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## The denial of humanitarian assistance as a crime under international law

**A massacre is not necessarily committed only with knives.  
A refugee from Kosovo**

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The images we see every day on our television screens are, sadly, all too familiar: civilians fleeing an armed conflict, struggling to survive under difficult circumstances. They lack food, water, appropriate clothing and shelter, and have no access to medical assistance. These images may come from the Balkans, the Great Lakes region in Central Africa, or any other part of the world, but the main problem facing humanitarian organizations in every conflict situation stays the same — that is, how to reach people in need. Fighting often makes it impossible to access an area, sometimes the terrain or meteorological conditions do not allow the passage of relief goods, and in other cases the whereabouts of victims are unknown. Frequently, difficulties in gaining access to those requiring assistance are not, however, a matter of unfortunate circumstances but are man-made and intentional. Looting of relief supplies, attacks on convoys, or refusal to authorize access can make it difficult for aid to reach its intended beneficiaries. The consequences can be disastrous, as events in Biafra, Somalia, Bosnia or southern Sudan — to name but a few tragic examples — have shown.

The withholding of food and other vital goods is not a new phenomenon. Throughout history, starvation has been used as a method of warfare. The foremost goal of sieges and blockades was not to inflict suffering on the civilian population, which was seen as an inevitable "by-product", but to bring about the surrender of the enemy army. In today's wars, however, humanitarian assistance is increasingly denied as part of a deliberate policy to target civilians, in particular during internal armed conflicts. The often-discussed change in the nature of warfare might be one reason for this development. The other reason might be the change in the nature of humanitarian operations. In the 1990s, there has been an increasing tendency to use them as a substitute for effective political or military action. Besides, the number of relief operations has risen steadily. This has led to a situation where humanitarian assistance is often used as a bargaining chip in political dealings and is therefore regularly impeded. Because the international media is giving more attention to the matter, the withholding of aid has also become more obvious than before.

This article seeks to clarify under which circumstances the denial of humanitarian assistance can constitute a crime under international law. It examines three core crimes of international law: war crimes, crimes against humanity and genocide. The paper does not suggest creating a new category of crimes, but rather examines the question as to whether the denial of humanitarian assistance fits into the definition of existing crimes. The purpose of covering all three crimes is to gain an overview of the possibilities for prosecuting someone for the denial of humanitarian aid. While the article is limited to situations of armed conflict, the consideration of crimes against humanity and genocide can open a discussion on the withholding of goods essential for survival in times of internal tension and disturbances not covered by international humanitarian law, or even in peacetime.

The study of this topic is of particular interest as these crimes have regained relevance with the work of the ad hoc Tribunals for the Former Yugoslavia (ICTY) and for Rwanda (ICTR), and, most importantly, with the recent adoption of the Statute for an International Criminal Court (ICC). The future ICC will not only

permit that perpetrators of the most serious violations of international law be brought to justice, but it will also contribute to the prevention of such violations.

### **Humanitarian assistance in international law**

Before analysing whether the denial of humanitarian assistance can be considered a crime under international law, we must first define the type of assistance under discussion and give a brief overview of the rules governing it.[1]

For the purposes of this article, humanitarian assistance is defined as including all emergency action to ensure the survival of those directly affected by armed conflict of an international or internal character. It encompasses material aid — food, water, clothing, medicines, fuel, shelter, bedding, hospital equipment, etc. — and the services of trained personnel. In order for assistance to be humanitarian in nature, its sole purpose must be to prevent and alleviate human suffering [2]. The beneficiaries of humanitarian aid are needy civilians, including internees, and prisoners of war. Assistance given during internal disturbances and tension (however difficult the distinction between internal disturbances and internal armed conflict might be at times) and natural disasters will be excluded. Furthermore, only aid given by outside humanitarian organizations, whether international, governmental or non-governmental, will be considered.

The principle of subsidiarity dictates that the primary responsibility for meeting the needs of the civilian population in an armed conflict rests with the warring parties that are in effective control of the territory on which that population lives. Only if those parties are unable to meet their obligations should outside relief action be taken. In an international armed conflict, the Third and Fourth Geneva Conventions regulate the provision of food and other goods for prisoners of war, and persons in occupied territories and internees, respectively [3]. The 1977 Additional Protocol II contains further rules on relief action for the civilian population [4]. In non-international armed conflicts, Article 3 common to the four Geneva Conventions and 1977 Additional Protocol II provide for humanitarian assistance for civilians, including those whose liberty has been restricted. [5]

Humanitarian organizations have the right to offer humanitarian aid to States without this being regarded as interference in the internal matters of a State [6]. They further have the right to furnish humanitarian assistance provided that they obtain the consent of the government concerned [7]. Consent must be given when the necessary requirements are fulfilled, i.e., that the international relief operation is of an exclusively humanitarian and impartial nature and conducted without any adverse distinction vis-à-vis those in need [8]. In practice, humanitarian organizations also need the agreement of a non-State party to a conflict which is in de facto control of the territory where the relief operation is to be carried out. The ICRC Commentaries on the Protocols state that the fact that consent is required does not mean that the decision on a relief operation is left to the discretion of the parties: "If the survival of the population is threatened and a humanitarian organization fulfilling the required conditions of impartiality and non-discrimination is able to remedy this situation, relief actions must take place (...) [A] refusal would be equivalent to a violation of the rule prohibiting the use of starvation as a method of combat (...)" [9]. Once a relief operation is accepted in principle, the authorities are under an obligation to cooperate, for example by facilitating the rapid transit of relief consignments and by ensuring the safety of convoys [10]. Parties to the conflict, however, have a right to supervise the operation and impose certain restrictions, such as the arrangement of transits in accordance with a precise timetable and itinerary, and the search of convoys. [11]

### **Aspects of the denial of humanitarian assistance**

The denial of humanitarian assistance will be defined in this paper as follows: a situation where, as a result of the intentional behaviour of certain persons, humanitarian assistance does not reach its intended beneficiaries. In order to shed light on how such a denial can occur in practice, we shall look at some of the main factors identified in different cases. The ways of impeding aid are obviously innumerable; therefore the list of factors and examples given here does not claim to be exhaustive.

First of all, various **actors** may be responsible for hampering assistance, such as agents of a government, representatives of non-governmental groups, and bandits. Sometimes, parts of the civilian population who are not the intended recipients are implicated in the denial of aid to those who need it. In the event of general anarchy, as was the case in Somalia, the affiliation of some actors and the purpose of their looting might be difficult to ascertain.

There are different **means** of preventing aid from reaching potential beneficiaries. A government may, for example, stop aid agencies from entering the country at all and can thus ensure that no assistance is

given. Once humanitarian organizations are working in the country, a government may use — or rather abuse — its above-mentioned right to supervise relief consignments by, for example, searching convoys for an excessive length of time. Both governmental and non-governmental forces may confiscate relief or refuse permission to access a certain region. They can also prevent aid from reaching the victims by putting up roadblocks, through the closure or constant shelling of airports, through a sea blockade or by besieging a town. Sometimes, unacceptable conditions are imposed, for example the payment of taxes for the delivery of assistance or the demand that the same amount of aid be given to all sides in the conflict, without regard to actual needs.

