Articles

Classifying Acts as Crimes Against Humanity in the Rome Statute of the International Criminal Court

By Iris Haenen[*]

A. Introduction

The law is a living organism, which is reflected by the ever-evolving landscape of international criminal law. Time and again, conflicts demonstrate the many ways in which human beings can hurt each other. The law must be able to anticipate and react to these cruelties. On the one hand, the law must be specific enough to assure legal certainty and prevent arbitrary convictions; on the other hand, it must be broad and general enough to keep up with developments in real life and cover previously unimagined behavior. Forced marriage is an example of such a criminal phenomenon, which, even though the taking of brides by the victor has for centuries been a common occurrence during conflict situations, has only recently appeared in the international limelight.[1] When the international community is confronted with criminal practices that are not codified in the Rome Statute of the International Criminal Court, it is faced with the daunting task of legally characterizing this conduct: can the act in question be brought within the ambit of the core crimes of the Rome Statute? And if so, how is it best criminalized: as a war crime, a form of genocide, or a crime against humanity?[2]

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[1] Over the past few decades, many conflicts around the world have been marked by the abduction of women and girls who were forced into (conjugal) associations with their captors. A few examples are Sierra Leone (CHRIS COULTER, BUSH WIVES AND GIRL SOLDIERS: WOMEN'S LIVES THROUGH WAR AND PEACE IN SIERRA LEONE (2009)), Cambodia (PEG LEVINE, LOVE AND DREAD IN CAMBODIA: WEDDINGS, BIRTHS, AND RITUAL HARM UNDER THE KHMER ROUGE (2010)), and Uganda (KHRISTOPHER CARLSON & DYAN MAZURANA, FORCED MARRIAGE WITHIN THE LORD'S RESISTANCE ARMY, UGANDA (2008)). The case law of international criminal courts and tribunals, numerous NGO reports and literature demonstrate that the international community strongly condemns this practice and wants to hold perpetrators of these forced marriages criminally responsible (See *inter alia* Prosecutor vs. Brima, Kamara and Kanu, 2008 SCSL-04-16-A, Appeal Judgement (February 22); Prosecutor v. Sesay, Kallon and Gbao, 2009 SCSL-04-15-A, Appeal Judgement (October 26); Case of Nuon Chea, Ieng Sary, Khieu Samphan & Ieng Thirith, 2010 ECCC 002/19-09-2007/ECCC/OCIJ, Closing Order (September 15); Neha Jain, *Forced Marriage as a Crime Against Humanity: Problems of Definition and Prosecution*, 6 JICJ 1013, 1022-1025 (2008); Human Rights Watch, *"We'll kill you if you cry" Sexual Violence in the Sierra Leone Conflict*, January 2003, available at: http://www.hrw.org/reports/2003/01/15/well-kill-you-if-you-cry (last accessed: 27 June 2013).

[2] As of 2017, the International Criminal Court will also exercise jurisdiction over the crime of aggression, *see* Resolution 6 of the Review Conference, Jun. 11, 2010, C.N. 651.2010.

This article focuses on the latter category of crimes and its purpose is to analyze when a certain act can be classified as a crime against humanity.[3] In order to answer this question, it is important to understand what justifies criminalization in the first place. Therefore, the first part of this article focuses on the doctrinal foundations of international criminalization: what characteristics raise conduct to the level of an international crime in the first place? Over the past few years, several authors have made an effort to formulate a doctrinal basis for the international criminalization process and these theories will be discussed in section B. Next, the taxonomy of international criminalization and the structure of crimes against humanity will be highlighted (section C). After the required knowledge about international criminalization has been acquired, a road map pertaining to the criminalization of acts as crimes against humanity is presented in section D. For this purpose, the taxonomy of Article 7 of the Rome Statute, the provision in which crimes against humanity are defined, is analyzed. Subsequently, the requirements that an act must fulfill in order to amount to an inhumane act will be discussed, with a special focus on the scope of the category of 'other inhumane acts'.

B. Doctrinal Foundations of International Criminalization

I. The Advancement of the Core Crimes: A Short Overview

International criminalization of individual conduct is a recent phenomenon that only really started evolving from the 1990s onwards.[4] Before the establishment of the *ad hoc* International Criminal Tribunals for the Former Yugoslavia and Rwanda (ICTY and ICTR), international law had a mainly repressive function in criminal matters: criminal aspects of international law aimed at allowing states to better regulate the joint repression of certain (mainly transnational) offences, such as human trafficking and counterfeiting. These so-called treaty-crimes, which are part of the field of law known as international criminal law in the broad sense, do not create direct individual criminal responsibility under international law.[5] The first real developments with regard to international criminal law in the strict sense–that is the substantive law concerning the crimes for which international

[3] This article focuses on crimes against humanity only. The classification of conduct as a war crime, form of genocide or aggression falls outside of the scope of this article.

[4] *See* ROBERT CRYER, PROSECUTING INTERNATIONAL CRIMES: SELECTIVITY AND THE INTERNATIONAL CRIMINAL LAW REGIME 9-72 (2005).

[5] Instead, states are obliged by treaty to criminalize the offences in their domestic laws Paola Gaeta, *International criminalization of prohibited conduct*, *in* OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 63, 63-65, 69-70 (Antonio Cassese ed., 2009); and Robert Cryer, *The doctrinal foundations of international criminalization*, *in* INTERNATIONAL CRIMINAL LAW. VOLUME I: SOURCES, SUBJECTS AND CONTENTS 107, 109 (Mahmoud Cherif Bassiouni ed., 2008).

law does impose direct individual criminal liability, also known as 'core crimes'[6]–took place after World War II, with the Nazi atrocities that were committed during this conflict acting as the catalyst for the crystallization of these core crimes.[7] The end of the war resulted in the drafting of three important legal instruments: the London Charter which established the Nuremberg International Military Tribunal (IMT), the Tokyo Charter creating the International Military Tribunal for the Far East (IMTFE), and Control Council Law No. 10, which formed the legal basis for the war crime trials in the occupied zones. Both the London Charter as well as the Tokyo Charter contained provisions criminalizing aggression (referred to as 'crimes against peace'), war crimes and crimes against humanity. This list of international crimes also features in Control Council Law No. 10.[8] In 1947, the UN General Assembly established a commission known as the International Law Commission (ILC), authorizing it to prepare a draft code of offences against the peace and security of mankind.[9] The trauma of World War II also set the stage for further developments on the international level and resulted in the promulgation of a set of pivotal conventions: the 1948 Genocide Convention and the Four Geneva Conventions of 1949.[10]

This state of flux was temporarily hampered by the outbreak of the Cold War, but after the end of this epoch of military and political tension, the core crimes developed considerable momentum in the 1990s with the creation of the ICTY and ICTR.[11] Both *ad hoc* tribunals were given jurisdiction over crimes against humanity, war crimes and genocide. In 1998 the UN Diplomatic Conference of Plenipotentiaries on the establishment of an

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[6] Marko Milanović, *Is the Rome Statute binding on individuals? (And why we should care)*, 9 JICJ 25, 28 (2011); and Cryer, *supra* note 5, at 108-109. The core crimes, i.e. those crimes over which the ICC and other international criminal courts and tribunals have jurisdiction, refer to the crimes of genocide, war crimes, crimes against humanity and aggression.

[7] MAHMOUD CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW, 253 (1999); Cryer, *supra* note 5, at 119-120. The first initiatives regarding criminalization of core international crimes date back to the 1919 report of the Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties and to the 1919 Treaty of Versailles after the First World War (*see* CRYER, *supra* note 4, at 32-35).

[8] GERHARD WERLE, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 15 (2009).

[9] The ILC was established on 21 November 1947, by UN General Resolution 174(II) and directed to formulate the principles of international law recognized in the Charter and the judgment of the Nuremberg Tribunal and to prepare a draft code of offences against the peace and security of mankind. See U.N. General Assembly [UNGA], Establishment of an International Law Commission (Res 174(II)) (Nov. 21, 1947); U.N. General Assembly [UNGA], Formulation of the principles recognized in the Charter of the Nüremberg Tribunal and in the judgment of the Tribunal (Res 177(II)) (Nov. 21, 1947).

[10] Supplemented by the 1977 Additional Protocols I and II. A third additional protocol was adopted in 2005. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Jun. 8, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), Dec. 8, 2005.

[11] Cryer, *supra* note 5, at 131.

International Criminal Court was held in Rome. The Rome Statute, which was negotiated during this Conference, gives the International Criminal Court (ICC) jurisdiction over genocide, crimes against humanity, war crimes and the crime of aggression.[12] During the Rome Conference there was a relatively large amount of (indirect) input from (international) criminal law experts–which is rather exceptional seeing as in the process of drawing up a treaty, the participation of lawyers is usually more the exception than the rule.[13] Delegates at Rome, many of whom were not experts in (international) criminal law, were able to draw upon the work done by committees such as the ILC, the 1995 Ad Hoc Committee and the 1996 Preparatory Committee. These committees had done preparatory work and had prepared the consolidated text of the Draft Rome Statute.[14] The experienced former members of these committees also coordinated most of the working groups during the negotiations in Rome. Nevertheless, the delegates had to opt for consensus, presumably at the cost of a consistent legal method, which, in view of the difficulties of reconciling different legal systems, seems to have been the only option for the creation of a widely accepted statute.[15]

As the above demonstrates, the evolutionary process of international criminalization lacks any form of systematization or method and is best characterized as a series of *ad hoc* responses to specific events.[16] Created and amended in reaction to atrocities committed during various conflicts and continuously put to the test by man's ingenuity when it comes to inflicting harms upon others, the special part of international criminal law has traditionally not been founded on elaborate, crystallized theories. There exists no coherent, generally agreed-upon set of principles that may be used to justify criminalization: international crimes are in part based on 'intuitive-moralistic' and legal-

[12] The ICC will have jurisdiction over the crime of aggression once the States Parties have activated the jurisdiction, which will happen after January 1, 2017, see Resolution 6 of the Review Conference, *supra* note 2.

