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THE INTERNATIONAL CRIMINAL COURT DOES NOT HAVE COMPLETE JURISDICTION OVER CUSTOMARY CRIMES AGAINST HUMANITY AND WAR CRIMES

JORDAN J. PAUST*

I. RECOGNITIONS OF THE LIMITED REACH OF ICC JURISDICTION OVER INTERNATIONAL CRIMES

It is well-understood that the International Criminal Court (ICC) does not have jurisdiction over all international crimes. Article 5(1) of the Rome Statute of the International Criminal Court¹ declares that the “jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole,”² and proceeds to list merely four crimes under customary international law (e.g., genocide, crimes against humanity, war crimes, and the crime of aggression).³ As documented in Article 10, it is also understood that nothing in Part 2 of the Rome Statute (which includes Articles 5 through 21 and contains definitions and/or lists of genocide, crimes against humanity, and war crimes) “shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.”⁴ It is

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1. Rome Statute of the International Criminal Court art. 5(1), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

2. *Id.*

3. *Id.* art. 5(1)(a)-(d).

4. *Id.* art. 10. It should be noted that what makes conduct a crime under international law is international law, customary and treaty-based—nothing more or less. Therefore, there is no other required differentiation between an international and domestic crime. Consider, for example, the fact that international crimes include an unreported single act of piracy, pillaging during war, mercenarism, torture, slavery, or forced disappearance, whereas the widely publicized acts of a local U.S. serial bank robber who has victimized eleven U.S. banks in eleven states and hundreds of customers (none of whom were foreign nationals) is merely a domestic crime. The fact that the reach of international law does not match some personal theoretic construct is not relevant no matter how logical or elegant such a preference might otherwise be and how inconvenient is the reach.

evident, therefore, that some of the definitions or lists of crimes contained within Part 2 are not meant to be exclusive or complete definitions or lists of the crimes under customary international law. This expectation is also evident in Article 22 of the Rome Statute, which notes that a person is not criminally responsible before the ICC “unless the conduct in question constitutes . . . a crime within the jurisdiction of this Court,”⁵ that “[t]he definition of a crime shall be strictly construed,”⁶ and that “[t]his article shall not affect the characterization of any conduct as criminal under international law independent of this Statute.”⁷ Quite clearly, it is understood that the Statute’s characterizations are not meant to be exclusive, do not fully reflect other characterizations under international law, and “shall not affect” or change characterizations under dynamic customary international law. Moreover, since a definition within the Rome Statute must also be “strictly construed,” it is evident that the reach of some crimes under customary international law will be broader.

The recognitions in Articles 5, 10, and 22 are important with respect to the reach of ICC jurisdiction over crimes against humanity and war crimes because the definitions or lists within the Rome Statute concerning such crimes are facially incomplete. Additionally, with respect to crimes against humanity set forth in Article 7, the first paragraph in Article 7 uses the limiting phrase “[f]or the purpose of this Statute, ‘crime against humanity’ means.”⁸ This phrase necessarily implies recognition of the fact that other definitional orientations under international law exist and that they are not fully reflected in Article 7 of the Statute. The same limiting phrase appears in Article 8, paragraph 2 with respect to an otherwise lengthy list of war crimes covered under the Rome Statute,⁹ thereby providing the same recognition concerning war crimes reflected in the Statute. When one considers the combination of recognitions in Articles 5, 7(1), 8(2), 10, and 22, the conclusion is unavoidable that definitions or lists of crimes against humanity and war crimes set forth in Articles 7 and 8 of the Rome Statute were not expected to provide or mirror the exclusive measure of such crimes under then extant or future customary international law. As noted below, Articles 7 and 8 do not cover all such crimes under customary international law and, therefore, the ICC has limited jurisdiction over such crimes.

5. *Id.* art. 22(1).

6. *Id.* art. 22(2).

7. *Id.* art. 22(3).

8. *Id.* art. 7(1).

9. *Id.* art. 8(2) (“For the purpose of this Statute, ‘war crimes’ means . . .”).

II. THE REACH OF VARIOUS DEFINITIONS OF CRIMES AGAINST HUMANITY

Two hypotheticals demonstrate the difference between coverage of crimes against humanity under customary international legal definitions and that contained in Article 7 of the Rome Statute. First, assume that instead of using several aircraft on September 11, 2001, al Qaeda had used one aircraft and that it hit one of the World Trade Center towers, killing 1,500 persons, and that al Qaeda had never attacked U.S. nationals before. Second, assume that five private individuals acting on their own had obtained a rocket with a nuclear warhead and used it to destroy one half of Tel Aviv, Israel with the intent to retaliate against Israel's killing of several Palestinians in Gaza. As noted in this Article, crimes against humanity have been and can be engaged in by non-state actors,¹⁰ but would either hypothetical attack constitute a crime against humanity under customary