A very effective means of impeding the work of humanitarian organizations is simply to state that their security cannot be guaranteed. Any actor — State agents, rebel forces, other non-governmental groups, bandits, or civilians — could obstruct the delivery of assistance by intimidating aid workers or drivers, or by attacking relief convoys, ships or aircraft, or aid personnel. In some cases, snipers have attacked people on their way to collect humanitarian assistance. On many occasions, the fighting itself, whether between State forces, governmental and non-governmental forces, or non-governmental groups fighting each other, has prevented aid from reaching the victims. Mine-laying often makes routes impassable for vehicles, thereby cutting off potential beneficiaries. In the case of camps or prisons, the persons in control of such places could divert relief goods, refuse access to aid agencies or simply deny the fact that these detention centres even exist.

The denial of humanitarian assistance may have various **aims**. In a conflict where civilians are targeted, the displacement of part of the population or their starvation is such an aim; this could, for example, further a policy of "ethnic cleansing". The aim of sieges or blockades is to bring hostilities to a quicker end with less casualties for the besieging forces by obliging the besieged forces to surrender. Furthermore, belligerents may confiscate aid in order to fortify their troops, instead of "feeding useless mouths". Also, bandits or criminal gangs may loot humanitarian assistance for the sole purpose of making profits. However, drawing the line between criminal gangs and forces directly involved in the conflict is not always easy.

The **consequence** of denying humanitarian assistance is a deterioration in the living conditions of the civilians affected. This may in turn lead to malnutrition, the spread of diseases, or even death. Lack of resources may also aggravate inter-community tension, especially between displaced persons and the resident population.

Those who prevent assistance from reaching people in need will not normally disclose their real intentions. The **reasons** given may be of a legalistic nature, for example the claim that such assistance constitutes interference in the conflict, or insistence on the right of supervision. The urgency of the need for outside aid may not be acknowledged. Reprisals, although generally considered illegal when committed against civilians, might also serve as a justification. Military considerations are often put forward to justify starvation, on the ground that only such rigorous measures can bring the hostilities to a speedy close. The civilian nature of a population may also be questioned, with the suggestion that its members belong in reality to rebel forces.

### **The denial of humanitarian assistance as a crime under international law**

This chapter will examine the extent to which denial of humanitarian assistance amounts to a crime under international law. The first step will be to analyse the elements that make an offence under domestic law a crime of international concern. The next step will be to consider the offences that constitute war crimes, crimes against humanity and genocide.

#### **1. War crimes**

A war crime is a serious and criminally punishable violation of international humanitarian law [12] committed by any physical person, no matter whether military or civilian [13]. In order for an act to become a war crime, the existence of an armed conflict is essential. The Appeal Chamber of the ICTY established in the *Tadic* case that an armed conflict exists "whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State" [14]. In order for a crime to fall within international jurisdiction, it is not sufficient that it be perpetrated in a State where an armed conflict takes place, but a nexus must be established between the offence and the armed conflict. This, however, does not mean that the crime has to be committed at the exact time and place where active hostilities are under way. "The only question, to be determined in the circumstances of each individual case, is whether the offences were closely related to the armed conflict *as a whole*." [15]

Another criterion which has to be fulfilled is that the act must be committed against a person protected under international humanitarian law. In the case of the denial of humanitarian assistance, the victims of such acts will be either civilians, including individuals deprived of their liberty, or prisoners of war (in an international armed conflict). Although Article 3 common to the Geneva Conventions does not mention the term "protected person", protection extends to all "persons taking no active part in the hostilities", who shall be treated humanely [16]. Persons who take a direct part in the hostilities lose their protected status for as long as they are involved in the actual fighting [17]. Regarding violations of international humanitarian law in non-international armed conflicts, it is now accepted that they can give rise to individual criminal responsibility [18]. The denial of humanitarian assistance can therefore constitute a war crime regardless of whether it occurs in international or in non-international armed conflicts.

### Particular offences

#### (a) Wilful killing or murder

"Murder is a crime that is clearly understood and well defined in the national law of every State." [19] Murder is a war crime in both international and non-international armed conflicts [20]. The Geneva Conventions and their Additional Protocols employ the term "wilful killing" in the context of an international armed conflict, where this is considered a grave breach [21], and "murder" in the context of an internal armed conflict [22]. Regarding a difference between the two terms, the ICTY found that there "can be no line drawn between 'wilful killing' and 'murder' which affects their content" [23]. The elements of murder constituting a war crime are causing the death of a protected person, that the death results from an act or omission contrary to the law of armed conflicts, and that the perpetrator acted wilfully. [24]

The crime of wilful killing can be committed either by act or by omission; this was confirmed by the ICTY and the ICTR [25]. If civilians die as a clear result of the unlawful denial of humanitarian assistance, for instance if a region is completely blocked from the outside world for a long period, then it is arguable that the denial constitutes murder if the other conditions are fulfilled. This could also be the case when detainees are unlawfully deprived of the most essential goods. In its comment on the prohibition of wilful killing, the Commentary published by the ICRC says that "it seems, therefore, that persons who gave instructions for the food rations of civilian internees to be reduced to such a point that deficiency diseases causing death occurred among the detainees would be held responsible" [26]. Furthermore, the Israeli Statute on crimes against humanity, for example, mentions that death through starvation is tantamount to deliberate killing; [27] and a commentator expressly stated that "the reduction of rations for prisoners of war resulting in their starvation falls into the category of wilful killing". [28]

In order for the element of unlawfulness to apply, a person responsible for impeding the delivery of relief supplies must violate at least one of the provisions on humanitarian assistance mentioned above. The condition that the State must give its consent and has a right to impose certain restrictions sometimes makes it difficult to establish such unlawfulness. However, as stated before, if the survival of civilians or prisoners of war is threatened, a relief operation must be allowed.

The term "wilful" is understood to include "intent" and "recklessness", but to exclude ordinary negligence. This is stated in the ICRC's Commentary on the Geneva Conventions [29], and was confirmed by various decisions handed down by the *ad hoc* Tribunals for the former Yugoslavia and for Rwanda. In the *Delalic* case, for example, the ICTY held that "the necessary intent (...) required to establish the crimes of wilful killing and murder (...) is present where there is demonstrated an intention on the part of the accused to kill, or inflict serious injury in reckless disregard of human life" [30]. In the case of wilful killing committed by omission, intent can be inferred if death is the foreseeable consequence of such an omission. [31]

It would seem therefore that the withholding of relief can under certain circumstances be considered wilful killing. Recent international jurisprudence provides little precedent for this interpretation, however. In three cases currently before the ICTY, depriving inmates of food and other vital services in detention centres constitutes the basis for the charges of war crimes and crimes against humanity; these are, however, being brought under the headings "wilfully causing great suffering or serious injury to body or health", "cruel treatment" and "inhumane acts" [32]. Acts which resulted in indictments for wilful killing or murder were killings by shooting, mutilations resulting in death and the like. That the widespread and also well-documented instances of denial of humanitarian aid [33] were not used as a basis for indictments might be due to the fact that, considering the limited time and resources available to the Tribunal, other grave violations of international law are considered more serious and easier to prove because of a more direct relationship between the acts committed and the consequences thereof.