[13] The legislative process on the international level differs greatly from that on the national level. The adoption of legislation by a state is usually preceded by a lengthy procedure of preparatory work by legislative experts, input from Bar Associations, professional groups and non-legal consultants, debates in the Upper and Lower Houses of Parliament, resulting in revisions which are then followed by more debates. In contrast, generally only few experts are involved in the process of drawing up a treaty. On the international level diplomats are the ones that conduct treaty negotiations and these diplomats are not necessarily experts in the subject at hand. *See* MAHMOUD CHERIF BASSIOUNI, THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT. VOLUME 1: INTRODUCTION, ANALYSIS AND INTEGRATED TEXT 91 (2005).

[14] *Id.* at 66-67, 72.

[15] *Id.* at 92.

[16] As stated, the Genocide Convention–even the term 'genocide' itself (*see* RAPHAËL LEMKIN, AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS, 79 (1944))–was a direct result of the atrocities committed during World War II, which also influenced the content of the 1949 Geneva Conventions. The Vietnam War, in turn, influenced additional Protocol I (*see* Cryer, *supra* note 5, at 119-120; and BASSIOUNI, *supra* note 7, at 253.

political considerations.[17] But seeing as international criminal law is a developing field of law and since it is not inconceivable that in the future more offences will be brought within the jurisdiction of the ICC,[18] the added value of uncovering the doctrinal foundations of the international criminalization process is self-evident.[19] Several authors have made an effort to reveal such a doctrinal basis. Three of these theories are discussed in the following paragraph.[20] The scholars referred to below focus on international criminal law in the broad sense (i.e. not just the core crimes, but also transnational and treaty-crimes for which international law does not impose individual criminal liability), with the exception of May, who discusses the criminalization of crimes against humanity in particular.[21]

II. An Inductive, a Descriptive and a Normative Approach: Bassiouni, Cassese and May

Mahmoud Cherif Bassiouni was one of the first scholars who set forth a doctrinal basis for the international criminalization policy, basing his theory on an empirical study he conducted.[22] Analyzing all relevant sources of international law, Bassiouni selected all conventions that in one way or another penalize or oblige States to penalize certain behavior. This exercise resulted in a grand total of 267 conventions. Going through these conventions, he identified a total number of twenty-eight international crimes.[23] From

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[17] Ben Saul, *Reasons for defining and criminalizing 'terrorism' in international law*, The University of Sydney, Sydney Law School, Legal Studies Research Paper no. 08/121, 208, 210, 216 (2008); Immi Tallgren, *The sensibility and sense of international criminal law*, 13 EJIL 561, 564 (2002).

[18] *See* for example, Resolution E attached to the Final Act of the UN Diplomatic Conference of Plenipotentiaries on the establishment of an International Criminal Court, Jul. 17, 1998, UN Doc. A/CONF.183/10, which provides for the possibility of including crimes of terrorism and drug crimes in the Rome Statute. This means that it is possible that in the future, these crimes will become part of the category of core crimes, and thus give rise to direct individual liability under international law. *See* Cryer, *supra* note 5, at 110.

[19] LARRY MAY, CRIMES AGAINST HUMANITY: A NORMATIVE ACCOUNT 21, 64-68 (2005), also acknowledges–indeed stresses–the importance of uncovering the theoretical foundations of international criminalisation, see section B.II of this paper.

[20] For a fourth theory on international criminalization, *see* Win-chiat Lee, *International crimes and universal jurisdiction*, *in* ICL & PHIL., 15, 15-38 (Larry May & Zachary Hoskins eds., 2010).

[21] These theories concern the international criminalisation of crimes *sui generis* or categories of crimes, such as crimes against humanity, war crimes, but also slavery and piracy. The theories therefore do *not* concern the labelling of specific acts (such as murder or rape) as crimes against humanity (with the exception of May's normative theory).

[22] Cryer, *supra* note 5, at 133.

[23] For an overview see Cryer, *supra* note 5, at 134-135. These are international crimes in the broad sense, i.e. including treaty crimes that do not create direct individual criminal responsibility. Bassiouni conducted this empirical study for the first time in 1983. In that year, he classified twenty international crimes. *See* Mahmoud Cherif Bassiouni, *The penal characteristics of conventional international criminal law*, 15 CASE WEST. RES. J. OF INT'L

these offences he then derived common features that he translated into five alternative criteria that in his opinion are applicable to the policy of international criminalization. Bassiouni concluded that each of the twenty-eight offences was internationally criminalized because the conduct either:

> 1. (...) affects a significant international interest, in particular, if it constitutes a threat to international peace and security;
> 2. (...) constitutes an egregious conduct deemed offensive to the commonly shared values of the world community, including what has historically been referred to as conduct shocking to the conscience of humanity;
> 3. (...) has transnational implications in that it involves or effects more than one state in its planning, preparation, or commission, either through the diversity of nationality of its perpetrators or victims, or because the means employed transcend national boundaries;
> 4. (...) is harmful to an internationally protected person or interest; or
> 5. (...) violates an internationally protected interest but it does not rise to the level required by (1) or (2), however, because of its nature, it can best be prevented and suppressed by international criminalization.[24]

A second scholar who has studied the international criminalization process was Antonio Cassese. Instead of departing from distinct classes of international or transnational crimes, Cassese adopted a more descriptive approach and formulated a comparable, albeit narrower definition of international criminalization.[25] He stated that an international crime results from the cumulative presence of the following elements: (1) an international crime violates international customary rules, either unwritten or codified in treaties; (2) these rules protect values that are considered important by the whole international community, they are binding and enshrined in a gamut of international instruments; (3) there exists a

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L. 27, 27-29 (1983). In 1999, he repeated the exercise and identified a total of twenty-five international crimes. *See* MAHMOUD CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 253 (1999).

[24] Cryer, *supra* note 5, at 133.

[25] Pursuant to Cassese's narrower definition, piracy, trafficking in drugs, arms and humans, money laundering, slave trade and apartheid are not international crimes. See ANTONIO CASSESE, INT'L CRIM. L. 12-13 (2008). These offences are classified as international crimes under Bassiouni's alternative criteria.

universal interest in repressing these crimes, which, in principle, results in universal jurisdiction;[26] and finally (4) the perpetrators of international crimes do not enjoy functional immunity, which means that *de facto* or *de iure* state officials can be held accountable for committing international crimes.[27]

A different approach to the international criminalization process is taken by Larry May. Whereas Cassese and Bassiouni give a descriptive answer to the question 'what are international crimes?', summing up the criteria that are used in the process of identifying them, May approaches international criminalization and especially the legitimacy of international prosecutions for crimes against humanity from a predominantly normative point of view. May stresses the importance of uncovering the theoretical foundations of international criminalization, so that a clear basis for identifying international crimes can be developed.[28] He contends that three basic moral principles legitimize criminalization in general, that is on both the national as well as the international level: the principles of legality, harm[29] and proportionality.[30] If a criminal rule does not adhere to these three basic notions, it is not morally legitimate and its enforcement cannot be justified.[31] However, May argues that *international* criminalization and prosecutions require further moral justifications. In his view, these justifications are provided by two additional normative principles of international criminal law: the security principle and the international harm principle. The security principle makes prosecution before international criminal courts and tribunals possible: when a state deprives its own citizens of physical security or subsistence, or when it fails to protect its citizens from violations of physical security or subsistence, a state loses its claim to sovereignty and the international community can intervene in the state's internal affairs.[32] This intervention can take the form of prosecution of that state's subjects before international criminal bodies: by harming or not protecting its people from harm, a state has also lost its right to exclusive

[26] *Id.* at 11.

[27] Cassese points out that some senior state officials, such as heads of state, may nevertheless enjoy personal immunity while they are in office. See *id.* at 12. However, in a recent decision of ICC Pre-Trial Chamber I in the case against the President of Sudan, Omar Al Bashir, the Pre-Trial Chamber ruled that personal immunity of former or sitting heads of state cannot be invoked to oppose a prosecution by an international court. *See* The Prosecutor v. Omar Hassan Ahmad Al Bashir, 2009 ICC-02/05-01/09, Decision pursuant to Article 87(7) of the Rome Statute on the failure by the Republic of Malawi to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir (Dec. 12, 2011) at para. 36.

[28] MAY, *supra* note 19, at 21, 64-68.

[29] It is legitimate to criminalise an act when it causes (at least a certain amount of) harm–defined as a 'setback of interests'–and when criminalisation is aimed at the prevention of this harm. *See id.*, at 66.

[30] The principle of proportionality requires that the punishment fits the crime. *See id.* at 67.