10. See *infra* notes 22, 33, 36-38, 41 (listing various instances in which non-state actors have engaged in crimes against humanity and other international crimes). It should also be noted that under international law there have been many actors other than "the state," including nations, belligerents, (who, like the Confederate States of America during the U.S. Civil War, are bound by all of the customary laws of war) kingdoms, empires, peoples, tribes, principalities, sultanates, and free cities. See, e.g., JORDAN J. PAUST, JON M. VAN DYKE & LINDA A. MALONE, *INTERNATIONAL LAW AND LITIGATION IN THE U.S.* 10-14 (3d ed. 2009); see also *infra* notes 22, 33 (addressing the issue of private actors in this context). Therefore, it is presumptively illogical and would not be policy-serving to expect that any international crime can be committed only by the "state" or a "state" actor, and this is not the case. See *infra* notes 22, 33, 36-37, 41 (providing examples of non-state actors). More generally, the principle of inclusivity in international criminal law compels recognition of the reach of responsibility to any actor that is not expressly excluded in a particular instrument. See also Opinion and Judgment of the International Military Tribunal at Nuremberg (Oct. 1, 1946) ("That international law imposes duties and liabilities upon individuals as well as upon States has long been recognized . . . Crimes against international law are committed by men, not by abstract entities . . ."), reprinted in 41 AM. J. INT'L L. 172, 221 (1947); JORDAN J. PAUST ET AL., *INTERNATIONAL CRIMINAL LAW* 30, 33-35 (3d ed. 2007) (concerning the express reach of modern instruments to "any person" of any status or affiliation) [hereinafter PAUST, BASSIOUNI, ET AL.]; U.S. DEPT OF ARMY, FIELD MANUAL NO. 27-10, *THE LAW OF LAND WARFARE* 178, ¶ 498 (1956) ("Any person, whether a member of the armed forces or a civilian, who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment. Such offenses . . . comprise . . . [c]rimes against humanity.") [hereinafter FM 27-10]; text *infra* notes 15-16 (referencing the language "any person"). Moreover, far earlier in human history it was recognized that private actors can commit an extensive variety of international crimes. See, e.g., Jordan J. Paust, *The Reality of Private Rights, Duties, and Participation in the International Legal Process*, 25 MICH. J. INT'L L. 1229, 1234-35, 1237-39 (2004) (demonstrating that private people can be actors in crimes against humanity) [hereinafter Paust, *Private Actors*].

definitions and/or that contained in Article 7 of the Rome Statute?

A. *Customary Definitions in the Traditional Instruments*

Customary definitions of crimes against humanity, or *crimen contra omnes*, can be found in charters and laws used for prosecution of crimes against humanity that had been engaged in during World War II and they are also reflected in a 1950 United Nations General Assembly resolution documenting the customary Nuremberg Principles. Article 6, paragraph c of the Charter of the International Military Tribunal at Nuremberg defines crimes against humanity as:

Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.¹¹

11. Charter of the International Military Tribunal at Nuremberg art. 6(c), Annex to the London Agreement, Aug. 8, 1945, 82 U.N.T.S. 279. Professor William Schabas, after noting that Article 6 contains no “state plan or policy” limitation, nonetheless claims that such a limit is “implicit” and appears to claim that “[t]he *chapeau* of Article 6 of the Charter” (which merely notes that “[t]he Tribunal . . . shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes . . .”) supports an implied limitation with respect to the reach of crimes against humanity as such. William A. Schabas, *Crimes Against Humanity: The State Plan or Policy Element*, in *THE THEORY AND PRACTICE OF INTERNATIONAL CRIMINAL LAW: ESSAYS IN HONOR OF M. CHERIF BASSIOUNI* 347, 348-49 (Leila Nadya Sadat & Michael P. Scharf eds., 2008). First, the *chapeau* merely expresses a limit of the jurisdiction of the I.M.T, not a supposed limitation of the reach of customary crimes against humanity. No one could rightly assume that crimes against humanity can only be committed by “European Axis countries.” Second, private actors are not excluded, since they could be acting alone “as individuals” but “in the interests” of countries, the phrase “whether as individuals” certainly does not exclude any individual actors acting “as individuals,” and the phrase “or as members of organizations” certainly does not exclude private individuals acting “as members” of private organizations. Moreover, it is clear from the language used that those acting “as” individuals or members of organizations need not be acting “as” state actors. Third, the *chapeaus* of the next three international instruments should be consulted; and one would recognize that there is a limit to the jurisdiction of the International Military Tribunal for the Far East but it contains no reference to states or “countries” and covers crimes committed by persons “as individuals or as members of organizations,” and that Control Council Law No. 10 contains no reference to a state or country. See *infra* notes 12-13 (citing to various agreements involving the language discussed). Similarly, the 1950 General Assembly Declaration on the Principles of the Nuremberg Charter and Judgment contains no limiting reference to a state or country and it even mirrors the principle of inclusivity. See *infra* text accompanying notes 15-16

The Charter of the International Military Tribunal for the Far East (Tokyo Charter) has a similar definition:

Crimes against Humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.¹²

Control Council Law No. 10, which was used for prosecutions in Europe in certain national military commissions, contains the following definition:

Crimes against Humanity. Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.¹³

In 1950, generally shared *opinio juris* of the international community was expressed by the United Nations General Assembly when it reaffirmed common features of the three World War II definitions noted above and set forth its Declaration on the Principles of the Nuremberg Charter and Judgment that had been formulated by the International Law Commission of the U.N.¹⁴ The first principle in the Declaration on Principles mirrors the general principle of inclusivity when affirming that “[a]ny person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment.”¹⁵ Thereafter, the General Assembly identified which acts constitute crimes against humanity:

Crimes against humanity:

Murder, extermination, enslavement, deportation and other

(demonstrating how this principle is implicit in the language).

12. Charter of the International Military Tribunal for the Far East art. 5(c), as amended by General Orders No. 20, Apr. 26, 1946, T.I.A.S. No. 1589.

13. Allied Control Council Law No. 10, art. II(1)(c), Dec. 20, 1945, Control Council for Germany, Official Gazette 50 (Jan. 31, 1946).