#### (b) Torture, inhuman treatment, wilfully causing great suffering or serious injury to body or health

"Torture or inhuman treatment" and "wilfully causing great suffering or serious injury to body or health" are grave breaches under the Geneva Conventions. In internal armed conflicts common Article 3, para. 1(a), and Protocol II, Article 4, para. 2(a), prohibit "cruel treatment" and "torture". The offence of torture in the context of an international armed conflict carries the same meaning as in the context of a non-international armed conflict; the same is true of inhuman treatment and cruel treatment. [34]

Torture is criminally punishable in both international and non-international armed conflicts [35]. It was defined by the 1984 Torture Convention as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions" [36]. This definition was considered by the ICTY and the ICTR as representing customary international law, also in international humanitarian law. [37]

If the definition of the Torture Convention is applied, the denial of humanitarian assistance can constitute torture only if it causes severe pain or suffering, for example as a result of a serious shortage of goods essential for the survival of the civilian population. Furthermore, the "purpose" requirement must be fulfilled. The withholding of food from prisoners, for example, could be committed for all the enumerated purposes. The list of purposes is, however, not exhaustive, and the prohibited purpose must simply be part of the motivation behind the conduct and need not be the predominating or sole purpose [38]. Importantly, the ICTY stated that the condition that "the suffering be inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity" must be interpreted to include officials of non-State parties to a conflict [39]. It also found that torture extends to officials who "take a passive attitude or turn a blind eye to torture" [40]. As wilful killing, torture can be committed either by act or by omission [41]. The Special Rapporteur on Torture mentioned the prolonged denial of food as constituting torture in one of his reports. [42]

It might be easier to prove that impeding the delivery of relief amounts to inhuman treatment than to establish that it constitutes torture, as the threshold for the former crime is lower. Inhuman treatment, as a grave breach within the meaning of the Geneva Conventions, involves acts or omissions that cause severe physical or mental suffering or injury or constitute a serious attack on human dignity [43]. The threshold is also lower for the crime of "wilfully causing great suffering or serious injury to body or health" [44]. Unlike the case of torture, the purpose of an act is not an element of the offence; the definition can, for example, also be held to cover mental suffering. [45]

The ICTY established that all acts or omissions found to constitute torture or wilfully causing great suffering or serious injury to body or health would also constitute inhuman treatment, but that the latter is not limited to those acts already incorporated in the former two. Instead, inhuman treatment extends further to acts which "violate the basic principle of humane treatment, particularly the respect for human dignity" [46]. Depriving civilians or prisoners of war of relief will in many cases be contrary to the principle of humanity and therefore constitute inhuman treatment. In the *Delalic* case the Trial Chamber held that the "creation and maintenance of an atmosphere of terror in the Celebici prison camp, by itself and a *fortiori*, together with the deprivation of adequate food, water, sleeping and toilet facilities and medical care, constitutes the offence of cruel treatment under Article 3 of the Statute, and wilfully causing great suffering or serious injury to body or health under Article 2 of the Statute". [47]

Denial of assistance could also constitute an "outrage upon personal dignity, in particular humiliating and degrading treatment", an act prohibited under the Geneva Conventions and their Protocols [48], and an international crime also in internal armed conflicts, as the Statutes of the ICTR and the ICC now clearly confirm. [49]

### (c) Starvation

The prohibition to starve civilians as a "method of warfare" is included in Article 54 of Protocol I and Article 14 of Protocol II. "To use starvation as a method of warfare would be to provoke it deliberately, causing the population to suffer hunger, particularly by depriving it of its sources of food or of supplies." [50] Starvation is not specifically mentioned as a grave breach in Protocol I. However, the Appeal Chamber of the ICTY confirmed in the *Tadic* case that even if the Geneva Conventions and Protocols do not explicitly stipulate that a prohibited act constitutes a crime, it is still possible to establish criminal responsibility for such an act. [51]

The Statute of the ICC explicitly mentions the denial of humanitarian assistance as an example of an act that may lead to starvation. According to the relevant provision, "[i]ntentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions" is a serious violation of the laws and customs of war [52]. However, starvation has been included in the jurisdiction of the ICC only in respect of international armed conflicts, although there has been a considerable amount of lobbying for its inclusion in the list of crimes committed in non-international armed conflicts as well. This is regrettable since the prohibition of starvation is also mentioned in Protocol II [53]. In accordance with Article 10 of the ICC Statute, this omission will not, however, change the customary status of the rule [54]. As a matter of present customary international law, starvation can constitute a war crime regardless of the kind of conflict in which it occurs. [55]

In some cases, it might be difficult to prove the specific intent to use starvation as a method of warfare, i.e., as "a weapon to annihilate or weaken the population" [56]. However, if the outcome of impeding humanitarian assistance is obvious according to the ordinary course of events, the intention can be inferred. Military necessity cannot serve as a justification, as even during sieges or blockades relief operations must be allowed. [57]

#### (d) Collective punishments

Article 33 of the Fourth Geneva Convention and Article 4, para. 2(b), of Protocol II prohibit collective punishments, which are defined as "penalties of any kind inflicted on persons or entire groups of persons in defiance of the most elementary principles of humanity, for acts that these persons have not committed" [58]. The Commentary on Protocol II published by the ICRC stresses the fact that the term "collective punishments" should be understood in its widest sense and as including any kind of sanction [59]. Collective punishments were, *inter alia*, qualified as a war crime by the Statute of the ICTR [60] as well as by the ILC Draft Codes of crimes of 1991 and 1996 [61]. Since these acts are punishable when committed in non-international armed conflicts, an argument can be made that they should *a fortiori* be punishable in international armed conflicts. If humanitarian assistance is impeded in order to punish certain persons, this could constitute collective punishment. Depending on the result, the acts in question could at the same time constitute murder, inhuman treatment or other crimes.

