ‘the right and aspiration of individuals to live in their communities and homes without outside interference’.¹⁰⁶ “Deportation” is understood as ‘the forced removal of people from one country to another, while “forcible transfer of population” relates to the “compulsory movement of people from one area to another within the same state’.¹⁰⁷ The term “forced” is not limited to physical force; it may also include the ‘threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment’.¹⁰⁸ ‘The essential element is that the displacement was involuntary in nature, that the relevant persons had no real choice. In other words, a civilian is involuntarily displaced if he is not faced with a genuine choice as to whether to leave or to remain in the area.’¹⁰⁹ In *Kordić and Čerkez*, the ICTY clarified that the term imprisonment ‘should be understood as arbitrary imprisonment, that is to say, the deprivation of liberty of the individual without due process of law, as part of a widespread or systematic attack directed against a civilian population’.¹¹⁰

Even if the initial imprisonment was lawful, it could become unlawful subsequently, for example, by keeping a person in prison after a court had ordered the person’s release or the sentence of imprisonment had come to an end.¹¹¹ The term “other severe deprivation of physical liberty” has a wide meaning which would encompass the broad definition of imprisonment under customary international law and would include a wide variety of restrictions on physical liberty, including house arrest, restriction to a closed city or similar restrictions which might not be considered to fit within the customary international law definition.¹¹² “Torture” is moreover defined in Article 7 paragraph 2 (e). ICC established in *Bemba* that the rape was used as an instrument of torture.¹¹³

In *Akayesu*, six weeks after the Rome Diplomatic Conference, after noting that there was at the time no commonly accepted definition of “rape” in international law, the Trial Chamber of the ICTR, reflecting in part the approach of the UN Special Rapporteur and legal arguments advanced in an *amicus curiae* brief submitted by non-governmental organisations, defined rape as ‘a physical invasion of a sexual nature, committed on a person under circumstances which are coercive’.¹¹⁴ It further noted that

106 Hall and Stahn, 2016, p. 192.

107 Ibid.

108 ICTY, *Prosecutor v. Simić et al.*, 2003, pp. 125–126.

109 Ibid.

110 ICTY, *Prosecutor v. Kordić and Čerkez*, 2001, p. 302.

111 Ibid.

112 Hall and Stahn, 2016, p. 201.

113 ICC, *Prosecutor v. Bemba*, 2009, p. 199.

114 Hall and Stahn, 2016, p. 209.

‘coercive circumstance did not need to be evidenced by a show of physical force: threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or military presence.’¹¹⁵

“Sexual slavery” includes: limitations on one’s autonomy, freedom of movement and power to decide matters relating to one’s sexual activity.¹¹⁶ Sexual slavery thus also encompasses situations where women and girls are forced into marriage, domestic servitude or other forced labour that ultimately involves forced sexual activity, including rape by their captors.¹¹⁷ “Enforced prostitution” might cover a situation that does not amount to slavery or enslavement, but in which a person is compelled to perform sexual acts in order to obtain something necessary for survival or to avoid further harm.¹¹⁸ Such situations might also not be covered by rape if they do not meet the requirement of an element of coercion or force or threat of force.¹¹⁹ “Sexual violence” is considered to be any act of a sexual nature committed on a person under circumstances which are coercive.¹²⁰ It is not limited to a physical invasion of the human body and may include acts that do not involve penetration or even physical contact.¹²¹ Sexual violence can take many forms, some more obvious than others. It can include acts committed with a sexual motive or for the sexual gratification of the perpetrator; scenarios where two or more unwilling participants are forced to carry out sexual acts on each other; acts committed for the purpose of humiliation or degradation, such as forcible public nudity; or acts which target the victim’s sexual organs or sexual function, such as forcible castration, genital mutilation or sexualised torture.¹²²

4. War Crimes

War crimes are in Article 8 paragraph 2 of the Rome Statute incriminated as grave breaches of the Geneva Conventions of 12 August 1949:

‘... namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention: (I) Wilful killing; (II) Torture or inhuman treatment, including biological experiments; (III) Wilfully causing great suffering, or serious injury to body or health; (IV) Extensive destruction and appropriation of property, not justified by military necessity

115 ICTR *Prosecutor v. Akayesu*, 1998, p. 688.

116 Hall and Stahn, 2016, p. 212.

117 Ibid.

118 Ibid., p. 215.

119 Ibid.

120 ICTR, *Prosecutor v. Akayesu*, 1998, p. 688.

121 Ibid.

122 Hall and Stahn, 2016, p. 217.

and carried out unlawfully and wantonly; (V) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power; (VI) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial; (VII) Unlawful deportation or transfer or unlawful confinement; (VIII) Taking of hostages.’