14. International Law Commission, *Declaration on the Principles of the Nuremberg Charter and Judgment*, at 11-14 ¶ 99, U.N. Doc. A/1316 (1950). In 1946, the General Assembly had also affirmed the principles of international law recognized in the Nuremberg Charter and the judgment of the I.M.T. See *Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal*, G.A. Res. 95(I), U.N. GAOR, 1st Sess., U.N. Doc. A/64/Add.1 (Dec. 11, 1946) (“[a]ffirms the principles of international law recognized by the Charter . . . and the judgment of the Tribunal . . .”) (unanimous vote).

15. *Id.* princ. I. With respect to the principle of inclusivity, see *supra* note 10 (covering the inclusivity of non-state actors).

inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.¹⁶

Each of the customary definitions noted above addresses “crimes against humanity” in the plural and identifies two basic types of crimes against humanity: (1) inhumane acts committed or done against any civilian population, and (2) persecutions of persons on certain stated grounds.¹⁷ Importantly, a single crime against humanity can involve an inhumane act or a persecution on stated grounds, whereas “crimes” involve acts or persecutions. With respect to the two hypotheticals noted above, the first type of crime against humanity would be relevant, especially the act of murder. Moreover, it is recognized that although the phrase “civilian population” might theoretically require an impermissible act against an entire population, actual trends in decision and patterns of generally shared expectation support the reach of this phrase to acts committed or done against civilians as opposed to a population as such.¹⁸ There is no requirement that the perpetrator of a crime against humanity have any particular status, such as that of a state actor, belligerent, or member of an organization of any sort. There is no requirement that an inhumane act be

16. *Id.* princ. VI(c).

17. PAUST, BASSIOUNI, ET AL., *supra* note 10, at 704-06, 721, 744.

18. *See, e.g., id.*, at 744 (quoting the U.N. War Crimes Commission Report of 1948, “[a]cts against civilians”); *see also* Prosecutor v. Blaskic, Case No. IT-95-14-A, Appeals Chamber Judgment, ¶ 113 & n. 220 (July, 29, 2004) (during an armed conflict, “civilians” include those “taking no active part in the hostilities”); Prosecutor v. Kayishema & Ruzindana, Case No. ICTR 95-1-T, Trial Chamber Judgment, ¶ 127 (May 21, 1999) (includes “all persons *except* those who have the duty to maintain public order and have the legitimate means to exercise force.”). Moreover, even under more restrictive definitional orientations convictions of persons for crimes against humanity have occurred when as few as 1, 3, 7, 11, 30, or 44 direct victims had been targeted. *See, e.g.,* PAUST, BASSIOUNI, ET AL., *supra* note 10, at 745. *See also* LYAL S. SUNGA, *INDIVIDUAL RESPONSIBILITY IN INTERNATIONAL LAW FOR SERIOUS HUMAN RIGHTS VIOLATIONS* 136 (1992) (stating that an attack on one person can suffice); Irwin Cotler, *International Decisions: Regina v. Finta* [1994], 90 AM. J. INT’L L. 460, 470, n.62 (1996) (stating that “against even one victim” is enough); *cf.* United States v. Altstoetter, (The Justice Case), 3 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 284 ([1948] 1951) (claiming that “isolated cases of atrocities or persecutions” should not be included). Previously, some textwriters had seemingly missed the trends in judicial decision regarding convictions when there were only a few direct victims and had preferred that there be a large number of direct victims. *See* Catherine R. Blanchet, *Some Troubling Elements in the Treaty Language of the Rome Statute of the International Criminal Court*, 24 MICH. J. INT’L L. 647, 657-58 (2003) (seeming to define the terms “widespread” and “systematic” as excluding isolated incidents).

widespread or systematic or be part of some widespread or systematic conduct, cause great or serious injury, or be in furtherance of some state or organizational policy. In view of the above, it is clear that under the customary definitions both hypothetical attacks were on civilians and can constitute crimes against humanity under customary international law.

B. *Newer Definitions with a More Limited Reach*

In the 1990s, one finds new definitional orientations that have a more limited reach. For example, in 1993 the Secretary General of the United Nations issued a report with respect to the International Tribunal for the Former Yugoslavia (ICTY) that preferred additional limiting elements not found in any of the traditional international legal instruments. The report contained the following definitional preferences:

Crimes against humanity

47. Crimes against humanity were first recognized in the Charter and Judgement of the Nurnberg Tribunal, as well as in Law No. 10 of the Control Council for Germany.¹⁹ Crimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character.

48. Crimes against humanity refer to inhumane acts of a very serious nature, such as wilful killing, torture or rape, committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds. In the conflict in the territory of the former Yugoslavia, such inhumane acts have taken the form of so-called "ethnic cleansing" and widespread and systematic rape and other forms of sexual