## 2. Crimes against humanity

Recent international jurisprudence and the adoption of the ICC Statute have helped clarify the definition of crimes against humanity, which had been a matter of controversy since the Nuremberg Charter. It is now widely accepted that the following conditions have to be fulfilled: acts have to be committed against any civilian population and in a widespread or systematic manner, and must be based on a policy by a State, an organization or a group [62]. A connection to an armed conflict is no longer necessary, and a majority of sources indicate that a discriminatory intent behind every act is not required. [63]

The requirement that an act be committed against any civilian population will, in the case of humanitarian assistance, generally be fulfilled. "Widespread manner" is normally interpreted as meaning that acts must be directed against a multiplicity of victims. "It therefore excludes an isolated inhumane act committed by a perpetrator acting on his own initiative and directed against a single victim." [64] The concept of "systematic" has been defined as "thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources. There is no requirement that this policy must be adopted formally as the policy of a State" [65]. Furthermore, the crimes committed should "form a part of a system based on terror or constitute a link in a consciously pursued policy directed against particular groups of people" [66]. While some commentators hold that this policy must be that of a State, the more recent view is that acts can be instigated or directed not only by a government but also by any organization or group [67]. Regarding the level of formalization of the policy, the Trial Chamber asserted in the *Tadic* Decision that a policy "need not be formalized and can be deduced from the way in which the acts occur. Notably, if the acts occur on a widespread or systematic basis that demonstrates a policy to commit those acts, whether formalized or not". [68]

In order for the denial of humanitarian assistance to become a crime against humanity, it would therefore need to be either systematic or widespread and based on a policy. This excludes random acts of impediment of humanitarian aid that are not committed as part of a broader plan or policy. Examples would be the spontaneous looting of a warehouse containing relief goods by civilians or soldiers, or spontaneous attacks on relief convoys by a group of drunken soldiers. Isolated criminal conduct which brings about the blockade of relief is not a crime against humanity, however tragic its consequences may be [69]. Acts of impediment of aid after a general breakdown of law and order do not normally qualify as

crimes against humanity. However, the breakdown might have been orchestrated to hide the nature of the crimes — seemingly spontaneous acts are often the results of careful planning. Even if there is only a small number of victims, a crime against humanity may still be taking place as long as the "systematic" condition is fulfilled. It can be argued that the commission of a single act injuring one victim can fit the definition if there is an intent thereby to act against or to target other civilians [70]. For instance, only one aid worker would need to be killed in order to make all the agencies pull out of the region, thus leaving the population without assistance. This could be construed as a crime against humanity, depending on the consequences of the act for the population. The possibility that a single act may qualify as a crime against humanity if there is a link with a widespread or systematic attack against a civilian population was, for example, endorsed by the Trial Chamber in the *Vukovar Hospital Case*. [71]

Regarding the intent required for the denial of humanitarian assistance to constitute a crime against humanity, the Tadic Judgment confirmed that, in addition to the intent to commit the underlying offence, the perpetrator must know of the broader context in which his act occurs. The Trial Chamber referred to the approach taken by the majority in *R. v. Finta* by the Canadian Supreme Court, which ruled that "the mental element required to be proven to constitute a crime against humanity is that the accused was aware of or wilfully blind to facts or circumstances which would bring his or her acts within crimes against humanity" [72]. It is not necessary, however, to establish that the accused knew that his actions were inhumane [73] or that he knew exactly what would happen to the victims. [74]

### Particular offences

The following offences constituting crimes against humanity could be interpreted to include a denial of humanitarian assistance: murder, extermination, torture, persecution, and other inhumane acts. Murder has already been discussed in the chapter on war crimes and will therefore not be mentioned again.

#### (a) Extermination

Extermination is normally interpreted as murder on a large scale. The UN International Law Commission explained the difference between murder and extermination as follows: "Extermination is a crime which by its very nature is directed against a group of individuals. In addition, the act of extermination involves an element of mass destruction which is not required for murder." [75] Unlike genocide, extermination also applies to situations in which some members of a group are killed while others are spared.

An important step towards regarding the denial of humanitarian assistance as a crime against humanity has been taken in the definition of extermination in the ICC Statute, which affirms that extermination "includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population" [76]. Since not all the crimes are defined in the Statute and even fewer examples are given, the fact that these acts are the only explicit examples of extermination is remarkable and shows the importance of the prohibition of such conduct. If the circumstances of the denial of humanitarian assistance are such that it can be considered "calculated to bring about the destruction of part of a population", then the conditions for extermination seem to be fulfilled.

#### (b) Torture

The definition of torture as a crime against humanity seems to differ from its definition as a war crime. The Statute of the ICC contains the following definition: "Torture means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions." [77] The Akayesu Judgment, however, used the same definition as the Torture Convention [78]. It is thus not clear whether the ICC definition eliminating the requirements of purpose and some official acquiescence constitutes custom or whether custom is only moving in this direction. [79]

If the definition in the ICC Statute is applied, then it is easier to argue that the withholding of aid constitutes torture. "Under the control" could be interpreted as limiting the crime to acts in a detention situation. In this case, the definition would apply only to persons in a prison camp or other detention facility who are denied vital goods and services. On the other hand, it would also be possible to interpret "under the control" in a broader sense. For example, if a given territory is completely encircled by enemy troops, as was the case in some so-called "safe areas" in Bosnia, or during an occupation by an enemy State, then access to assistance for the people in the encircled or occupied areas lies completely in the hands of the occupying or besieging forces. In such instances, the population can be considered under the effective control of these forces, which may inflict severe suffering on them.

### (c) Persecution

While the term persecution has never been clearly defined in international criminal law [80], it normally covers any severe and wilful deprivation of the fundamental rights of members of an identifiable group. The ICC Statute defines persecution as the "intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity", [81] on "political, racial, national, ethnic, cultural, religious, gender (...) or other grounds that are universally recognized as impermissible under international law" [82]. No definite grounds for persecution are required under customary international law; a variety of different grounds have been listed in international instruments [83]. One of these grounds is sufficient for the act to constitute persecution [84].

The *Tadic* Judgment confirmed the view that persecution is a crime per se, and does not have to refer to other crimes: "Because the 'persecution type' is separate from the 'murder type' of crimes against humanity it is not necessary to have a separate act of an inhumane nature to constitute persecution; the discrimination itself makes the act inhumane." [85] The crime of persecution thus encompasses acts of varying severity, from acts that are mentioned under other crimes which are inhumane per se, to acts that become inhumane through the discrimination behind them. In addition to the criminal liability which attaches to certain inhumane acts, there is an additional element of culpability when they are committed with discriminatory intent; this was stated to constitute customary international law by the Trial Chamber in the *Tadic* case. [86]

Apart from the crimes that could be interpreted to include the denial of humanitarian assistance and that would also count as persecution if committed for discriminatory reasons, it is arguable that any withholding of assistance based on discrimination constitutes persecution, without regard to the consequences of the withholding. The Trial Chamber in the *Tadic* case found, for example, that economic measures of a personal type, such as the deprivation of food, can constitute persecutory acts. [87]

### (d) Other inhumane acts

The category of "other inhumane acts" ensures that new forms of crimes against humanity will not escape international criminal responsibility. The notion of other inhumane acts is circumscribed by two requirements. First, according to the *ejusdem generis* principle of interpretation, other inhumane acts include only acts that are of a nature similar to those listed before, such as murder, extermination, enslavement, deportation, and torture. Second, the acts must in fact cause injury to human beings in terms of physical or mental integrity, health or human dignity. In the ICC Statute, other inhumane acts are mentioned at the end of the list of crimes against humanity: "[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health." [88]

Deprivation of assistance can be an example of an inhumane act, if it intentionally causes great suffering, or serious injury to body or to mental or physical health. Importantly, the UN Secretary-General in his analysis of the Nuremberg Judgment suggested that depriving part of the civilian population of their means of subsistence might be one example of such an "other inhumane act". [89] In the *Nikolic* Indictment, the Prosecutor of the ICTY stated: "Nikolic (...) committed a crime against humanity by participating in inhumane acts against more than 500 civilians (...) by endangering the health and welfare of detainees by providing inadequate food, endangering the health and welfare of detainees by providing living conditions failing to meet minimal basic standards (...)." [90]

## 3. Genocide

Genocide is often regarded as the most atrocious international crime. One should therefore be very careful to preserve its special status and not to water down its definition to any instance of mass killing. Genocide is the only crime against humanity which has been authoritatively codified in one international instrument, the 1948 Genocide Convention [91]. The treaty's generally accepted definition of genocide is "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 to prevent births within the group; (e) Forcibly transferring children of the group to another group" [92]. No nexus to an armed conflict or to another crime is therefore necessary. The provision of the Genocide Convention is reproduced in the Statutes of the ICTY, the ICTR and the ICC [93]. For the denial of humanitarian assistance to constitute genocide, the following three elements must thus be present: the denial must amount to one of the enumerated acts, the act in question must be directed against one of the mentioned groups, and the perpetrator must have the intent to destroy the group in whole or in part.