[31] *Id.* at 65-67.

[32] *Id.* at 68-69.

adjudication.[33] However, the security principle alone is not enough to justify international criminalization and prosecution.[34] The required additional justification is found in what May calls the international harm principle. To put it briefly, this principle implies that crimes which are group-based–because they are either perpetrated by a group (which includes state involvement) or victimize a group–violate a strong interest of the international community and in some cases even humanity as a whole. And because this group-based harm damages humanity, the conduct is raised to the status of an international crime.[35] The group-based nature of the victim–that is when crimes harm a large group of victims–makes a crime widespread. The group-based nature of the perpetrator, on the other hand, makes a crime systematic.[36] In this way, the international harm principle recognizes that international crimes (and crimes against humanity in particular) are those crimes that are either widespread or systematic and so egregious that they harm humanity.[37] Summarizing May's argument: international criminalization and prosecution are legitimate when the conduct in question violated a security interest of the victim and somehow harms an interest of the world community.[38]

The three theories described form a doctrinal basis for the international criminalization process. They advance criteria that may be used to justify the creation of crimes under international (criminal) law. Although the approaches taken by the authors differ, the outcomes of their studies are similar: there are certain universal values that the international community holds in such high regard that violation of these values warrant international criminalization. Crimes against humanity were criminalized because they constitute a threat to international peace and security and because they shock the conscience of mankind–they therefore rise to the level required by Bassiouni's first and second criterion applicable to the policy of international criminalization.[39] Crimes against humanity shock the conscience of mankind because they are contrary to universal norms. The notion of 'shocking the conscience of mankind', therefore, is linked to the universality of certain values.[40] May's normative approach also clearly reflects this value-based

[33] *Id.* at 72, 75, 80.

[34] *Id.* at 70.

[35] *Id.* at 80-95.

[36] *Id.* at 81-82, 84-90.

[37] *Id.* at 80, 82.

[38] *Id.* at 107.

[39] As do the other three core crimes, see Rome Statute of the International Criminal Court, Preamble (2) (3), Jul. 17, 1998, 2187 U.N.T.S. 90.

[40] *See* ROBERT CRYER, HAKAN FRIMAN, DARRYL ROBINSON & ELIZABETH WILMSHURST, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE, 71 (2010); Gaeta, *supra* note 5 at 66; Cryer, *supra* note 5, at 133, 138.

justification for international criminalization: when an act violates a strong interest of the international community or humanity as a whole and thereby harms humanity, the conduct is raised to the status of an international crime.[41] Cassese includes in his characterization of international crimes violations of international customary rules that protect values that are considered binding and important by the whole international community.[42] All three theories thus put emphasis on the violation of universal values.

The concept of universal values has had to endure a fair amount of opposition. Some have argued, for example, that international criminal law is a Western edifice that is imposed on other societies.[43] The fact, however, that every state in the world has ratified the Geneva Conventions[44] provides evidence to the contrary and so does the repeated and unanimous condemnation of genocide, war crimes, aggression and crimes against humanity by the UN General Assembly.[45] As was pointed out by Leila Sadat, Chinese, Islamic as well as Hindu traditions "underscore the universal values enshrined in the prohibition of (...) crimes that shock the conscience of mankind."[46] And it is, in the words of Paola Gaeta, "on account of the values they protect that these crimes (i.e. the core crimes; IH) are truly international; it is because of the importance of these values that the international community directly criminalizes them".[47]

[41] MAY, *supra* note 19, at 80-95.

[42] ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 11 (2008).

[43] *See* references in CRYER, FRIMAN, ROBINSON & WILMSHURST, *supra* note 40 at 38. *See e.g.* remarks made by the Libyan delegation during the 6th plenary meeting held during the Rome Conference: "Western values and legal systems should not be the only source of international instruments. Other systems were followed by a large proportion of the world's population", Summary record of the 6th plenary meeting held during the Rome Conference, Jun. 17, 1998, UN Doc. A/CONF.183/SR.6, Nov. 20, 1998, para. 83.

[44] The same cannot be said with regard to Protocol I additional to the Geneva Conventions which concerns the protection of victims of international armed conflicts: this Protocol is less broadly ratified. See CRYER, FRIMAN, ROBINSON & WILMSHURST, *supra* note 40, at 53.

[45] CRYER, FRIMAN, ROBINSON & WILMSHURST, *supra* note 40, at 38.

[46] Leila Sadat, *The effect of amnesties before domestic and international tribunals: law, morality, politics*, *in* ATROCITIES AND INTERNATIONAL ACCOUNTABILITY 225, 229 (Edel Hughes, William Schabas & Ramesh Thakur eds., 2007). Saul also opines that consensus has emerged on core international crimes, irrespective of cultural differences between States. See Saul, *supra* note 17, at 208, 211.

[47] Gaeta, *supra* note 5, at 66.

C. Taxonomy of Crimes Against Humanity

I. The Criminalization of Crimes Against Humanity

In 1997, the Preparatory Committee, established by the UN General Assembly in 1995 and charged with drafting a consolidated text of a statute for the Rome Conference,[48] had agreed that the prospective international criminal court ought to deal only with crimes that are of the most serious concern to the international community as a whole.[49] As remarked by a European candidate, the ICC was not created 'as a panacea for all ills'.[50] This notion of subsidiarity is reflected by the preamble of the Rome Statute, and more specifically with regard to crimes against humanity by the ICC Elements of Crimes (EoC) in the introductory provision to this core crime:

> Since article 7 pertains to international criminal law, its provisions, consistent with article 22, must be strictly construed, taking into account that crimes against humanity as defined in article 7 are among the most serious crimes of concern to the international community as a whole, warrant and entail individual criminal responsibility, and require conduct which is impermissible under generally applicable international law, as recognized by the principal legal systems of the world.[51]

[48] U.N. General Assembly [UNGA], Establishment of an international criminal court, Dec. 18, 1995, UNGA Resolution 50/46 of 11 December 1995; see also BASSIOUNI, *supra* note 13, at 36.

[49] Although the general idea was that the crimes which were to be included in the Rome Statute should be the most serious crimes already established under customary international law, in the end crimes which were not (yet) part of customary international law were also included in the Statute. See Cryer, *supra* note 5, at 107, 118; and Valerie Oosterveld, *Sexual slavery and the International Criminal Court: advancing international law*, 25 MICHI. J. OF INT'L L. 605, 615 (2004); Herman von Hebel, *The making of the Elements of Crimes*, *in* THE INTERNATIONAL CRIMINAL COURT. ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 3, 5 (Roy Lee ed., 2001)). Certain enumerated crimes expand customary international law, in the sense that they are (or at least *were* at the time of codification in the Statute) broader than customary international law, examples are sexual slavery, forced pregnancy and apartheid, see Antonio Cassese, *Crimes against Humanity, in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, VOLUME I 353, 376 (Antonio Cassese, Paola Gaeta & John Jones eds., 2002); and ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW, 126 (2008). Some delegates also explicitly stated that they believed the Rome Statute could advance international law. See Valerie Oosterveld, *Sexual slavery and the International Criminal Court: advancing international law*, 25 MICH. J. OF INT'L L. 605, 623, 625 (2004). In other words: there was no consensus among delegates with regard to the customary nature of crimes to be included in the Statute. *See also* Milanović, *supra* note 6 at 25, 32, footnote 25.

[50] Darryl Robinson, *The elements of crimes against humanity*, in THE INTERNATIONAL CRIMINAL COURT. ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 57, 70 (Roy Lee ed., (2001). *See also* Oosterveld, *supra* note 49, at 622-623.

[51] INTERNATIONAL CRIMINAL COURT, ELEMENTS OF CRIMES, art. 7, para. 1 (2011).

Acts that already had been recognized as crimes against humanity in the statutes of other international criminal courts and tribunals, such as the IMT, ICTY and ICTR, were included in the Rome Statute because these particular offences were considered to reflect customary international law. When it came to including 'new' acts as crimes against humanity, i.e. acts which were not included in previous major instruments pertaining to international criminal law, such as the enforced disappearance of persons, the drafters of the Rome Statute considered it important to avoid as much overlap as possible between different inhumane acts, so as to maintain clarity and prevent superfluous crimes.[52] This is evidenced, *inter alia*, by the negations on the inclusion of sexual slavery, both as a war crime and as a crime against humanity. From the outset, the codification of sexual slavery in the Rome Statute enjoyed much support among delegates. Nevertheless, in Rome, during the negotiations concerning this crime, two important issues arose: questions concerning what the differences are between sexual slavery and the broader crime of enslavement on the one hand, and what the differences are between sexual slavery and enforced prostitution on the other hand. Some delegates were concerned that sexual slavery, being a form of enslavement, was completely subsumed under this latter crime and would therefore become superfluous, especially seeing as the sexual elements of sexual slavery could be addressed by charging rape cumulatively with enslavement. However, after several discussions, delegates agreed that rape and enslavement–the two crimes that were traditionally used to prosecute instances of sexual slavery[53]–did not cover the spectrum of harms caused by sexual slavery, and therefore it was decided to list both enslavement and sexual slavery as distinct crimes against humanity.[54]

As regards the second issue, some delegates were concerned about the overlap between sexual slavery and enforced prostitution. The leading question during the debates on this issue was whether sexual slavery should replace the crime of enforced prostitution. Supporters of this proposal concluded that sexual slavery encompasses enforced prostitution and better reflects the reality of the crime. Opponents, i.e. those who remonstrated that both crimes deserved to be included in the Rome Statute, argued on the other hand that enforced prostitution has its own unique elements, especially when committed in peacetime, which make it distinct from sexual slavery.[55] Eventually, opinion

[52] It should be noted that some overlap already existed between crimes recognized under customary international law, such as between the crimes against humanity of murder and extermination. See Oosterveld, *supra* note 49, at 623.