19. This statement regarding first recognitions is in manifest error. For pre-World War II recognitions of crimes against humanity and offences against the laws of humanity, see, e.g., PAUST, BASSIOUNI, ET AL., *supra* note 10, at 702-04, 748; (discussing relevant cases) Prosecutor v. Akayesu, ICTR-96-4-T Trial Chamber Judgment, ¶¶ 565-66 (Sept. 2, 1998); *infra* note 33. In 1849, the Supreme Court of Texas declared that by then "a more elevated sense of right, of justice, and the laws of humanity has asserted an ascendancy over the cruelty and despotism of the past[.]" that "[i]t instructs and commands, in a language that will be obeyed, the commanding general that he shall use no unnecessary rigor even to the prisoners taken in battle; that to the peaceful citizen, not found in the ranks of war, he is to extend the arm of protection to his person and property[.]" and that "[o]n this subject, public opinion in almost every civilized community, has proved one of the most humane and beneficial portions of the law of nations." McMullen v. Hodge and Others, 5 Tex. 34, 23 (1849). This substantially predates similar recognitions in the 1868 Declaration of St. Petersburg ("contrary to the laws of humanity"), extract available in PAUST, BASSIOUNI, ET AL., *supra* note 10, at 679, and the "Martens clause" in the preamble to the Hague Convention IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539[hereinafter HC IV].

assault, including enforced prostitution²⁰

Under paragraph 48 of the report, the conduct addressed in the two hypotheticals noted above could involve responsibility for crimes against humanity. With respect to the hypothetical involving an attack on one of the World Trade Center towers with one aircraft, one might logically conclude that the attack was “widespread,” since a large number of persons were killed even though they were killed merely in one building and aircraft. Per hypo, however, the attack was not “systematic.” The same conclusions would apply to the targeting of Tel Aviv in the second hypothetical. It should also be noted that the Secretary-General’s report did not adopt the approach regarding inhumane acts found in the customary definitions and used a new limitation set forth in the phrase “of a very serious nature.”

It is interesting that the actual Statute of the ICTY did not adopt the Secretary-General’s definition. Instead, it uses the phrase “the following crimes . . . directed against any civilian population[.]” and then lists several types of acts that would constitute such crimes, including “murder” and “inhumane acts.”²¹ It does not contain any limitation that would require either a widespread or systematic act. Moreover, as in the case of customary crimes against humanity, no plan or policy is required,²² and most of the acts against civilians that are

20. Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), ¶¶ 47-48, U.N. Doc. S/25704 (May 3, 1993), reprinted in 32 I.L.M. 1163, 1173 (1993).

21. Statute of the International Criminal Tribunal for Former Yugoslavia art. 5, Res. 827, Annex, U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter Statute of the ICTY].

22. See, e.g., Prosecutor v. Krstic, Case No. IT-98-33-A, Appeals Chamber Judgment, ¶ 223 (Apr. 19, 2004) (stating that customary crimes against humanity do not require a plan or policy); see also PAUST, BASSIOUNI, ET AL., *supra* note 10, at 707, 711 (Krstic, ICTY), 727 (Sadat: French court’s requirement of a “German plan” was a “revisionist approach” that had resulted in outrage), 729 (Sadat: the “most egregious error was the introduction of the French requirements of ‘hegemonic state’ and ‘execution of a common plan’”), 731 (Sadat: common plan is not a requirement and was part of an entirely separate offense at Nuremberg), 753 (Rutaganda, ICTR), 769 (Cassese); John Cerone, *The Jurisprudential Contributions of the ICTR to the Legal Definition of Crimes Against Humanity—The Evolution of the Nexus Requirement*, 14 NEW ENG. J. INT’L & COMP. L. 191, 197-99, n.18 (2008), citing *Semanza v. Prosecutor*, Case No. ICTR 97-20-A, Appeals Chamber Judgment, ¶ 269 (May 20, 2005) (stating that a plan is not necessary); *Prosecutor v. Kunarac*, IT-96-23/1-A, Appeals Chamber Judgment, ¶¶ 89, 98 (June 12, 2002) (stating that attacks need not be supported by a policy or a plan), among other cases; John H. Knox, *Horizontal Human Rights Law*, 102 AM. J. INT’L L. 1, 19 (2008) (declaring that “private actors have duties . . . not to commit . . . crimes against humanity, or genocide.”); Naomi Roht-Arriaza, *The Complex Architecture of International Justice*, 10 GONZ. J. INT’L L. 38, 38 (2006-2007) (reiterating that private actors can be liable for aiding and abetting “genocide

or crimes against humanity"); Jennifer M. Smith, *An International Hit Job: Prosecuting Organized Crime Acts as Crimes Against Humanity*, 97 GEO. L.J. 1111, 1126-28 & nn.148-149 (2009) (finding that national courts and the ICTY have "recognized that private actors could commit crimes against humanity[.]" and state policy is not required; and since the Appeals Chamber decision in *Prosecutor v. Kunarac* "explicitly held that a policy or plan is not even an element of crimes against humanity under customary international law . . . other ICTY and ICTR judgments have consistently reaffirmed that a plan or policy is not a requisite legal element . . . [listing 12 ICTY cases and 4 ICTR cases]. For example, the ICTR Appeals Chamber in *Semanza v. Prosecutor* reaffirmed that the existence of a plan or policy is not" required "and rejected the defendant's contention that crimes against humanity require 'the existence of a political objective' and 'the implication of high level political and/or military authorities in the definition and establishment of [a] methodical plan'"); Beth Stephens, *Sosa v. Alvarez-Machain: "The Door is Still Ajar" for Human Rights Litigation in U.S. Courts*, 70 BROOK. L. REV. 533, 538 (2004-2005) (noting the holding that private corporations can be responsible for "violations that do not require state action, such as crimes against humanity"); Leila Sadat Wexler, *Prosecutions for Crimes Against Humanity in French Municipal Law: International Implications*, 91 PROC., AM. SOC. INT'L L. 270, 273 & n.13 (1997) (French case addition of requirements of "systematic," "state policy," and "a 'common plan' (a misreading of the conspiracy charge" at Nuremberg), were "so distant from its international meaning" and "distorted," and the courts "misinterpret[ed] international norms"); *Kadic v. Karadzic*, 70 F.3d 232, 236 (2d Cir. 1995) (stating "We hold . . . that Karadzic may be found liable for genocide, war crimes, and crimes against humanity in his private capacity"); *Prosecutor v. Sesay, Kallon, and Gbao*, Case No, SCSL-04-15-t (Special Court for Sierra Leone) Judgment, ¶¶ 78-79 (Mar. 2, 2009) (stating that "existence of a policy or plan, or that the crimes were supported by a policy or plan to carry them out, . . . is not a separate legal requirement"); FM 27-10. *supra* note 10 (affirming that no plan is necessary); *supra* notes 11-16 and accompanying text (showing none of the customary instruments require a plan or policy); *infra* note 33 (giving examples of crimes against humanity which do not involve a plan). *But see* M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 244, 247 (1992); VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 79-80 (1995); Schabas, *supra* note 11, at 347-48, 358, 360, 362-63 (claiming that Professor Bassiouni's admittedly rare minority viewpoint that crimes against humanity can only be committed by state actors pursuant to a state plan or policy is somehow customary); William A. Schabas, *State Policy as an Element of International Crimes*, 98 J. CRIM. L. & CRIMINOLOGY 953, 972-74 (2008) (claiming that requiring a State plan or policy as an element of a crime against humanity would have many advantages in terms of coherence and judicial policy.)