The attributes defining protected groups are not addressed by the Genocide Convention. In particular, the definition of nationality and the difference between ethnic and racial group are problematic. The Trial Chamber in *Akayesu* held that "a national group is defined as a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties" [94]. "An ethnic group is generally defined as a group whose members share a common language or culture. The conventional definition of racial group is based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national, or religious factors. The religious group is one whose members share the same religion, denomination or mode of worship." [95]

Another open question is whether the targeted group has to be separate from the perpetrator's group. It is clear that the definition does not require the complete annihilation of a group, but not how large the part of the targeted group has to be for the act to constitute genocide. This must be decided on a case-by-case basis, depending on the nature of the victims and the proportion they represent of the complete population of the group. As in the case of crimes against humanity, if the leadership of a group is targeted, the number of victims may be lower but the impact will be stronger. Contrary to war crimes and crimes against humanity, in the case of genocide even the direct and public incitement to commit the crime is punishable [96]. A leader who publicly calls for the impeding of relief to a certain group with the intent to destroy that group could therefore be held responsible.

Intent is the most difficult element of genocide to prove. In the absence of a confession, intent can be inferred only from certain factual circumstances. In the case of denial of humanitarian assistance this might be particularly difficult: it is already complicated to establish a link between the act of impeding and the result, but even more so to prove that the intended result of the denial is destruction of a particular group. The ICTY found that the specific intent "may be inferred from a number of facts such as the general political doctrine which gave rise to the acts in Article 4 [of the ICTY Statute], or the repetition of destructive and discriminatory acts. The intent may also be inferred from the perpetration of acts which violate, or which the perpetrators themselves consider to violate the very foundation of the group — acts which are not in themselves covered by the list in Article 4(2) but which are committed as part of the same pattern of conduct" [97]. The judges in the *Akayesu* case stated that the "general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others (...)" [98] has to be taken into account. Even if a general genocidal intent can be established, that intent must be imputed to individual perpetrators to convict them. The closer an individual is associated with an organization with genocidal intent, the easier this can be proved.

### Particular offences

The denial of humanitarian assistance could fit into the categories of "killing members of the group", "causing serious bodily or mental harm to members of the group" and "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part", provided that the prerequisites for genocide are fulfilled. What was said for murder as a war crime is also applicable, *mutatis mutandis*, to genocide.

#### (a) Causing serious bodily or mental harm to members of the group

The ICTR found in the *Akayesu* Judgment that it is not necessary that the harm caused be permanent and irremediable [99]. It stated that "the Chamber takes serious bodily or mental harm, without limiting itself thereto, to mean acts of torture, be they bodily or mental, inhumane or degrading treatment, persecution" [100]. This definition would include a very wide range of acts which certainly encompass the wilful impediment of relief. This view was confirmed by the Israeli Court in the *Eichmann* case, which considered the following acts to constitute infliction of serious physical or mental harm: "by the enslavement, *starvation*, deportation and persecution (...) and by their detention in ghettos, transit camps and concentration camps in conditions which were designed to cause their degradation, deprivation of their rights as human beings, and to suppress them and cause them inhumane suffering and torture". [101]

#### (b) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part

By including this act, the Genocide Convention expanded the definition of murder and extermination as international crimes. In the *Eichmann* case it was held that "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part" included acts committed with the intention to kill, even if the victims stayed alive [102]. The ICTR concluded that the crime "should be construed as the methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction." It gives the example of subjecting a

group of people to a subsistence diet and the reduction of essential medical services below minimum requirements. [103]

As long as the intent requirement is fulfilled, the impeding of relief could fall within the definition of this act. In an authoritative commentary on the Genocide Convention, the following examples are given for "conditions of life": placing a group on a subsistence diet, reducing medical services below a certain minimum level, and withholding sufficient living accommodation. [104]

### Conclusion

The discussion of the previous chapter clearly shows that the withholding of relief can constitute any of the three crimes considered, provided that their specific requirements are fulfilled. It will be easier to prove that the denial of humanitarian assistance is a war crime, as its threshold is lower [105]. On the other hand, crimes against humanity and genocide need not be committed during an armed conflict; furthermore, it will be possible to prosecute them once the ICC is established, whereas in the case of war crimes the Statute provides for an "opting out" for a period of seven years [106]. In respect of war crimes, but not the crime of genocide or crimes against humanity, the ICC also provides that superior orders may under strict conditions be a defence. [107]

One difficulty that is common to most instances of denial of humanitarian assistance is to prove that assistance has been withheld intentionally. On the other hand, as mentioned, the intent to commit certain acts can often be deduced from the way in which aid is actually impeded and from the general conduct of hostilities. These factors can also be conclusive for the policy behind the acts required for crimes against humanity and the special intent for genocide. A further problem is the issue of causality: how can one prove that there was a direct link between the act of denial and a certain result, for example the death of a person? Furthermore, in some instances it might be difficult to ascribe an act to a specific person. In the case of a prison or a besieged city causality can be established more easily than in a more complex environment.

Another question that arises in the context of humanitarian assistance is whether parties are obliged to suspend the fighting in order to allow for relief to be delivered and whether their refusal would constitute a crime. There is no easy answer to this question. Although humanitarian organizations should not impede military operations, the view that parties to a conflict should conduct hostilities in such a way as to allow access to the civilian population is increasingly gaining ground [108]. Still, the problem remains how to prove an intent or a policy behind the fighting.

Having established that under certain circumstances the denial of aid can constitute a crime under international law, we need to ask ourselves what difference this will make in reality. As with international humanitarian law in general, the crucial point is whether the law will be enforced. As States are generally reluctant to comply with their obligations to repress violations of humanitarian law, optimism is not appropriate. While the creation of the ICC is a big step forward, it remains to be seen how effective it will be. It is to be hoped that the Court will consider the wilful impediment of relief supplies not only as starvation, which is specifically mentioned in the Statute, but also as the other crimes discussed in this article, if the necessary conditions are fulfilled.

It is undoubtedly essential to show caution when declaring a certain conduct a crime under international law, in particular where crimes against humanity or genocide are concerned. However, it should not be forgotten that — although not always as obvious or as easy to prove in the reality of armed conflicts — the impact of the denial of humanitarian assistance can be just as strong as massacres "committed with knives".