Article 8 categorises the offenses mainly according to the type of conflict in which the respective war crime is applicable. War crimes committed in international armed conflicts are listed in sub-paragraphs (a) and (b), while war crimes committed in non-international armed conflicts with a threshold according to Common Article 3 are contained in sub-paragraph (c) and war crimes committed in a non-international armed conflict with a threshold spelled out in Article 8 paragraph 2 are contained in sub-paragraph (e).¹²³ In Addition, Article 8 to some degree distinguishes war crimes according to their humanitarian law source which primarily are broadly or even universally ratified treaties.¹²⁴ Subparagraph (a) contains grave breaches of the four Geneva Conventions of 1949 with eight acts of commission, while the war crimes under sub-paragraph (b) have been drawn from a number of sources, namely Additional Protocol I, the 1907 Hague Regulations, other particular international instruments such as treaties prohibiting certain weapons and customary international humanitarian law with twenty-six acts of commission.¹²⁵ The war crimes under sub-paragraph (c) reflect violations of Common Article 3 with four acts of commission. The war crimes under sub-paragraph (e) are primarily, but not exclusively based on Additional Protocol II of 1977 with twelve acts of commission.¹²⁶

4.1. International Humanitarian Law and War Crimes

War crimes are violations of international humanitarian law (IHL) criminalised under treaty or customary international law.¹²⁷ War crime can be briefly described as a serious violation of IHL that entails individual responsibility under international law.¹²⁸ Not every violation of IHL is a war crime, but serious violations must be proven.¹²⁹ Elements required for a specific conduct to amount to a war crime are according to Cottier:

‘existence of an armed conflict; nexus of the conduct to this armed conflict; violation of a specific rule of IHL; is this violation of IHL criminalised under

123 Cottier, 2016, p. 318.

124 Ibid.

125 Cottier, 2016, p. 318; Omerović, 2021, p. 169.

126 Ibid.

127 Cottier, 2016, p. 305.

128 Munivrana Vajda, 2018, p. 25.

129 Omerović, 2021, p. 169.

international law, and if so, does the conduct fulfil all requisite material and mental elements of the offence.’¹³⁰

IHL is also called the law of armed conflict or *ius in bello*, more archaically also the laws and customs of war or simply law(s) of war.¹³¹

In the literature two branches of IHL are commonly distinguished: the so called “Hague law” and “Geneva law”. Persons protected under the so-called “Geneva law” branch of IHL most particularly include the wounded, sick, shipwrecked, prisoners of war and any other person detained, interned or otherwise deprived of liberty in connection with an armed conflict, and civilians, particularly the population in an occupied territory.¹³² Such persons in the hands of an adversary must be treated humanely. In general, protected persons that are deprived of liberty are entitled to a judicial examination of their status and, insofar they are prosecuted, to fair trial guarantees.¹³³ The main sources of this branch are: the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GC I); the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (GC II); the Geneva Convention relative to the Treatment of Prisoners of War (GC III); the Geneva Convention relative to the Protection of Civilian Persons in Time of War (GC IV); Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I); Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II).¹³⁴ The provisions of the Geneva Conventions are applied in international armed conflicts, and only one Article – Article 3, the content of which is identical in all four Conventions, so it is often attributed as “Common Article 3” refers to armed conflicts that are not of an international character.¹³⁵ The “Geneva law” branch of IHL also protects property in the hands of an adversary and particularly protects the population, property and pre-existing order of an occupied territory.¹³⁶

The “Hague law” sets limits on how armed warfare and military operations may be conducted in armed conflicts.¹³⁷ Important sources of this branch of IHL are most particularly the 1907 Hague Regulations and the First Additional Protocol of 1977, but also the 1899 and 1907 Hague Conventions and the 1954 Convention on the Protection of Cultural Property in the Event of Armed Conflict.¹³⁸