[53] *See e.g.* Prosecutor v. Dragoljub Kunarac *et. al.* (Trial Judgment}, 2001 I.C.T.Y. IT-96-23-T, IT-96-23/1-T (Feb. 22) [hereinafter *Kunarac* Trial Judgement]. In this precedent-setting case, the ICTY considered the crime of enslavement for sexual purposes (NB: enslavement was included in the ICTY Statute; sexual slavery was not).

[54] Oosterveld, *supra* note 49, at 625.

[55] Oosterveld, *supra* note 49, at 620-621.

on this matter remained (and arguably still is) divided and because it was not clear whether scenarios were possible in which an act of enforced prostitution would not also constitute sexual slavery, it was decided to include both crimes in the corpus of positive international criminal law.[56]

The importance of the distinctiveness of crimes was not only discussed with regards to sexual slavery. As a result of the guiding principle that overlap should be avoided, a proposal to include a crime of mass starvation in the list of crimes against humanity did not receive sufficient support because delegates opined that this conduct would most likely fall under the existing crimes of murder and extermination.[57]

II. The Structure of Crimes Against Humanity

Crimes against humanity are codified in Article 7 of the Rome Statute. The first paragraph of this provision contains a list of inhumane acts preceded by a chapeau, which sets out the conditions under which the commission of these acts amounts to a crime against humanity:

> 1. For the purpose of this 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;

[56] Oosterveld, *supra* note 49, at 622; Jain, *supra* note 1, at 1029.

[57] In addition, it was argued that a crime of mass starvation did not have the special recognition in international instruments that other crimes such as apartheid enforced disappearance did have. For apartheid, *see e.g.* Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Nov. 26, 1968, 754 U.N.T.S. 73; International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, A/RES/3068(XXVIII); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Jun. 8, 1977, 1125 U.N.T.S. 3. With regard to enforced disappearance, *see* The Inter-American Convention on Forced Disappearance of Persons, Mar. 28, 1996, O.A.S.T.S. 68, 33 ILM 1429. See Herman von Hebel & Darryl Robinson, *Crimes within the jurisdiction of the court*, *in* THE INTERNATIONAL CRIMINAL COURT. THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS 79, 103 (Roy Lee ed., 1999).

> (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.

The category of acts that constitute crimes against humanity set out in Article 7(1) of the Rome Statute is not exhaustive: any act which is inhumane in nature and character may amount to a crime against humanity (an 'other inhumane act'), provided the chapeau elements are met.[58]

D. A Road Map for the Criminalization of Acts as Crimes Against Humanity

I. Introduction: Options for Criminalization

The theories on international criminalization advanced by Bassiouni, Cassese and May demonstrate that only the most serious crimes warrant international criminalization. This coincides with the intent of the drafters of the Rome Statute and is also affirmed by the text of this Statute and its EoC. More specifically, it is reflected by the definition of crimes against humanity: crimes against humanity are among the most serious crimes of concern to the international community as a whole. Pursuant to Article 7 of the Rome Statute the *condicio sine qua non* for penalizing conduct as a crime against humanity is that the

[58] Prosecutor v. Jean-Paul Akayesu (Trial Judgment), ICTR-96-4-T, Sept. 2, 1998, para. 585 [hereinafter Akayesu Trial Judgement]. With regard to the category of other inhumane acts, the ICTY Trial Chamber in the Blaškić case (Prosecutor v. Tihomir Blaškić, Trial Judgment, ICTY IT-95-14-T, Mar. 3, 2000, para. 237 [hereinafter Blaškić Trial Judgement]) quoted JEAN PICTET, COMMENTARY ON THE 1ST GENEVA CONVENTION OF 12 AUGUST 1949, 54 (1952): "However much care [is] taken in establishing a list of all the various forms of infliction, one would never be able to catch up with the imagination of future torturers who wished to satisfy their bestial instincts; and the more specific and complete a list tries to be, the more restrictive it becomes."

conduct amounts to an inhumane act.[59] When an act cannot be qualified as 'inhumane' it will not amount to a crime against humanity, meaning the conduct cannot be criminalized as such. There are two ways in which certain conduct can constitute a crime against humanity. First, it is possible that the conduct in question is in fact already penalized as a crime against humanity, because it is subsumed under the inhumane acts enumerated in Article 7 of the Rome Statute. This was the case for the forced marriages that took place in the Democratic Republic of Congo: in the decision on the confirmation of the charges in the case against Katanga and Ngudjolo Chui, the ICC Pre-Trial Chamber stated that forced marriage is a form of sexual slavery that is completely subsumed under the latter offence and can therefore not be qualified as a distinct crime under the heading 'other inhumane acts'.[60] The same goes for the forced marriages that took place during the civil war in Sierra Leone: in the recently issued judgment in the case against Charles Taylor, the Trial Chamber of the Special Court for Sierra Leone (SCSL) considered that forced marriage is not a new crime, not a distinct inhumane act, but that it is in fact subsumed under the crime of sexual slavery.[61] Another example of an act that is considered to be subsumed under an enumerated inhumane act is the crime of mass starvation: as was mentioned above, during the negotiations in Rome on the Statute of the ICC, delegates considered that this conduct would most likely be covered by the crimes of murder and extermination.[62]

Second, it is possible that particular conduct is not covered by already enumerated inhumane acts, but nevertheless amounts to an inhumane act and is therefore criminalized through the catch-all clause 'other inhumane acts' codified in Article 7(1)(k). This was the case for example with forced nudity: the ICTR Trial Chamber in the *Akayesu* judgment found that forced nudity, which is not listed as an inhumane act in the ICTR Statute as such, can amount to an 'other inhumane act'.[63] And contrary to what was stated above

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[59] This was also recognised during the negotiations on the inclusion in the Rome Statute of *inter alia* sexual slavery, enforced disappearance of persons and apartheid. *See* Darryl Robinson, *Defining "Crimes against Humanity" at the Rome Conference*, 93 AJIL 43, 55 (1999); Hebel & Robinson, *supra* note 57, at 102. *See also* CRYER, FRIMAN, ROBINSON & WILMSHURST, *supra* note 40, at 230.

[60] The Prosecutor v. Katanga and Ngudjolo Chui (Decision on the confirmation of charges), ICC Case No. ICC-01/04-01/07, Sept. 30, 2008, para. 431. The ICC Trial Chamber and Appeals Chamber have yet to speak out on this.

[61] Prosecutor v Charles Ghankay Taylor (Trial Judgment), SCSL-03-01-T, May 18, 2012, at paras. 422-430. Unlike in the AFRC and RUF cases (see below), forced marriage was not charged in the indictment against Charles Taylor, but the evidence adduced by the Prosecution related to charges of sexual violence did include extensive testimony by women and girls regarding so-called 'bush marriages'. The Trial Chamber, at paragraph 422, "considered this evidence with regard to the charges in the Indictment, as well as the past jurisprudence of the SCSL with regard to this issue."

[62] See Hebel & Robinson, *supra* note 57, at 103.

[63] Akayesu Trial Judgement, *supra* note 58, at paras. 598, 688. The ICTY and ICTR also qualified sexual violence, forced disappearance and forced prostitution as 'other inhumane acts'. These crimes were not included as

with regard to the Charles Taylor trial judgment, in its earlier case law, the SCSL has held that the forced marriages which took place during the civil war in Sierra Leone should be qualified as 'other inhumane acts', because they are distinct from enumerated acts such as sexual slavery.[64] Therefore, when the conduct in question contains at least one distinct element which is not included in the definition of existing inhumane acts, those acts will not adequately cover the distinguishing characteristics of this conduct and consequently will not completely subsume that act. If this is the case, then the question should be asked whether or not the particular conduct could be qualified as an 'other inhumane act'. When the crime does not amount to an 'other inhumane act', either because it cannot be classified as 'inhumane' or because it did not cause serious suffering or injury,[65] it will fall outside the ambit of crimes against humanity and can therefore not be criminalized as such. This paragraph analyses each of these possibilities of criminalizing conduct as a crime against humanity.

II. The Conduct is Subsumed Under Enumerated Specific Inhumane Acts

From a practical point of view, the most logical step is to first verify whether the conduct in question is perhaps already subsumed under existing inhumane acts. If perpetrators of particular conduct can be adequately prosecuted using existing law, creating a new crime would be redundant.[66] The negotiations on the inclusion of certain acts, such as sexual slavery and enforced disappearance of persons, as distinct crimes against humanity in the Rome Statute clearly demonstrate that while overlap between crimes is allowed,[67] a 'new' crime against humanity should (ideally) be materially distinct, in the sense that it has at

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distinct crimes against humanity in the statutes of the ICTR and ICTY, but have now been included in the Rome Statute as such. *See* CRYER, FRIMAN, ROBINSON & WILMSHURST, *supra* note 40, at 265.