### Notes

1. See, e.g., Denise Plattner, "Assistance to the civilian population: The development and present state of international humanitarian law", IRRC, No. 288, May-June 1992, pp. 249-263; UNESCO (eds), *Le droit à l'assistance humanitaire*, Actes du Colloque international organisé par UNESCO, Paris, 1995; European Commission (eds), *Law in Humanitarian Crises*, Volume II, Brussels/Luxembourg, 1995.
2. See also the statement in the Nicaragua Judgment of the International Court of Justice: *Military and Paramilitary Activities In and Against Nicaragua*, I.C.J. Reports 1986, paras 97 and 242-243.
3. Geneva Convention relative to the Treatment of Prisoners of War (Third Geneva Convention), Arts 26-32 and 72-75; Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth

Geneva Convention), Arts 23, 55-63 and 108-111.

- 4.** Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Arts 69-71 and 81 (on activities of the ICRC).
- 5.** Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Arts 5.1(b) and (c) and 18.2.
- 6.** Art. 3 common to the four Geneva Conventions; Protocol I, Art. 70.1. Activities of the ICRC are also mentioned in Arts 9/9/9/10 of the Conventions.
- 7.** First Geneva Convention, Art. 27; Protocol I, Arts 64, 70.1 and 81.1; Protocol II, Art. 18.2.
- 8.** Protocol I, Art. 70.1; Protocol II, Art. 18.2.
- 9.** Y. Sandoz, C. Swinarski, B. Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987. On Protocol II, Art. 18.2, see para. 4885, p. 1479, and on Protocol I, Art. 70.1, see para. 2808, p. 820.
- 10.** For international armed conflicts, see Fourth Geneva Convention, Arts 59-61 and 108; Protocol I, Art. 70.2 and 70.3.
- 11.** First Geneva Convention, Art. 27; Fourth Geneva Convention, Arts 59-63, 108 and 109; Protocol I, Arts 64 and 70.3.
- 12.** See the provisions on "grave breaches" of the Geneva Conventions, Arts 50/51/130/147. Also: Statutes of the Nuremberg Tribunal, Art. 6(b); Statutes of the *two ad hoc* Tribunals: ICTY, Arts 2 and 3, and ICTR, Art. 4; and ICC Statute, Art. 8.
- 13.** See Geneva Conventions, Arts 49/50/129/146, which speak only of acts committed by "persons". Also: Statutes of the Nuremberg Tribunal, Art. 6, and of the Tokyo Tribunal, Art. 5; Statutes of the ICTY, Arts 6 and 7, and the ICTR, Arts 5 and 6; and Statute of the ICC, Art. 25.
- 14.** ICTY, *Prosecutor v. Dusko Tadic a.k.a. "Dule": Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, 2 October 1995, Case No. IT-94-1-AR72, para. 70. See Art. 2 common to the Geneva Conventions, Protocol I, Art. 1.4, and Protocol II, Art. 1.
- 15.** ICTY, *Prosecutor v. Dusko Tadic a.k.a "Dule": Opinion and Judgment*, 7 May 1997, Case No. IT-94-1-AR72, para. 573 (emphasis added).
- 16.** Art. 3.I. common to the Geneva Conventions. Fundamental guarantees are also included in Protocol II, Art. 4.
- 17.** See Protocol I, Art. 51.3, and Protocol II, Art. 13.3. The fact that civilians may include those who at one time bore arms was confirmed, *inter alia*, in the *Vukovar* decision of the ICTY: *The Prosecutor v. Mrksic, Radic, Sljavančanin and Dokmanovic: Rule 61 Decision*, 3 April 1996, IT9513R61, para. 29.
- 18.** The first time that the criminality of such violations was asserted by an international tribunal was the *Decision on the Appeal on Jurisdiction* in the *Tadic* case, op. cit. (note 14). Further evidence in support of that view is given by the Statute of the ICTR, which confers jurisdiction on the Court with respect to serious violations of common Art. 3 and Protocol II, Art. 4, and by the Statute of the ICC, Art. 8.2(c) and (e).
- 19.** 1996 Draft Code of Crimes against the Peace and Security of Mankind, Report of the International Law Commission on the work of its forty-eighth session 6 May–26 July 1996, 51 UN GAOR Supp. (No. 10), UN Doc. A/51/10, p. 96.
- 20.** Murder in internal armed conflicts is recognized as a war crime in, *inter alia*, the Statutes of the ICTR, Art. 4(a), and of the ICC, Art. 8.2(c)(i), as well as in the jurisprudence of the ICTY and the ICTR.
- 21.** Geneva Conventions, Arts 50/51/130/147.

- 22.** Art. 3.I(a) common to the Geneva Conventions and Protocol II, Art. 4.2(a).
- 23.** ICTY, *The Prosecutor v. Zejnil Delalic, Zdravko Mucic a.k.a. "Pavo", Hazim Delic, Esad Landzo a.k.a. "Zenga"*, Judgment, 16 November 1998, Case No. IT-96-21-T, para. 422.
- 24.** See, e.g., *Paper prepared by the ICRC on Article 8, paragraph 2(a), of the Rome Statute of the ICC*, Preparatory Commission for the ICC, 19 February 1999, PCNICC/1999/WGEC/INF.1 (with references to case law).
- 25.** See, e.g., *Delalic Judgment, op. cit.* (note 23), para. 424, and ICTR, *The Prosecutor v. Jean Paul Akayesu*, Judgment, 2 September 1998, Case No. ICTR-96-4-T, para. 589 (considering murder as a crime against humanity).
- 26.** Jean S. Pictet (ed.), *Commentary, IV, Geneva Convention relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva, 1958, ad Art. 147, p. 597.
- 27.** "Nazi and Nazi Collaborators (Punishment) Law, 5710/1950, Section I (b)", in E. Lauterpacht (ed.), *International Law Reports*, Vol. 36, Butterworths, London, 1968, p. 7.
- 28.** Rüdiger Wolfrum, "Enforcement of international humanitarian law", in Dieter Fleck (ed.), *Handbook of Humanitarian Law in Armed Conflict*, Oxford University Press, 1995, p. 532.
- 29.** See, e.g., ICRC Commentary on Protocol I, *op. cit.* (note 9), Art. 85, para. 3474, p. 994.
- 30.** *Delalic Judgment, op. cit.* (note 23), para. 439.
- 31.** ICRC Commentary on the Fourth Geneva Convention, *op. cit.* (note 26), Art. 147, p. 597.
- 32.** ICTY, *The Prosecutor v. Dragan Nikolic, a.k.a. "Jenki" Nikolic*, Indictment, 4 November 1994, Case No. IT-94-2; ICTY, *The Prosecutor v. Milorad Krnojelac, a.k.a. "Mico"*, Indictment, 6 June 1997, Case No. IT-97-25-I; *Delalic Judgment, op. cit.* (note 23).
- 33.** See, e.g., the various Reports by the Special Rapporteur of the Commission on Human Rights for the Former Yugoslavia, in particular: *Sixth periodic report on the situation of human rights in the territory of the former Yugoslavia*, submitted by Mr Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, pursuant to paragraph 32 of Commission resolution 1993/7 of 23 February 1993. UN Doc. E/CN.4/1994/110 (21 February 1994), Chapter I.I.: Human rights issues arising from interference with humanitarian aid, pp. 12-14.
- 34.** See, e.g., *Delalic Judgment, op. cit.* (note 23), para. 443.
- 35.** The fact that torture also constitutes a war crime in non-international armed conflicts is recognized, *inter alia*, in the Statutes of the ICTR, Art. 4(a), and of the ICC, Art. 8.2(c)(i), as well as in the jurisprudence of the ICTY and the ICTR.
- 36.** 1984 Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment. Art. 1 (2) of this Convention contemplates that the term "torture" may have a broader application under other international instruments.
- 37.** *Delalic Judgment, op. cit.* (note 23), para. 459; ICTY, *The Prosecutor v. Furundzija*, Judgment, 10 December 1998, Case No. IT-95-17/1-PT, para. 160; *Akayesu Judgment, op. cit.* (note 25), para. 593. There exists, however, some controversy as to whether the specific purpose and an official capacity or connivance are still necessary for the crime of torture. The definition of torture as a crime against humanity in the ICC Statute eliminated these two requirements (Art. 7.2(e)), and the current discussions between States on the elements of war crimes under the Statute of the ICC give an indication that at least the "official" requirement may be eliminated from the definition. See *Discussion paper proposed by the Coordinator of the Preparatory Commission for the ICC*, Working Group on Elements of Crimes, 25 February 1999, PCNICC/1999/WGEC/RT.2, p. 2.
- 38.** This was confirmed in the *Delalic Judgment, op. cit.* (note 23), para. 470.