130 Cottier, 2016, p. 305.

131 Ibid.

132 Ibid.

133 Ibid.

134 Munivrana Vajda, 2018, pp. 25–26.

135 Ibid.

136 Cottier, 2016, p. 306.

137 Ibid.

138 Ibid., p. 307.

‘The treaty rules applicable to non-international armed conflicts are far less numerous and detailed than those applicable in international armed conflicts. However, there is a clear tendency in practice and evolving customary international law to apply rules initially intended for international conflicts also to non-international conflicts. The adoption of the Rome Statute with Article 8 paragraph 2 (c) and (e) in July 1998 consolidated the view that there is, today, individual criminal responsibility directly under customary international law for war crimes committed in non-international armed conflicts. However, the rules applicable to international armed conflicts do not automatically apply to an internal armed conflict.’¹³⁹

Article 8 thus embodies, in accordance with the principle *nullum crimen sine lege*, the broadest concept of acts of the commission of war crimes so far, and in this regard it amounts to the codification of international criminal law.¹⁴⁰

4.2. International and Non-International Armed Conflict

The applicability of the *ius in bello* must be strictly separated from issues relating to the so-called “*ius ad/contra bellum*” regulating under what circumstances a state may lawfully use force against another state.¹⁴¹ The war crimes listed under Article 8 paragraph 2 (a) and (b) are applicable only in international armed conflicts. In contrast, the war crimes under Article 8 paragraph 2 (c) are applicable to non-international armed conflicts according to “Common Article 3”, while those under Article 8 paragraph 2 (e) apply in situations of a non-international armed conflict, the threshold of which is defined anew in Article 8 paragraph 2 (f).¹⁴² While an armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organised armed groups or between such groups within a state,¹⁴³ an international armed conflict always exists when there is a conflict between two or more states, but wars of national liberation, i.e. struggles of peoples against colonial domination and foreign occupation in order to exercise the right to self-determination are also considered international conflicts.¹⁴⁴ In addition,

‘in case of an internal armed conflict breaking out on the territory of a State, it may become international (or, depending upon the circumstances, be international in character alongside an internal armed conflict) if (i) another State intervenes in that conflict through its troops, or alternatively if (ii) some

¹³⁹ Ibid.

¹⁴⁰ Omerović, 2021, p. 170.

¹⁴¹ Cottier, 2016, p. 312.

¹⁴² Ibid.

¹⁴³ ICTY, *Prosecutor v. Tadić*, 1995, p. 70.

¹⁴⁴ Munivrana Vajda, 2018, p. 28; Sokanović, 2021, pp. 184–189.

of the participants in the internal armed conflict act on behalf of that other State.’¹⁴⁵

Not every form of influence necessarily leads to the conflict becoming internationalised. In this respect, the ICTY decided that “control by a state over subordinate armed forces or militias or paramilitary units may be of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training).¹⁴⁶ The criterion of “overall control” is achieved when the foreign state ‘has a role in organising, co-ordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group’.¹⁴⁷ Involvement must therefore go beyond mere logistical support, but that involvement does not imply that everything done by the group concerned is directed by the state taking part from a distance.¹⁴⁸

In order to possibly qualify as a war crime a conduct must have a sufficient *nexus* to the armed conflict by being closely related to it.¹⁴⁹ Generally, it seems that a sufficient *nexus* first exists where a war crime is committed in the course of armed hostilities.¹⁵⁰ In addition,

‘an offence appears also sufficiently related to the armed conflict where it is shaped or dependent upon the environment of the armed conflict in which it is committed, even if occurring temporally and geographically remote from any actual fighting. The armed conflict must, at a minimum, have played a substantial part on the perpetrator’s ability or decision to commit it, the manner in which it was committed, or the purpose for which it was committed.’¹⁵¹

5. The Crime of Aggression

Article 8 *bis* of the Rome Statute defines the Crime of aggression as:

‘... the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.’

¹⁴⁵ ICTY, *Prosecutor v. Tadić*, 1999, p. 84.

¹⁴⁶ Vité, 2009, p. 71.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

¹⁴⁹ Cottier, 2016, p. 316.