Moreover, human rights are violated when crimes against humanity are committed and it is informing that human rights violations can occur at the hands of private perpetrators, with or without any plan or policy and regardless of the fact that violations are not widespread or systematic. *See, e.g.*, Paust, *Private Actors*, *supra* note 10, at 1241-45 (recognizing that many human rights instruments prohibit groups or individuals from engaging in such conduct); Jordan J. Paust, *The Other Side of Right: Private Duties Under Human Rights Law*, 5 HARV. HUM. RTS. J. 51 (1992); *see also infra* notes 33, 41 (displaying the many crimes against humanity and other international crimes committed by private actors). From a human rights perspective, every

identified do not have to be engaged in “on national, political, ethnic, racial or religious grounds.”²³ Despite the definition set forth in the Statute of the ICTY, some opinions within the ICTY proffered startling new limitations that were clearly the result of judicial activism or attempts at judicial legislation. For example, an early opinion declared that acts against civilians must be organized and systematic despite the fact that these two limiting words do not appear in the Statute of the ICTY or in any of the traditional international legal instruments.²⁴ Acceptance of this type of limitation would obviously obviate jurisdiction over the types of customary crimes against humanity addressed in the two hypotheticals and would not be preferable.

One year after creation of the ICTY, the Statute of the International Criminal Tribunal for Rwanda (ICTR)²⁵ adopted a new requirement that crimes against humanity within the

new attempt to limit criminal responsibility for crimes against humanity is threatening to human dignity, the ultimate *raison d'être* for the existence of *crimen contra omnes*, which are crimes committed against us and that bear our name. Concerning the human rights base of crimes against humanity, see, e.g., PAUST, BASSIOUNI, ET AL., *supra* note 10, at 711, and references cited; see also Carlos S. Nino, *The Duty to Punish Past Abuses of Human Rights Put Into Context: The Case of Argentina*, 100 YALE L.J. 2619, 2638 (1991) (“crimes against human rights”); Robert Lansing, *Notes on World Sovereignty*, 15 AM. J. INT'L L. 13, 25 (1921) (the prohibition of the slave trade as “a crime against humanity” was “[u]nder the influence” of “the rights of man”). Additionally, it has long been recognized that numerous types of international crimes can be committed by private actors. See, e.g., Paust, *Private Actors*, *supra* note 10, at 1234, 1237-41 (listing instances of crimes against humanity and other international crimes being committed by private actors). In fact, I know of no general international crime that can only be committed by a state actor. For example, consider early references to offenses against peace by private actors, including breaches of neutrality (including breaches of treaties of neutrality—the very crimes recognized in the 1919 Report of the Responsibilities Commission and the I.M.T. at Nuremberg), territorial infractions, acts of hostility, and aggression. *Id.* at 1238 & n.30; PAUST, BASSIOUNI, ET AL., *supra* note 10, at 173, 222-30, 561-77. These can also be committed by nations, belligerents, and insurgents and surely not merely by states. See also the Trial of Arbuthnot and Ambrister, addressed in PAUST, BASSIOUNI, ET AL., *supra* note 10, at 301-02 (Arbuthnot was guilty of exciting Indians to war against the U.S. in violation of the law of nations and Ambrister was guilty of levying war against the U.S. by taking command of hostile Indians to give battle against the law of nations).

23. Under customary international law, only the persecution-type crime against humanity needs to be engaged in on certain discriminatory grounds. See, e.g., Prosecutor v. Tadic, Case No. IT-94-I-A, Appeals Chamber Judgment, ¶¶ 283-85, 288-95 (July 15, 1999) (also expressly addressing the inconsistent Report of the Secretary-General) *Id.* ¶¶ 293-97; *infra* note 27.

24. See, e.g., Prosecutor v. Nikolic, Case No. IT-94-2-R61, Trial Chamber, ¶ 26 (Oct. 20, 1995) (stating that acts must be organized and systematic and that the crimes considered as a whole must be of a certain gravity).

25. Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. Doc. S/955, Annex (Nov. 8, 1994).

jurisdiction of the ICTR be “committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds[,]”²⁶ thereby adding a “widespread or systematic” limitation, fusing the two general types of crimes against humanity into one committed as part of an “attack” against “civilians” (and thereby excluding persecution-type acts against military personnel), and limiting the reach of the jurisdiction of the ICTR to acts engaged in merely on certain “grounds.”²⁷ It is evident, therefore, that ICTR jurisdiction cannot reach all forms of customary crimes against humanity.

C. Limits in the Rome Statute

A far more severely limiting definition of crimes against humanity is contained in the Rome Statute, thus limiting its jurisdiction over customary crimes against humanity and leaving prosecution of customary crimes that are not covered to domestic courts of various states and to other international criminal tribunals with a broader jurisdictional competence. The first limitation, one that does not appear in any of the customary international legal instruments, is the requirement in Article 7(1) that a relevant act be “committed as part of a widespread or systematic attack.”²⁸ Presumably this new requirement would not obviate ICC jurisdiction over crimes against humanity addressed in the two hypotheticals if one concludes that the attack in each hypothetical was “widespread.” If not, there would be no ICC jurisdiction. Curiously, however, Article 7 contains a limiting definition of “attack” that is lacking in common sense. Instead of recognizing that one attack can constitute an “attack,” Article 7(2)(a) requires that an “attack” involve “a course of conduct involving the multiple commission of acts” referred to in a prior paragraph.²⁹ This additional limitation would obviate ICC jurisdiction with respect to each hypothetical because, although

26. *Id.* art. 3.

27. *Id.* See also Christopher L. Blakesley, *Jurisdiction, Definition of Crimes, and Triggering Mechanisms*, 25 DENV. J. INT'L L. & POL'Y 233, 253 (1997) (“There is no reason that such a limitation should apply”); Cotler, *supra* note 18, at 468 (“a requirement of ‘discrimination’ [on certain grounds] is not one mandated under international law.”); *supra* note 23. Some judges in cases before the ICTR were also activist, even following merely French activist opinions. PAUST, BASSIOUNI, ET AL., *supra* note 10, at 753 (for example, *Rutaganda* citing merely *Akayesu*, which cited merely *Eichmann* (and missing the circumstance of a crime against humanity targeting 93 direct victims), *Barbie*, *Touvier*, and *Papon*). Concerning French activist errors, see *id.* at 727, 729, 731 (addressing points made by Professor Sadat noted *supra* note 22); see generally Sadat Wexler, *supra* note 22 (addressing misinterpretations by the French court).

28. Rome Statute, *supra* note 1, art. 7(1).

29. *Id.* art. 7(2)(a).

each involved an actual attack, neither involved the multiple commission of relevant acts.

Also problematic is Article 7's use of the word "attack" instead of phrases found in the traditional international legal instruments such as "acts committed against,"³⁰ "acts committed,"³¹ and "acts done against."³² The word "attack" can be far more limiting than the customary phrases, since a logical interpretation of an "attack" on civilians might not cover their ill-treatment once they are detained (for example, during interrogation), rape, sexual assault, secret detention or forced disappearance, secret deportation, persecution, use as slave laborers, placement in horrendous concentration camps, or being paraded into gas chambers—all acts that have been associated with crimes against humanity³³ and

30. See text *supra* notes 11, 13 (discussing instruments including this language).

31. See text *supra* note 12 (citing a provision including this language).

32. See text *supra* note 16 (citing a provision including this language).

33. For early U.S. federal and state court cases identifying conduct of private actors involving rape, incest, slavery, and the slave trade as crimes against humanity, offenses against the laws of humanity, and/or crimes against mankind, see, e.g., PAUST, BASSIOUNI, ET AL., *supra* note 10, at 702-03 (discussing briefly such cases); United States v. Darnaud, 25 F. Cas. 754, 760 (C.C.E.D. Pa. 1855) (No. 14,918) (slave trade related to a "crime against mankind"); State v. Robbins, 221 Ind. 125, 46 N.E.2d 691 (1943) (sodomy of a girl is a "crime against mankind"); see also United States v. Haun, 26 F. Cas. 227, 231 (C.C.S.D. Ala. 1860) (No. 15,329) (Campbell, J., on circuit) (Justice Campbell affirmed President Jefferson's recognition in a Second Annual Message to Congress on December 2, 1806 that participation by U.S. citizens in the slave trade was a crime against "human rights"); Henfield's Case, 11 F. Cas. 1099, 1107 (C.C.D. Pa. 1793) (No. 6,360) (Justice Wilson on circuit addressing private actor breaches of neutrality and the commission of hostilities that involve criminal violations of "duties of humanity"); 1 Op. Att'y Gen. 515 (1821) ("crimes against the human family" committed by "enemies of the whole human family," including "poisoners, assassins, and incendiaries by profession . . ." quoting Vattel (1758)); 1 Op. Att'y Gen. 509, 513 (1821) ("crimes against mankind"); EMERICH DE VATEL, LAW OF NATIONS 464-65 (J. Chitty ed. 1883) (violence against a foreign ambassador is a "crime against mankind . . ."); Lansing, *supra* note 22. For U.S. prosecutions of German industrialists for their involvement in slave labor, see, e.g., PAUST, BASSIOUNI, ET AL., *supra* note 10, at 312-13 (citing cases); see also Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 NW. U.J. INT'L HUM. RTS. 304, 304 (2008) (regarding crimes against human rights committed by corporate elites); Jordan J. Paust, *Human Rights Responsibilities of Private Corporations*, 35 VAND. J. TRANSNAT'L L. 801, 803 n.4, 805, 806 n.9 (2002), available at <http://ssrn.com/abstract=1548112> (discussing crimes including slave or forced labor, torture, and crimes against women); *infra* note 41 (explaining that genocide is a crime against humanity committed by private actors). For U.S. cases finding that secret detention or forced disappearance is actionable for civil sanction purposes, see, e.g., *In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994) (concerning torture); *Bowoto v. Chevron Corp.*, No. C 99-02506 SI, 2007 WL 2349336, at *29 (N.D. Cal. Aug 14, 2007) (stating "there is sufficient circumstantial evidence of . . . forced disappearance [in Nigeria] to