- 39.** *Ibid.*, para. 473.
- 40.** *Ibid.*
- 41.** *Ibid.*, para. 468.
- 42.** *Report of the Special Rapporteur, Mr P. Kooijmans, appointed pursuant to the Commission on Human Rights*, UN Doc. Res. 1995/33, E/CN.4/1986/15, 19 February 1986, para. 119.
- 43.** *Delalic Judgment, op. cit.* (note 23), para. 442.
- 44.** "Wilfully causing great suffering or serious injury to body or health" was defined by the ICTY as "an act or omission that is intentional, being an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury. It covers those acts that do not meet the purposive requirements for the offence of torture, although clearly all acts constituting torture could also fall within the ambit of this offence." *Furundzija Judgment, op. cit.* (note 37), para. 511. See also *Delalic Judgment, op. cit.* (note 23), para. 442.
- 45.** See, e.g., ICRC Commentary on the Fourth Geneva Convention, *op. cit.* (note 26), ad Art. 147, p. 599; *Delalic Judgment, op. cit.* (note 23), para. 509.
- 46.** *Ibid.* See also *Furundzija Judgment, op. cit.* (note 37), paras 542-544.
- 47.** *Delalic Judgment, op. cit.* (note 23), para. 1119.
- 48.** Common Art. 3.1(c), Protocol I, Art. 75.2(b), and Protocol II, Art. 4.2(e).
- 49.** ICTR Statute, Art. 4(e), ICC Statute, Art. 8(2)(b)(xxi) and (c)(ii). See also 1996 ILC Draft Code of Crimes, *op. cit.* (note 19), Art. 20(c) and (f).
- 50.** ICRC Commentary on Protocol I, *op. cit.* (note 9), ad Art. 54, para. 2089, p. 653. "The term 'starvation' means the action of subjecting people to famine, i.e., extreme and general scarcity of food." ICRC Commentary on Protocol II, *op. cit.* (note 9), ad Art. 14, para. 4791, p. 1456.
- 51.** *Tadic Appeal on Jurisdiction, op. cit.* (note 14), para. 128. The ICRC Commentary on the Conventions states that the list of grave breaches is not to be taken as exhaustive and that criminality may extend beyond grave breaches in any case. *Op. cit.* (note 26), ad Art. 50, p. 371.
- 52.** ICC Statute, Art. 8.2(b)(xxv).
- 53.** Protocol II, Art. 14.
- 54.** Art. 10 of the ICC Statute: "Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute."
- 55.** Deliberate impeding of the delivery of food and medical supplies to the civilian population in internal armed conflicts was condemned as a violation of humanitarian law by the Security Council on many occasions. It was also stressed that "those who commit or order the commission of such acts will be held individually responsible in respect of such acts" (S/RES/794 (1992), para. 5, on Somalia). See also S/RES/787 (1992), para. 7, on Bosnia-Herzegovina. With regard to Bosnian enclaves, the President of the Security Council declared that "the deliberate impeding of the delivery of food and humanitarian relief essential for the survival of the civilian population constitutes a violation of the Geneva Convention of 1949 and the Council is committed to ensuring that individuals responsible for such acts are brought to justice" (S/25334, 25 February 1993). Furthermore, the General Assembly and an Independent Commission of Experts called for those responsible for the impediment of humanitarian assistance in Sudan and starvation in Rwanda, respectively, to be "brought to justice" (UNGA res. 52/140 (1997), para. 2; Interim Report of the Commission of experts on the evidence of grave violations of international humanitarian law in Rwanda, S/1994/1125, paras 107 and 150).
- 56.** ICRC Commentary on Protocol I, *op. cit.* (note 9), Art. 54, para. 2090, p. 653.