¹⁵⁰ Ibid.

¹⁵¹ ICTY, *Prosecutor v. Kunarac et al.*, p. 58.

International peace and security are protected by this criminal offence, so it is also called a crime against peace in international law.¹⁵² Article 8bis paragraph 1 provides that certain acts of aggression, namely those which due to their character, gravity and scale, constitute manifest violations of the Charter of the United Nations, entail individual criminal responsibility under the Court's statute.¹⁵³ Article 8bis thereby confirms the idea that certain qualified violations of the prohibition of the use of force and thus the *jus ad bellum*, just like serious violations of the *jus in bello*, as well as acts of genocide and crimes against humanity, do not only entail state responsibility, but also carry with them individual criminal sanctions under international law.¹⁵⁴

5.1. Crime vs. Act of Aggression

The preparation of plans for a future aggression does not amount to the liability for this offence if the aggression does not take place, as it results from the third of the Elements of Crimes concerning Article 8bis: 'that the respective act of aggression must indeed have been committed'.¹⁵⁵ This deliberate limitation to exclude mere attempts of aggression from the scope of application of Article 8bis, which must be taken at face value, stands in line with customary international law, given that all relevant precedents only considered acts of aggression that had actually taken place to eventually constitute a crime of aggression.¹⁵⁶ Only the participation in the development of specific (military or other) plans and operations of the state concerned with the commitment of a specific act of aggression that ought to fall within the meaning of the term "planning", in order not to excessively extend the scope of application *ratione temporis* of the crime.¹⁵⁷ The "preparation" of such an act refers to the taking of concrete steps to implement the plan which may consist, in the transport of weaponry or other military material to be used for the act of aggression, in the actual deployment of troops to the vicinity of a border to start hostilities, or in acts of a similar nature that will, when seen from an outside perspective, form part and parcel of the forthcoming actual violation of the prohibition of the use of force.¹⁵⁸

Perpetrators may be heads of state and government officials, as well as ministers of defence and other military leaders, such as high-ranking generals, due to leadership requirement dictated by the norm. Given the wording of the provision which refers to the ability to effectively exercise or direct the action of the state from which the act of aggression emanates, it is the factual capability to exercise such control or direction that is decisive, rather than the formal rank, *de jure* position or title of the person concerned.¹⁵⁹ Heads of state exercising merely ceremonial functions, but not being able,

152 Munivrana Vajda, 2018, p. 14.

153 Zimmermann and Freiburg in Triffterer and Ambos, 2016, p. 587.

154 Ibid.

155 ICC, 2013, p. 30.

156 Zimmermann and Freiburg in Triffterer and Ambos, 2016, p. 588.

157 Ibid., p. 589.

158 Ibid.

159 Ibid., p. 591.

either *de jure* or *de facto*, to participate in the decision-making process which leads to the alleged act of aggression are not capable of committing the crime of aggression.¹⁶⁰ In order to possibly commit the crime of aggression, a person concerned must either have alternatively been able to exercise control over, indicating commission of the crime by the way of supervision or to direct the political or military action of the state in question.¹⁶¹ An act of aggression must by its character, gravity and scale constitute a manifest violation of the Charter in order to be considered crime of aggression. According to Article 2 paragraph 4 of the Charter of the United Nations, all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations. Article 8 *bis* thus limits criminal liability to severe acts by using a threshold which captures the qualitative difference between an act of aggression and the individual crime.¹⁶²

Article 8 *bis* aims primarily at upholding the general prohibition of the use of force, as contained in Article 2 paragraph 4 of the Charter of the United Nations, the latter generally prohibiting both the threat and use of force. As noted earlier, according to Article 2 paragraph 4 of the UN Charter, states have the obligation to refrain from the threat or use of force against the territorial integrity or political independence of another state, or in any other manner inconsistent with the purposes of the UN. In addition, Article 39 of the Charter gives the Security Council the authority to take measures under Chapter VII of the UN Charter when it determines that an act of aggression has been committed.¹⁶³ Thus, all wars that are not defensive or not undertaken as part of collective UN measures are prohibited.¹⁶⁴ The term “of another state” indicates that only situations involving two states are covered, so neither mere inner-state conflicts, nor acts against private actors are encompassed unless, obviously, such acts, while being directed against non-state actors take place on the territory of another state.¹⁶⁵ In modern international law, a declaration of war does no longer constitute a necessary requirement for either the existence of an armed conflict, or indeed an act of aggression.¹⁶⁶