[64] Prosecutor vs. Brima, Kamara and Kanu, *supra* note 1, at paras. 197-202. This conclusion was followed by the Co-Investigating Judges at the ECCC, who have indicted the accused in one of the cases on charges of 'the other inhumane act of forced marriage'. *See* Case of Nuon Chea, Ieng Sary, Khieu Samphan & Ieng Thirith (Closing Order), ECCC 002/19-09-2007/ECCC/OCIJ, Sept. 15, 2010, at paras. 1442-1447.

[65] As required by the first element of the crime of 'other inhumane acts' (see INTERNATIONAL CRIMINAL COURT, *supra* note 51 at Article 7(1)(k)). The ILC commenting on its 1991 Draft Code also held that an inhumane act "must in fact cause injury to a human being in terms of physical or mental integrity, health or human dignity", as quoted in Prosecutor v. Clément Kayishema (Trial Judgment), ICTR-95-1-T, May 21, 1999, para. 150 [hereinafter Kayishema Trial Judgement].

[66] *See also* Suzanne Mattler, *Memorandum for the Office of the Prosecutor of the Special Court for Sierra Leone. Issue: forced marriage as a prosecutable crime against humanity*, CASE WESTERN RESERVE UNIVERSITY, SCHOOL OF LAW, INTERNATIONAL WAR CRIMES RESEARCH LAB 23 (2004), available at: http://law.case.edu/war-crimes-research-portal/memoranda/SMattler.pdf (last accessed: 27 June 2013).

[67] Murder and extermination are two crimes against humanity which overlap.

least one element that is not included in already enumerated crimes.[68] In other words, the act should require proof of a fact that is not required by other crimes.[69] The requirement that a new crime contains at least one unique element that is not encompassed in existing crimes is also mentioned in literature with regard to international criminal law in the broad sense. Ben Saul argues, for example, that the fact that existing international or transnational crimes already prohibit the same conduct under a different nomenclature constitutes a pragmatic, but compelling objection to separately criminalize that conduct.[70] When, on the other hand, the conduct in question has unique and distinguishing characteristics which are not adequately reflected in existing criminal prohibitions, this constitutes an indication that it may be warranted to specifically criminalize this conduct.[71] More generally, restricting the proliferation of superfluous or duplicate international criminal offences will contribute to the overall systematic integrity and coherence of international criminal law.[72]

A similar type of reasoning is reflected by the umbrella category of 'other inhumane acts' (discussed in detail below). This catch-all clause was included in the provision of crimes against humanity (for the first time in the London Charter of the IMT) to prevent inhumane acts that are not explicitly enumerated as crimes against humanity from falling outside the scope of international criminal law.[73] This means that in order to qualify as an 'other

[68] Oosterveld, *supra* note 49, at 638, footnote 149. The argument that a crime must have a unique element was also raised by the Holy See in relation to the crime of enforced pregnancy. The Holy See argued, together with several Catholic and Arab countries, that the elements of this crime were already covered in the Draft Rome Statute by the offences of rape and unlawful detention, which made inclusion of a specific crime of enforced pregnancy unnecessary in their view. *See* Cate Steains, *Gender issues*, *in* THE INTERNATIONAL CRIMINAL COURT. THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS 357, 367 (Roy Lee ed., 1999). Delegates from Bosnia and Herzegovina, however, argued that a specific criminalisation of this offence was needed because it has a different criminal purpose (i.e. making and keeping a woman pregnant, for example to change the ethnic composition of a population) than other forms of sexual assaults. See *Discussion Paper: Delegation of Bosnia and Herzegovina (crime of enforced pregnancy)*, Rome Conference Preparatory Works, 15 April 1998, available at: http://www.legal-tools.org/en/go-to-database/ltfolder/0_15715/#results (last accessed: 27 June 2013). It should be noted that the main reason the Holy See had for arguing that forced pregnancy should not be included, was that it (along with a few Catholic and Arab countries) was concerned that a crime of forced pregnancy might oblige national systems to allow women who were forcibly impregnated to abort the fetus, and would in that way in fact create a right to abortion. *See* Hebel & Robinson, *supra* note 57, at 100; and Cate Steains, *Gender issues*, in THE INTERNATIONAL CRIMINAL COURT. THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS 357, 366-367 (Roy Lee ed., 1999).

[69] Prosecutor v. Delalić, Mucić, Delić and Landžo (Appeal Judgment), ICTY IT-96-21-A, Feb. 20, 2001, para. 412 (hereinafter "Čelebići Appeal Judgement").

[70] Saul, *supra* note 17, at 245.

[71] With regard to criminalising terrorism in international law, *see id.* at 247 (2008).

[72] *Id.* at 210.

[73] The ICTY Trial Chamber declared that the charge of 'other inhumane acts' is generic and encompasses a series of criminal activities that are not explicitly enumerated. See Blaškič Trial Judgement, *supra* note 58, at para. 237.

inhumane act', the conduct must not already be covered by one of the crimes specified as crimes against humanity in a particular statute.[74] This conclusion is confirmed by the case law of the ICTY and ICTR and also follows from logical grammatical interpretation: the clause deals with *other* inhumane acts.[75]

The uniqueness or distinctiveness of a crime–and the concern for the proliferation of offences and the creation of duplicitous crimes–also has procedural importance, which may be demonstrated by turning to the practice of cumulative convictions, which is accepted before international criminal bodies.[76] In accordance with the case law of the ICTY, cumulative convictions of two or more offences for the same conduct are only allowed in so far as each distinct crime contains at least one materially distinct element not included in the other crimes. If this is not the case, cumulative convictions are impermissible and instead, the more specific provision will have primacy over the less specific offence in accordance with the *lex specialis*-rule.[77] The ICC's position with regard to cumulative convictions is still unclear.[78] The ICC has, however, already spoken out on the phenomenon of cumulative *charging*. Whereas other international criminal tribunals and courts, such as the *ad hoc* Tribunals, the SCSL and the Extraordinary Chambers in the Courts of Cambodia (ECCC), permit the prosecutorial practice of cumulative charging, even when one charge is fully subsumed in another charge, the position of the ICC Pre-Trial Chamber appears to be different, or at least less definite.[79] In the decision on the

[74] *See e.g.* the preliminary observations of the Prosecution in the Stakić case with regard to the classification of forcible transfer as an inhumane act. The prosecutor submitted that forcible transfer is an inhumane act which 'is not a lesser offence included in the crime of deportation.' The Trial Chamber disagreed and held that forcible transfer was in fact included in the crime of deportation. *See* Prosecutor v. Milomir Stakić (Trial Judgment), ICTY IT-97-24-T, Jul. 31, 2003, paras. 716, 722 [hereinafter "Stakić Trial Judgement"]. The Appeals Chamber reversed this judgement and held that forcible transfer as an 'other inhumane act' and deportation are in fact conceptually different. *See* Prosecutor v. Milomir Stakić (Appeal Judgement), ICTY-IT-97-24-A, Mar. 22, 2006, para. 321 [hereinafter "Stakić Appeal Judgement"].

[75] Jain, *supra* note 1, at 1028, referring to the Kayishema Trial Judgment, *supra* note 65, at para. 150. *See also* Prosecutor v. Mitar Vasiljević (Trial Judgment), ICTY IT-98-32-T, Nov. 29, 2002, para. 234; Prosecutor v. Dario Kordić & Mario Čerkez (Trial Judgment), ICTY IT-95-14/2-T, Feb. 26, 2001, at para. 269.

[76] For concerns with regard to formulating duplicitous crimes (in particular with regard to forced marriage), *see also* Michael Scharf, *Forced marriage: exploring the viability of the Special Court for Sierra Leone's new crime against humanity*, *in* AFRICAN PERSPECTIVES ON ICJ 77, 95 (Evelyn Ankumah & Edward Kwakwa eds., 2005).

[77] Čelebići Appeal Judgement, *supra* note 69, at paras. 412-413.

[78] On March 14, 2012, the ICC issued its first ever judgment. The Lubanga case concerned only one crime (the war crime of child soldiering); the issue of cumulative convictions therefore did not arise. See Prosecutor v. Thomas Lubanga Dyilo (Trial Judgment), ICC-01/04-01/06, Mar. 14, 2012.

[79] At the pre-trial stage, the ICTY allows the prosecutor to cumulatively charge offences for the same conduct, since at an early stage of the trial, it is difficult for prosecutors to know precisely which charges will ultimately be proven. *See* Čelebići Appeal Judgement, *supra* note, at para. 400; Saul, *supra* note 17, at 249. However, in earlier case law, the ICTY Trial Chamber judged otherwise: "the Prosecutor may be justified in bringing cumulative charges when the Articles of the Statute referred to are designed to protect different values and when each

confirmation of the charges in the case against Jean-Pierre Bemba Gombo, Pre-Trial Chamber II applied the test for cumulative convictions, which was formulated by the ICTY in the *Čelebići* case, to the charging stage, considering that "only distinct crimes may justify a cumulative charging approach and, ultimately, be confirmed as charges."[80] In other words, the Pre-Trial Chamber ruled that the prosecution can only bring multiple charges for the same conduct if each of these crimes requires at least one additional material element which is not required by the other.[81] Notably, approximately three months before Pre-Trial Chamber II issued this decision, Pre-Trial Chamber I permitted the practice of cumulative charging in the arrest warrant against Sudanese President Omar Al Bashir.[82] This suggests that the issue of cumulative charging is not yet settled in the context of the ICC.