that otherwise appear in subparagraphs (a) through (k) in Article 7(1) of the Rome Statute. Perhaps there is a special definition of “attack” within Article 7(2)(a) that avoids such a limitation, however, because part of the definition of “attack” contained therein focuses on the phrase “a course of conduct involving the multiple commission of acts.”³⁴ The word “conduct” can cover relevant acts, but the limitations contained in the phrases “course of conduct” and “multiple commission of acts” are still problematic. For example, they would not cover a single act of torture, rape, sexual assault, persecution, or inhumane treatment or a single forced disappearance unless one concludes that secret detention over a period of time involves a “course of conduct” and multiple acts. It is possible, however, that these acts will suffice if they are committed “as part of” a widespread or systematic attack, although they would not constitute an “attack” under Article 7(2)(a).

What is even more limiting of ICC jurisdiction over customary crimes against humanity is the additional requirement in paragraph 2(a) that such multiple acts be engaged in “pursuant to or in furtherance of a State or organizational policy to commit such attack.”³⁵ This additional limitation would clearly obviate ICC jurisdiction over the five private persons who used a nuclear weapon to destroy half of Tel Aviv. It would also obviate jurisdiction over state actors if they were rogue state officials or employees of a state that had engaged in the same conduct outside of any state or organizational policy, although far fewer deaths engaged in over time pursuant to a policy of a private organization

support tort claims”); *Tachiona v. Mugabe*, 234 F. Supp. 2d 401, 416, 426 (S.D.N.Y. 2002) (addressing human rights and listing “causing the disappearance of individuals” as actionable); *Xuncax v. Gramajo*, 886 F. Supp. 162, 184-85 (D. Mass. 1995) (finding that caused disappearance constituted recognized violations of international law); *Forti v. Suarez-Mason*, 694 F. Supp. 707, 710-12 (N.D. Cal. 1988) (supporting the characterization of “disappearance” as violating universally recognized human rights); 22 U.S.C. § 2151n(a) (2006) (including “prolonged detention without charges, causing the disappearance of persons . . . and clandestine detention of those persons”); *Id.* § 2304(d)(1) (“causing the disappearance of persons” is among “flagrant” and “gross violations of internationally recognized human rights”); S. REP. NO. 102-249, at 9 (1991), quoted in *Xuncax*, 886 F. Supp. at 172.

34. Rome Statute, *supra* note 1, art. 7(2)(a). *See also* *Prosecutor v. Kunarac*, Case No. IT-96-23/1-A ¶ 86 (the word attack “encompasses any mistreatment of the civilian population”).

35. *Id.* Existence of a plan or policy is certainly not a requirement under customary international law or before the ICTY, ICTR, and Special Court for Sierra Leone. *See supra* note 22 (citing authors who explain that a plan or a policy is not needed). Moreover, private actors have committed crimes against humanity without being part of an organization. *See supra* notes 22, 33 (listing cases and articles involving private actors committing crimes against humanity and other international crimes).

engaged in organized crime would be covered.³⁶ Al Qaeda is doubtless an organization with an “organizational policy,” but the multiple acts limitation contained within the Statute’s definition of “attack” still leaves the ICC without jurisdiction over the hypothetical’s single widespread attack on civilians as a covered crime against humanity despite extensive recognition that the actual 9/11 attacks were crimes against humanity under customary international law.³⁷ Nonetheless, conduct addressed in

36. See, e.g., Sonia Merzon, *Extraterritorial Reach of the Trafficking Victims Protection Act*, 39 GEO. WASH. INT’L L. REV. 887, 901 (2007), citing Tom Obokata, *Trafficking of Human Beings as a Crime Against Humanity: Some Implications for the International Legal System*, 54 INT’L & COMP. L.Q. 445, 445 (2005) (concerning the seriousness of the crime of human trafficking in the international law community); Smith, *supra* note 22, at 1122-1124, 1129-30, 1139-52 (showing that the term “organization” also covers private, non-state actors); Bruce Zagaris, *U.S. International Cooperation Against Transnational Organized Crime*, 44 WAYNE L. REV. 1401, 1462 (1998) (regarding “genocide and crimes against humanity by transnational organized crime groups . . .”).