5.2. Acts of Commission

Acts of commission relay on General Assembly resolution 3314 (XXIX), with the Definition of Aggression annexed to it, adopted on 14 December 1974. An “invasion” requires that the aggressor state’s armed forces illegally trespass another state’s frontiers, thereby breaching the principle of the inviolability of state borders.¹⁶⁷

160 Ibid.

161 Ibid.

162 Ibid., p. 594.

163 Munivrana Vajda, 2018, p. 14.

164 Ibid.

165 Zimmermann and Freiburg in Triffterer and Ambos, 2016, p. 606.

166 Ibid.

167 Sayapin, 2014, p. 266.

The term “attack” describes the act of falling upon with force or arms, of commencing battle, an offensive operation; an onset or an assault.¹⁶⁸ For the purposes of *jus in bello*, the “armed forces” of a party to an armed conflict (and thus also of a state when it comes, as in then scenarios covered by Article 8 *bis*, to international armed conflicts) are defined in Article 43 paragraph 1 of Additional Protocol I as all organised armed forces, groups and units which are under a command responsible to that state for the conduct of its subordinates, regardless of whether they constitute land, naval or air forces.¹⁶⁹ In order to make a finding as to whether an act of aggression in the form of an invasion or attack has taken place, the court will eventually have to make a finding as to whether (as might be claimed) the alleged aggressor state has a valid title to the territory concerned, or rather not.¹⁷⁰ Under Article 42 of the Hague Regulations of 1907, having codified customary law on the matter, (military) “occupation” refers to situations where a state’s military forces exercise effective control and authority over the territory of another state.¹⁷¹

‘Annexation covers the forcible acquisition of a state’s territory by another state in violation of international law.¹⁷² In line with the practice of the Security Council, even acts of a state purporting to extend its domestic laws to occupied territory and assimilating it to its own territory, while not formally “annexing” as such, might nevertheless amount to a (de facto) annexation.’¹⁷³

The term “bombardment” describes any attack from land, sea, or air bases with heavy weapons which, like artillery, shells, missiles, or aircraft, are capable of destroying enemy targets at a greater distance beyond the specific battle lines, while the term “blockade” describes belligerent operations to prevent vessels from entering or exiting ports or coastal areas belonging to another nation.¹⁷⁴ Paragraph 2 (e) includes two specific forms of acts of aggression, one being the use of force in contravention of the specific conditions of the agreement providing for the stationing of troops, while the second encompasses the use of force after the armed forces should have already left the foreign territory due to the lapse or termination of the agreement. Paragraph 2 (f) regulates a state assisting another state in perpetrating an act of aggression by allowing its territory to be used by said other state to commit an act of aggression.¹⁷⁵ It covers forms of “indirect” aggression by sending irregular forces of various kinds into another state to then carry out acts of armed force in such latter state.¹⁷⁶

168 Ibid.

169 Zimmermann and Freiburg in Triffterer and Ambos, 2016, p. 609.

170 Ibid.

171 Ibid., p. 610.

172 Ibid.

173 Ibid.

174 Ibid., p. 611.

175 Ibid., p. 614.

176 Ibid., p. 615.

Concerning the necessary degree of control that is required to equate the sending and conduct of the mentioned non-state actors – armed bands, groups, irregulars and mercenaries – with direct acts of the sending state, in *Nicaragua* judgement, the ICJ held that such control must amount to “effective control”.¹⁷⁷ By “effective control”, the court meant a situation where the state directly controls the perpetration of specific acts.¹⁷⁸ The Appeals Chamber of the ICTY contested the *Nicaragua* judgement’s effective control test arguing that the *Nicaragua* test was inconsonant with both the logic of the law of state responsibility and with judicial, as well as with state practice, the required degree of control being one of “overall” control over subordinate armed forces or military or paramilitary units ‘going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations’.¹⁷⁹

177 Ibid.

178 Ibid.

179 ICTY, *Prosecutor v. Duško Tadić*, 1999, p. 145.

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