As was stated above, for behavior to be classified as a crime against humanity, it must amount to an inhumane act. Several of these inhumane acts are already specifically enumerated in Article 7 of the Rome Statute. The drafters of the Rome Statute, as well as legal doctrine and criminal procedure, greatly value the substantive distinctiveness of a crime. When certain conduct is not materially distinct from an enumerated inhumane act, this forms a compelling pragmatic argument not to reshape this particular conduct into a new crime, under a new label. Therefore, when evaluating whether certain conduct could be criminalized as a crime against humanity, the first question that must be addressed is

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Article requires proof of a legal element not required by the others". *See* Prosecutor v. Kupreškić *et al.* (Decision on the Defence challenges to form of the Indictment), ICTY IT-95-16-T, May 15, 1998.

[80] Prosecutor v. Jean-Pierre Bemba Gombo (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo), ICC-01/05-01/08-PT, Jun. 15, 2009, para. 202 [hereinafter "Bemba Gombo Decision on the Confirmation of Charges"].

[81] *Bemba Gombo* Decision on the Confirmation of Charges, *supra* note 80 at para. 202. The Pre-Trial Chamber recognised that the practice of cumulative charging is widely accepted before other international criminal bodies, but pointed to the unique context of the ICC: in contrast to the Trial Chambers of the *ad hoc* Tribunals, the ICC Trial Chamber is authorised to modify the legal characterisation of facts and give them the most appropriate legal characterisation and is therefore actively involved in determining (and, when necessary, correcting) the charges. See International Criminal Court, *Regulations of the Court*, ICC-BD/01-02-07, reg. 55, Dec. 18, 2007. Therefore, the Pre-Trial Chamber held, the necessity of cumulative charging before the ICC differs from the necessity of presenting all possible characterisations to the ICTY and ICTR, and this justifies a departure from the general practice of allowing cumulative charging without any restrictions. *See* Bemba Gombo Decision on the Confirmation of Charges, *supra* note 80, at para. 203. *See also* Prosecutor v. Ayyash *et al.* (Amicus Curiae Brief respecting the practice of cumulative charging before international criminal bodies, submitted by The War Crimes Research Office at the American University Washington College of Law), STL-11-01/I, Feb. 10, 2011, at 11, 15.

[82] The Pre-Trial Chamber included in the arrest warrant charges of both murder and extermination as crimes against humanity based on the same facts, even though the former crime is subsumed within the latter. See Prosecutor v. Omar Al Bashir (Decision on the Prosecution's Application for a Warrant of Arrest against Omar Al Bashir), ICC-02/05-01/09-PT, Mar. 4, 2009, paras. 95-96. *See also* Prosecutor v. Ayyash *et al.* (Amicus Curiae Brief respecting the practice of cumulative charging before international criminal bodies, submitted by The War Crimes Research Office at the American University Washington College of Law), *supra* note 81, at 13-14.

whether the act has at least one materially distinct element not included in existing crimes. This can be done by verifying whether the conduct is already subsumed under existing inhumane acts. When evaluating whether certain conduct falls within the ambit of the crimes listed in Article 7 of the Rome Statute, it is important to give heed to the *lex stricta* norm enshrined in Article 22 of the Rome Statute that provisions must be strictly construed.[83] If the conclusion is that the conduct has distinguishing characteristics which are not adequately reflected in the existing legal criminal instruments, the next step is answering the question of whether that particular conduct can nevertheless be classified as 'inhumane'. This question can be answered by assessing whether this conduct can be qualified as an 'other inhumane act'.

III. The Conduct Constitutes an 'other inhumane act'

1. The Definition of 'other inhumane acts'

The requirements an act must satisfy in order to be qualified as 'inhumane' follow from the umbrella clause 'other inhumane acts'. As stated, this particular provision was included in the provision of crimes against humanity to prevent inhumane acts that are not explicitly enumerated as crimes against humanity from falling outside the scope of international criminal law.[84] In this sense, the clause allows courts flexibility in determining the cases before them, which prevents the crimes against humanity provision from becoming too rigid.[85] The catch-all clause 'other inhumane acts', which is part of customary international law, is included in the provisions of crimes against humanity of the London Charter, the Tokyo Charter, and in the Statutes of the ICTY, ICTR, SCSL and ECCC.[86] In none of these documents, however, was the clause was defined, rendering it imprecise and unspecified. The Rome Statute and its concomitant EoC brought change to this indefiniteness.[87]

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[83] This is also emphasized by the ICC's Elements of Crime introductory paragraph to crimes against humanity. *See* INTERNATIONAL CRIMINAL COURT, *supra* note 51.

[84] The ICTY Trial Chamber declared that the charge of 'other inhumane acts' is generic and encompasses a series of criminal activities that are not explicitly enumerated. *See* Blaškič Trial Judgement, *supra* note 58, at para. 237.

[85] Prosecutor v. Kupreškić *et al*. (Trial Judgment), ICTY IT-95-16-T, Jan. 14, 2000, para. 623 [hereinafter "Kupreškić *et al*. Trial Judgement"].

[86] Prosecutor v. Momcilo Perišić (Trial Judgment), ICTY IT-04-81-T, Sept. 6, 2011, para. 110 [hereinafter "Perišić Trial Judgement"]; Stakić Appeal Judgement, *supra* note 74, at para. 315; Case of Nuon Chea, Ieng Sary, Khieu Samphan & Ieng Thirith (Decision on Appeals by Nuon Chea and Ieng Thirith against the Closing Order), ECCC 002/19-09-2007/ECCC/OCIJ, Feb. 15, 2011, para. 157 [hereinafter "Case 002 Decision on Appeals by Nuon Chea and Ieng Thirith against the Closing Order"].

[87] Article 7(1)(k) Rome Statute refers to "[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health." *See* Rome Statute of the International Criminal Court, *supra* note 39, at art. 7(1)(k).

Drawing from the case law of the ICTY and ICTR, and the International Law Commisson's 1996 Draft Code of Crimes against the Peace and Security of Mankind, the EoC offer clarifications on the scope of the category of inhumane acts by means of a set of specified requirements that must be fulfilled for an act to fall within the category of 'other inhumane acts'. The first three elements read as follows:

> 1. The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act.
> 2. Such act was of a character similar to any other act referred to in article 7, paragraph 1, of the Statute.
> 3. The perpetrator was aware of the factual circumstances that established the character of the act.[88]

A footnote clarifies that the term 'character' refers to the nature and gravity of the act. The second element of the definition incorporates a standard of *eiusdem generis*, which is a mode of interpretation that is very similar to analogy. By constructing a provision with the use of *eiusdem generis* a crime is defined with reference to a specified (list of other) crime(s). Thus, in the case of 'other inhumane acts', reference is made to actions of the same kind, nature and gravity as those specifically enumerated as inhumane acts in Article 7(1) of the Rome Statute.[89] This *eiusdem generis* principle can also be found in the Rome Statute provision pertaining to sexual violence as a crime against humanity ('any other form of sexual violence of comparable gravity').[90] Before the promulgation of the Rome Statute and the EoC, the *ad hoc* Tribunals also dealt with 'other inhumane acts' by means of an *eiusdem generis* standard, requiring, for example, that conduct be 'of similar seriousness to the other crimes enumerated [as crimes against humanity; IH].'[91]

The elements of the crime of 'other inhumane acts'–*i.e.* the requirements that an inhumane act of a character similar to any of the enumerated acts in the crimes against

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[88] INTERNATIONAL CRIMINAL COURT, *supra* note 51, at Article 7(1)(k). Elements 4 and 5 concern the chapeau requirement of crimes against humanity.

[89] The *eiudem generis* standard is an accepted rule of interpretation in international criminal law and is not regarded as a violation of the ban on analogy. *See* Case 002 Decision on Appeals by Nuon Chea and Ieng Thirith against the Closing Order, *supra* note 86, at para. 161. *See also* ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 49 (2008).

[90] Rome Statute of the International Criminal Court, *supra* note 39, at art. 7(1)(g).

[91] The Prosecutor v. Vlastimir Đorđević (Trial Judgment), ICTY IT-05-87/1-T, Feb. 23, 2011, para. 1610 [hereinafter "Đorđević Trial Judgement"]; Prosecutor v. Momcilo Krajišnik (Appeal Judgment), ICTY IT-00-39-A, Mar. 17, 2009, at para 331. For the ICTR, *see* inter alia Prosecutor v. Eliézer Niyitegeka (Trial Judgment), ICTR-96-14-T, May 16, 2003, para. 460 [hereinafter "Niyitegeka Trial Judgement"].

humanity provision caused great suffering, or serious injury to body or to mental or physical health on the part of the victim–are tightly interwoven. They are discussed below with a specific focus on the requirement that an act is inhumane.