- 57.** "Moreover, if it turned out to be impossible to send sufficient aid for that part of the population of a besieged or encircled area that is particularly weak, the principle of the prohibition of starvation should henceforth dictate the evacuation of such persons." ICRC Commentary on Protocol I, *op. cit.* (note 9), ad Art. 54.1, para. 2096, p. 654.
- 58.** ICRC Commentary on the Fourth Geneva Convention, *op. cit.* (note 26), ad Art. 33, p. 225.
- 59.** ICRC Commentary on Protocol II, *op. cit.* (note 9), ad Art. 4.2, para. 4536, p. 1374.
- 60.** Art. 4(b).
- 61.** Art. 22.2(a); Art. 20(f)(ii).
- 62.** See, e.g., Statutes of the ICTY, Art. 5, of the ICTR, Art. 3, and of the ICC, Art. 7.1 and 7.2(a). See also the 1996 ILC Draft Code of Crimes, *op. cit.* (note 19), Art. 18, and the jurisprudence of the ICTY and the ICTR.
- 63.** Although required in the Nuremberg Charter, such a connection to an armed conflict is now no longer considered to be necessary. The ICTR and ICC Statutes do not stipulate such a requirement. It was, however, reintroduced in the ICTY Statute, but the ICTY Appeal Chamber confirmed in the *Tadic* case that the crime had been defined more narrowly than necessary: "(...) customary international law no longer requires any nexus between crimes against humanity and armed conflict (...)". (*Tadic* Appeal on Jurisdiction, *op. cit.* (note 14), para. 78). Regarding discriminatory intent, there still exists some controversy around the issue whether an offender must have a reason linked to some character trait of the victim, and in particular, whether this ground for commission is relevant to all crimes against humanity or only to the category of persecutions. Although the Trial Chamber in the *Tadic* case adopted the requirement of discriminatory intent for all crimes against humanity, it confirmed that this was not necessary under customary international law (paras 652 and 716). Furthermore, the majority of States decided that murder and other crimes are so grave that the ground for commission is irrelevant and excluded this requirement from the ICC Statute.
- 64.** See, e.g., 1996 ILC Draft Code of Crimes, *op. cit.* (note 19), pp. 94-95. The International Law Commission used the term "large scale" instead of "widespread" to clarify that a territorial extension of acts is not necessarily needed.
- 65.** *Ibid.*, p. 94. The wording "against any civilian population" included in most definitions of crimes against humanity has sometimes been interpreted as demanding systematic and widespread action. However, the decision in the *Tadic* case stipulated that "(...) it is now well established that the requirement that the acts be directed against a civilian "population" can be fulfilled if the acts occur either on a widespread basis or in a systematic manner. Either one of these is sufficient to exclude isolated or random acts". *Tadic* Judgment, *op. cit.* (note 15), para. 653. Furthermore, the ICC Statute includes the customary formulation "widespread or systematic" in its Article 7(1).
- 66.** *Public Prosecutor v. Menten, Netherlands. International Law Reports*, *op. cit.* (note 27), Vol. 75, pp. 362-363.
- 67.** 1996 ILC Draft Code of Crimes, *op. cit.* (note 19), Art. 18. Neither the ICTY nor the ICTR Statute make any reference to governmental policy. The Trial Chamber of the ICTY confirmed that a State policy is no longer required (*Tadic* Judgment, *op. cit.* (note 15), para. 654). Furthermore, States recently adopted the wording "pursuant to or in furtherance of a State or organizational policy" for Art. 7.2(a) of the Statute of the ICC.
- 68.** *Tadic* Judgment, *op. cit.* (note 15), para. 653.
- 69.** While personal motives for acts resulting in assistance not reaching needy persons may be present, they should not, however, be the sole motivation for the act. See, e.g., *Tadic* Judgment, *ibid.*, para. 658, where several German cases arising from the Second World War are mentioned.
- 70.** Jordan Paust, "Threats to accountability after Nuremberg: Crimes against humanity, leader responsibility and national fora", *New York Law School Journal of Human Rights*, Vol. 12, 1995, p. 60.
- 71.** *Vukovar* Decision, *op. cit.* (note 17), para. 30. This was confirmed in the *Tadic* Judgment, *op. cit.* (note

15), para. 649.

**72.** *Tadic* Judgment, *op. cit.* (note 15), para. 657.

**73.** *Ibid.*

**74.** *Ibid.*

**75.** 1996 ILC Draft Code of Crimes, *op. cit.* (note 19), p. 97.

**76.** Art. 7.2(b).

**77.** Art. 7.2(e).

**78.** *Akayesu* Judgment, *op. cit.* (note 25), para. 593. See also the definitions of torture as a war crime in the *Delalic* and *Furundzija* Judgments, note 37.

**79.** See Art. 10 of the ICC Statute.

**80.** See M. Cherif Bassiouni, *Crimes against Humanity in International Criminal Law*, Nijhoff Publishers, Dordrecht, 1992, p. 318.

**81.** Art. 7.2(g).

**82.** Art. 7.1(h).

**83.** See, e.g., *Tadic* Judgment, *op. cit.* (note 15), para. 711.

**84.** Even though the ICTY Statute contains the conjunctive "and" (Art. 5(h) mentions "persecutions on political, racial and religious grounds"), the Trial Chamber ruled that the discriminatory bases should be read independently of each other. *Tadic* Judgment, *op. cit.* (note 15), para. 713.

**85.** *Ibid.*, para. 697. The last draft of the ICC Statute before the Rome Conference included the options that all crimes had to be based on discriminatory grounds, and that persecutions had to be committed in connection with other crimes within the jurisdiction of the Court. Unfortunately, instead of excluding both possibilities as not in conformity with customary international law, a consensus was found that kept a link to other crimes or acts: "Persecution (...) in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court". ICC Statute Art. 7.1(h). However, this will in practice not make a big difference, as in most cases there will be a link to another act.

**86.** *Ibid.*, para. 699.

**87.** The Trial Chamber referred to several cases of the Nuremberg Tribunal. See *Tadic* Judgment, *op. cit.* (note 15), para. 707.

**88.** Art. 7.1(k).

**89.** *The Charter and Judgement of the Nurnberg Tribunal: History and Analysis*, Memorandum submitted by the Secretary-General, UN Sales No. 1949.V.7, 1949, p. 67.

**90.** *Nikolic* Indictment, *op. cit.* (note 32), para. 24.1. See also other cases cited in note 32.

**91.** The Advisory Opinion of the I.C.J. on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, of 28 May 1951, confirmed that the prohibition of genocide is part of customary international law. *I.C.J. Reports* 1951, p. 12.

**92.** Convention on the Prevention and Punishment of the Crime of Genocide, of 9 December 1948, Art. 2.

**93.** Arts 4/2/6 respectively .

**94.** *Akayesu* Judgment, *op. cit.* (note 25), para. 512.

- 95.** *Ibid.*, paras 513-515.
- 96.** See Art. 3(c) of the Genocide Convention.
- 97.** ICTY, *The Prosecutor v. Radovan Karadzic and Ratko Mladic: Review of Indictment pursuant to Rule 61*, 11 July 1996, Cases No. IT-95-5-R61 and No. IT-95-18-R61, para. 94.
- 98.** *Akayesu Judgment, op. cit.* (note 25), para. 523.
- 99.** *Ibid.*, para. 502.
- 100.** *Ibid.*, para. 504.
- 101.** *Eichmann case, International Law Reports, op. cit.* (note 27), p. 238 (emphasis added).
- 102.** *Ibid.*, pp. 235-236.
- 103.** *Akayesu Judgment, op. cit.* (note 25), para. 506.
- 104.** Nehemiah Robinson, *The Genocide Convention: A Commentary*, Institute of Jewish Affairs, New York, 1960, pp. 63-64.
- 105.** The ICC Statute includes a threshold for war crimes in its Art. 8.1. "The Court shall have jurisdiction in respect of war crimes in particular when committed as a part of a plan or policy or as part of a large-scale commission of such crimes". This should, however, not introduce a new threshold for war crimes but should be interpreted as advice to the Prosecutor to concentrate on the most serious crimes.
- 106.** ICC Statute, Art. 124. This article permits a State to declare that it does not accept the jurisdiction of the Court for a period of seven years with respect to war crimes when they are alleged to have been committed by its nationals or on its territory. Still, following the principle of universal jurisdiction, States are already under an obligation to prosecute or extradite perpetrators regardless of their nationality or where the crime was committed.
- 107.** Art. 33.1.
- 108.** In the case of Somalia, for example, the Security Council demanded a cease-fire throughout the whole country in order to "promote the process of relief distribution". SC res. 794 (1992), 3 December 1992, para. 1.

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