2. Great Suffering, or Serious Injury to Body or to Mental or Physical Health

The definition of 'other inhumane acts' requires that an act caused a certain amount of suffering on the part of the victim, more specifically, it requires 'great suffering, or serious injury to body or to mental or physical health'. It is complicated to set a specific baseline for determining the level of suffering or pain that must have been caused. The *ad hoc* Tribunals draw parallels between the terminology used in the crime against humanity of 'other inhumane acts', and the war crimes of cruel treatment and inhuman treatment, considering that the severity of the conduct is the same for all three crimes: serious mental or physical sufferings or injury or a serious attack on human dignity.[92] The EoC of the Rome Statute, however, require different standards for these crimes: the threshold of suffering for the war crimes of inhuman treatment and cruel treatment are put on par with that required for torture: '*severe* physical or mental pain or suffering'; whereas 'other inhumane acts' were given a slightly lower threshold, requiring *great* suffering.[93] The commission of a serious attack on human dignity is not expressly included in the definition of 'other inhumane acts' under the Rome Statute.

The suffering element of 'other inhumane acts' can be informed by the interpretation of the war crime of willfully causing great suffering or serious injury to body or health under Article 8(2)(a)(iii) of the Rome Statute, which arises from the grave breach provisions of the Geneva Conventions.[94] This offence has been defined in the case law of the ICTY as an act that causes serious mental or physical suffering or injury.[95] In line with the case law of the ICTR, the ICTY has held that "serious harm need not cause permanent and irremediable harm, but it must involve harm that goes beyond temporary unhappiness, embarrassment or humiliation. It must be harm that results in a grave and long-term disadvantage to a person's ability to lead a normal and constructive life."[96]

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[92] *See* Prosecutor v. Goran Jelisić (Trial Judgement), ICTY IT-95-10-T, Dec. 14, 1999, para. 52; Prosecutor v. Ante Gotovina *et al.* (Trial Judgment) ICTY IT-06-90-T, 15 April 2011, at para. 1791; Knut Dörmann, *Article 8(2): meaning of "war crimes"*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (Otto Triffterer ed., 2008) at margin number 20.

[93] *See* INTERNATIONAL CRIMINAL COURT, *supra* note 51, at Article 8 (2) (a) (ii)-1, Article 8 (2) (a) (ii)-2, Article 8 (2) (c) (i)-3 (emphasis added).

[94] CRYER, FRIMAN, ROBINSON & WILMSHURST, *supra* note 40, at 291.

[95] Prosecutor v. Delalić, Mucić, Delić and Landžo (Trial Judgment), ICTY IT-96-21-T, Nov. 16, 1998, at para. 511.

[96] Prosecutor v Krstic (Trial Judgement), Case No. IT-98-33-T, Aug. 2, 2001, at para. 513.

In the end, the assessment of the gravity of greatness or seriousness of the suffering implies a value judgment.[97] In making this relative appraisal, the court must take into consideration all the factual circumstances of the case, such as the context in which the act was committed, the nature of the act, the duration and/or any repetition of the act, the physical, mental and moral effects the act had on the victim, and the individual circumstances of the victim, including age, health and sex.[98]

3. Determining the Scope of 'inhumane' Acts

As stated, the *eiusdem generis* canon of statutory construction makes the category of 'other inhumane acts' dependant on other acts already specified as 'inhumane'.[99] Although the elements of 'other inhumane acts' as set forth in the ICC EoC provide some guidance by prescribing the *eiusdem generis* rule of interpretation, they do not provide an indication of the legal standards which the Court should use to identify the prohibited other inhumane acts.[100] In other words, the definition still leaves open the question of whether parameters exist which a court could use when defining the actual conduct constituting an 'other inhumane act'. In its case law, the ICTY has recognized that the Rome Statute offers a clearer definition of 'other inhumane acts' and a more specific threshold than does any other Statute, and has on several occasions referred to the Rome Statute and EoC.[101] However, the ICTY has also recognized that the *eiusdem generis* rule of interpretation is not much help in interpreting the expression 'inhumane acts': it refers to actions similar to those specifically provided for, but it offers no guidelines or yardstick which help in identifying possible inhumane acts.[102] In the eyes of the ICTY Trial Chamber, applying the *eiusdem generis* rule for the purpose of comparing and assessing the gravity of the prohibited act is the second step of a two-pronged test: firstly, the legal parameters for determining the content of the category of 'other inhumane acts' must be identified.[103] The ICTY Trial Chambers have on several occasions set out to find such a standard. The first case in which the ICTY addressed this issue in-depth was in *Kupreškić et al*. In this case, the

[97] *See also* INTERNATIONAL CRIMINAL COURT, *supra* note 51, at para. 4.

[98] Đorđević Trial Judgement, *supra* note 91, at para. 1611. Dörmann, *supra* note 92, at margin number 22.

[99] Terhi Jyrkkiö, *Other inhumane acts as crimes against humanity*, 1 HELSINKI L. REV. 183, 196 (2011).

[100] Kupreškić *et al.* Trial Judgement, *supra* note 85, at para. 565.

[101] Kupreškić *et al*. Trial Judgement, *supra* note 85, at para. 565. The ICTR has also referred to the ICC Elements of Crime in the context of other inhumane acts. *See* Kayishema Trial Judgement, *supra* note 65, at para. 150.

[102] Kupreškić *et al.* Trial Judgement, *supra* note 85, at para. 564.

[103] Kupreškić et al. Trial Judgement, *supra* note 85, at para. 566.

Trial Chamber held that human rights law forms the standard by which the inhumanity of an act can be judged. Referring to the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the European Convention on Human Rights, the Inter-American Convention on Human Rights, and the Convention against Torture, the Trial Chamber argued that the provisions of the most important international human rights instruments may be used "to identify a set of basic rights appertaining to human beings, the infringement of which may amount, depending on the accompanying circumstances, to a crime against humanity."[104]

In a judgment published three years after the *Kupreškić et al*. judgment, Trial Chamber II of the ICTY greatly nuanced the unbridled use of human rights to identify parameters for the interpretation of 'other inhumane acts'. In its judgment in the *Stakić* case, Trial Chamber II explicitly stated that it disagreed with the approach taken by the Trial Chamber in *Kupreškić et al*. and called to mind the report of the Secretary-General which states that the legality principle requires the ICTY to "apply rules of international humanitarian law which are beyond doubt part of customary law". Since human rights do not necessarily amount to norms of international criminal law, the Chamber did not want to use human rights instruments automatically as a basis for such legal criminal norms.[105]

In principle, the ICC can use human rights law as a source for determining the scope of the clause 'other inhumane acts'. This claim is substantiated by four arguments. Firstly, the material jurisdiction of the ICC is not limited to the rules of international humanitarian law. Pursuant to Article 21 of the Rome Statute, the Court's first source of law is the Rome Statute together with the EoC and the Rules of Procedure and Evidence. The second source of law consists of applicable treaties and the principles and rules of international law, including the established principles of the international law of conflict. Thirdly, the Court can apply general principles of law that it derives from national laws and legal systems of the world. In accordance with the third paragraph of this Article, the Court must apply and interpret the law in a way that is consistent with internationally recognized human rights. Secondly, "crimes against humanity are to a great extent predicated upon international human rights law," and therefore it can be argued that the violation of human rights may be indicative of the seriousness and moral wrongness of certain conduct.[106] Thirdly, the view that human rights law can be used for determining what acts constitute inhumane

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[104] Kupreškić *et al.* Trial Judgement, *supra* note 85, at para. 566.

[105] *Stakić* Trial Judgement, *supra* note 74, at para. 721. "Not all human rights violations amount to crimes, and not all crimes amount to crimes against humanity". *See* Robinson, *supra* note 50, at 70.

[106] ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 99 (2008), as referred to in Natalae Anderson, *Memorandum charging forced marriages as a crime against humanity*, Documentation Center of Cambodia, Sept. 22, 2010 52, available at: http://www.d.dccam.org/Abouts/Intern/Natalae_Forced_marriage.pdf. (last accessed: 27 June 2013); Saul, *supra* note 17, at 233.

acts is further supported by earlier Draft Codes of Offences against the Peace and Security of Mankind prepared by the International Law Commission. In its 1991 Draft Code, the Commission did not use the term 'crimes against humanity' to refer to the acts that were later listed as such in the 1996 Draft Statute and are now enumerated in the Rome Statute.[107] Instead, the Commission referred to these inhumane acts under the article header 'systematic or mass violations of human rights'.[108] On occasion, the ICTY referred to this 1991 Draft Code and the congruence between mass violations of human rights and crimes against humanity.[109]

Fourthly, it can be argued that the changes in the chapeau requirements of crimes against humanity also support using human rights law when determining what acts are 'inhumane'. At its inception, crimes against humanity required a nexus with an armed conflict. Consequently, the standard that was applied to judge the inhumanity of an act used to be rooted in international humanitarian law, the body of law which deals with crimes committed in conflict situations.[110] However, this connection requirement was later departed from and as a consequence, the standard against which the inhumanity of an act can be judged is no longer restricted to international humanitarian law.[111] The ECCC Pre-Trial Chamber also considered the question of how to determine what constitutes inhumane conduct and in this context referred to serious violations of international humanitarian law and serious violations of fundamental human rights protected under international law.[112]

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[107] Jyrkkiö, *supra* note 99, at 192.

[108] Draft report of the Commission on the work of its forty-third session, Draft Code of Crimes against the Peace and Security of Mankind, Article 21, UN Doc. A/CN.4/L.464/Add.4, Jul. 15, 1991.

[109] Kunarac Trial Judgement, *supra* note 53, at para. 537.

[110] Jyrkkiö, *supra* note 99, at 190. *See* United Nations, Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement") art. 6(c), Aug. 8, 1945; Article 5 ICTY Statute, adopted 25 May 1993 by UNSC Resolution no. 827; Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, Dec. 20, 1945, 3 Official Gazette Control Council for Germany 50-55 (1946), however, did not require a nexus with an armed conflict. *See* CRYER, FRIMAN, ROBINSON & WILMSHURST, *supra* note 40, at 234.

[111] CRYER, FRIMAN, ROBINSON & WILMSHURST, *supra* note 40, at 234-235; Prosecutor v. Duško Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), ICTY-IT-94-1-A, Oct. 2, 1995, para. 140. Jyrkkiö, *supra* note 99, at 190-191.

[112] Case 002 Decision on Appeals by Nuon Chea and Ieng Thirith against the Closing Order, *supra* note 86, at para. 164. As examples of fundamental human rights, the Pre-Trial Chamber lists the right to life, to be free from torture, cruel, inhuman or degrading treatment or punishment, to liberty and security, to be treated with humanity and with respect for the inherent dignity of the human person when deprived of liberty and to a fair trial. *See* para. 118.

It would seem, however, that not every human rights violation constitutes an inhumane act.[113] Although all listed crimes against humanity constitute a violation of human rights; the reverse is not the case and there is valid reason for advocating a restrictive approach for the use of human rights in the context of crimes against humanity. As stated, the category of crimes against humanity pertain to the most serious crimes of concern to the international community as a whole: only the most atrocious acts committed as part of a widespread or systematic attack directed against a civilian population will rise to the level of this international crime. In accordance with the theories of international criminalization discussed above in section B.II, crimes against humanity have been internationally criminalized because they violate universal values. The acts that are currently listed in the Rome Statute as inhumane acts protect the right to life (murder and extermination), bodily integrity (torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity), and liberty (enslavement; deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, and enforced disappearance of persons).[114] Pursuant to the definition of 'other inhumane acts', only those acts that are of a character (meaning nature and gravity) *similar* to any other act referred to in Article 7 of the Rome Statute can qualify as 'other inhumane acts'. In this sense, the *eiusdem generis* standard limits the extent of the catch-all clause. Therefore, human rights law can be used as a source for determining the scope of other inhumane acts, but only those human rights violations that are of a character similar to enumerated inhumane acts in Article 7(1) of the Rome Statute (which will especially be the case when they involve violations of the right to life, physical integrity and liberty), and that resulted in great suffering on the part of the victim, or serious injury to their body or to their mental or physical health, will qualify as other inhumane acts.[115] As noted by the ICTR Trial Chamber in *Kayishema*, this will have to be determined on a case-by-case basis, taking into consideration all the factual circumstances.[116] Standards derived from human

[113] As an illustration, Article 24 UDHR stipulates that "everyone has the right to [...] periodic holidays with pay." It is difficult to imagine a violation of this right in itself amounting to an inhumane act. See Universal Declaration of Human Rights, art. 24, UN G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

[114] The crimes of persecution and apartheid require a link with any of the enumerated inhumane acts, see INTERNATIONAL CRIMINAL COURT, *supra* note 51 at Article 7 (1) (h) (4), Article 7 (1) (j) (1)-(2).

[115] In its comments on Article 18 of its Draft Code of Crimes, the International Law Commission stated that the category of 'other inhumane acts' "is intended to include only additional acts that are similar in gravity to those listed in the preceding subparagraphs. Second, the act must in fact cause injury to a human being in terms of physical or mental integrity, health or human dignity". *See* Report of the International Law Commission on the Work of its Forty-Eighth Session, May 6-Jul. 26, 1996, UN G.A. A/51/10 (Supp. No. 10) (Crimes Against the Peace and Security of Mankind) 103, at para. 17.

[116] Kayishema Trial Judgement, *supra* note 65, at para. 151.

rights law can assist in this exercise, especially those human rights norms that prohibit inhumane treatment.[117]

E. Conclusion

This article analyzed the ways in which an act can be classified as a crime against humanity. Crimes against humanity concern specific acts that are committed as part of an attack against a civilian population. As the terminology suggests, an act may be qualified as a crime against humanity when it constitutes an *inhumane* act, either because it is subsumed under enumerated acts (such as murder, torture, rape or extermination), or because it amounts to an 'other inhumane act'. When certain conduct does not have characteristics that materially distinguish it from enumerated inhumane acts, meaning it does not require proof of a fact that is not required by other crimes, this conduct can be said to be subsumed under one or more of those acts, and can consequently be charged as such. Contrary to what was stated in earlier judgments in other cases before the SCSL, in the 2012 judgment in the case against Charles Taylor the Trial Chamber–in the absence of any specific charge relating to forced marriage–held that forced marriage is not a distinct inhumane act, but is covered by the elements of enslavement and sexual slavery. However, when conduct is not covered by any of the listed specific inhumane acts, so when it has definitional characteristics that are not covered by the elements of enumerated crimes against humanity, the clause 'other inhumane acts' comes into view. This catch-all provision has endured some criticism over the past few years, especially with regard to the principle of *nullum crimen sine lege*. The crime is defined in the Rome Statute of the International Criminal Court and its concomitant Elements of Crimes. Even though the elements of the crime have now been delineated, its exact scope is not yet clear: the documents defining 'other inhumane acts' do not offer guidelines which help in identifying possible inhumane acts. The only yardstick that is provided is the *eiusdem generis* rule of interpretation, which requires that the act in question is of a comparable gravity to the listed crimes against humanity. Human rights law can be used in determining the inhumanity of an act, but some caution is required: crimes against humanity deal with the most serious criminal offences of concern to the world community as a whole and create direct individual criminal responsibility. The acts currently enumerated in Article 7 of the Rome Statute concern the right to life, bodily integrity and liberty. Not every violation of every human right will therefore amount to an inhumane act; only when it is of gravity

[117] Such as the Universal Declaration of Human Rights, art. 5, UN G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); UN General Assembly, International Covenant on Civil and Political Rights, art. 7, Dec. 16, 1966, 999 U.N.T.S. 171; Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, art. 3, Nov. 4, 1950, E.T.S. 5; The American Convention on Human Rights ("Pact of San Jose, Costa Rica"), art. 5, Nov. 22, 1969, O.A.S.T.S. 36; Organization of African Unity, African Charter on Human and Peoples' Rights ("Banjul Charter"), art. 5, Jun. 27, 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

similar to the listed acts will it qualify as such. In addition, the definition of 'other inhumane acts' requires that the act caused great suffering, or serious injury to body or to mental or physical health. When the abovementioned requirements are met, a crime can be charged and recognized as an 'other inhumane act'.

This article discussed two ways in which an act can be classified as a crime against humanity under the Rome Statute. There is a third possibility that is worth mentioning: adding a new, distinct inhumane act to the list under Article 7 of the Rome Statute. Several acts which initially were not listed as specific inhumane acts were qualified as 'other inhumane acts' in the case law of the international criminal courts and tribunals and were later codified as specific inhumane acts, for instance in the Rome Statute and the SCSL Statute. Examples include sexual violence, forcible transfer of population, enforced prostitution, and the enforced disappearance of persons.[118] This implies that acts that are currently not codified as crimes against humanity in the Rome Statute, but *are* qualified as 'other inhumane acts' by the ICC, could, theoretically, in the future be included in the list of inhumane acts under Article 7 of the Rome Statute. Especially when this particular crime with unique characteristics has certain prevalence in conflict situations and is likely to reoccur, it stands to reason to consider including it in the crimes against humanity provision. Codification of a new crime would require amendment of the Rome Statute. In accordance with Article 121 of the Rome Statute, a State Party can propose an amendment to the Statute. The Assembly of States Parties then deals with this proposal.[119] In case consensus cannot be reached, a two-thirds majority is required in order for the amendment to be accepted. Amendments to the core crimes provisions (i.e. Articles 5, 6, 7 and 8) only become applicable to States Parties that have accepted them. This means the Court is not able to exercise its jurisdiction regarding a crime covered by the amendment when it was committed on the territory of or by a national of a State which did not accept the amendment.[120]

Amending the Rome Statute, however, is something that cannot be done over night: it will take time and effort. This again underlines the importance of the residual clause 'other inhumane acts', which allows the Court to recognize 'new' crimes against humanity and maintains the flexibility of international criminal law.

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[118] Prosecutor vs. Brima, Kamara and Kanu (Appeal Brief of the Prosecution), SCSL-04-16-A, Sept. 13, 2007, para. 606. These acts are now listed as crimes against humanity in the Rome Statute. See Rome Statute of the International Criminal Court, art. 7(1)(d) - 7(1)(g), 7(1)(i), Jul. 17, 1998, 2187 U.N.T.S. 90. These crimes, with the exception of enforced disappearance of persons, are also included in the SCSL Statute.

[119] The Assembly can deal with the proposed amendment directly or convene a Review Conference pursuant to the Rome Statute of the International Criminal Court, *supra* note 39, at article 123(2).

[120] Roger Clark, *Article 121 Amendments*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, (Otto Triffterer ed., 2008) at margin number 5. This is in conformity with the Vienna Convention on the Law of Treaties art. 40(4), May 23, 1969, 1155 U.N.T.S. 331.