37. Quite clearly, however, al Qaeda is a non-state actor organization that has used both widespread and systematic attacks against civilians as part of a continued plan to engage in social violence and even persecutions on political, religious, and national origin grounds and various members can be prosecuted for crimes against humanity. See, e.g., HELEN DUFFY, *THE “WAR ON TERROR” AND THE FRAMEWORK OF INTERNATIONAL LAW* 76-93 (2005) (addressing the responsibility of non-state actors under international law); JAVAID REHMAN, *INTERNATIONAL HUMAN RIGHTS LAW: A PRACTICAL APPROACH* 464-65 (2003) (considering how terrorism fits into international criminal law); Roberta Arnold, *Terrorism as a Crime Against Humanity under the ICC Statute*, in *INTERNATIONAL COOPERATION IN COUNTER-TERRORISM* 121, 131 (Giuseppe Nesi ed. 2006) (also addressing other non-state actor terrorist targetings as crimes against humanity); Abdullahi Ahmed An-Na’im, *Globalization and Jurisprudence: An Islamic Perspective*, 54 EMORY L.J. 25, 30 (2005) (describing 9/11 as a crime against humanity that the ICC would have had jurisdiction over had it existed at the time); M. Cherif Bassiouni, *Legal Control of International Terrorism: A Policy-Oriented Assessment*, 43 HARV. INT’L L.J. 83, 101 (2002) (stating “the attacks upon the United States of September 11 constitute ‘Crimes Against Humanity’ as defined in Article 7 of the Statute of the . . . (ICC).”); Antonio Cassese, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law*, 12 EUR. J. INT’L L. 993, 994-95 (2001) (supporting the view that terrorism is considered prohibited by international law); Mark A. Drumbl, *Victimhood in Our Neighborhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Legal Order*, 81 N.C. L. REV. 1, 60-62 (2002) (assuming that al Qaeda does have an organizational policy, and their acts are crimes against humanity); James D. Fry, *Terrorism as a Crime Against Humanity and Genocide: The Backdoor to Universal Jurisdiction*, 7 UCLA J. INT’L L. & FOREIGN AFF. 169, 190 (2002) (finding that the terrorist attacks on September 11 meet all the requirements of a crime against humanity); John W. Head, *Essay: The United States and International Law After September 11*, 11 KAN. J. L. & PUB. POL’Y 1, 6 (2001) (discussing terrorist acts in the context of international customary law); Irene Zubaida Khan, *The Rule of Law and the Politics of Fear: Human Rights in the Twenty-First Century*, 14 BUFF. HUM. RTS. L. REV. 1, 4 (2008) (Amnesty International also recognized 9/11 as a crime against humanity); Chibli Mallat, *The Original Sin: “Terrorism” or “Crime Against Humanity”?*, 34 CASE W. RES. J. INT’L L.

245, 246-47 (2002) (qualifying the September 11 attack as a crime against humanity); Stephen P. Marks, *Branding the "War on Terrorism": Is There a "New Paradigm" of International Law?*, 14 MICH. ST. J. INT'L L. 71, 86 & n.52 (2006) (U.N. High Commissioner for Human Rights also recognized 9/11 as a crime against humanity); Juan E. Mendez, *Human Rights Policy in the Age of Terrorism*, 46 ST. LOUIS U.L.J. 377, 377 n.1 (2002) (explaining that "terrorism" clearly fits into the definition of crimes against humanity); Thomas Michael McDonnell, *The Death Penalty—An Obstacle to the "War on Terrorism"?*, 37 VAND. J. TRANSNAT'L L. 353, 384 n.150, 393 (2004) (reasoning that terrorist acts would not be justified under international law); Jordan J. Paust, *Responding Lawfully to al Qaeda*, 56 CATH. U. L. REV. 759, 761 (2007) (stating that such attacks constitute human rights violations and crimes against humanity); Vincent-Joel Proulx, *Rethinking the Jurisdiction of the International Criminal Court in the Post-September 11th Era: Should Acts of Terrorism Qualify as Crimes Against Humanity?*, 19 AM. U. INT'L L. REV. 1009, 1023 (2004) (analyzing the legal concepts of terrorism and crimes against humanity); Ron Sievert, *A New Perspective on the International Criminal Court: Why the Right Should Embrace the ICC and How America Can Use It*, 68 U. PITT. L. REV. 77, 100 & n.116 (2006) (also noting that ICC Prosecutor Luis Ocampo stated before a meeting of the ABA that "he would be willing to prosecute al Qaeda for the World Trade Center attacks based solely on the crimes against humanity charges currently available in the ICC criminal code"); Leila Nadya Sadat, *Terrorism and the Rule of Law*, 3 WASH. U. GLOBAL STUD. L. REV. 135, 148-49 (2004) (arguing the 9/11 attacks fit the definition of crimes against humanity under the Rome Statute); David J. Scheffer, *Staying the Course with the International Criminal Court*, 35 CORNELL INT'L L.J. 47, 49, 50 n.6 (2002) (acknowledging the 9/11 attacks as crimes against humanity); J.M. Spectar, *Beyond the Rubicon: Presidential Leadership, International Law & the Use of Force in the Long Hard Slog*, 22 CONN. J. INT'L L. 47, 63 (2006) (stating the al Qaeda attack was a crime against humanity); Susan Tiefenbrun, *A Semiotic Approach to a Legal Definition of Terrorism*, 9 ILSA J. INT'L & COMP. L. 357, 386 n.115 (2003) (citing Professor Michael P. Scharf on the discussion of including terrorist acts as a crime against humanity); Sabine von Schorlemer, *Human Rights: Substantive and Institutional Implications of the War Against Terrorism*, 14 EUR. J. INT'L L. 265, 272-74 (2003) (characterizing the 9/11 attacks as crimes against humanity); Corey Winer, *Smoke 'Em Out: U.S. Counterterrorist Mishaps Necessitating the Expansion of INTERPOL's Capabilities to Meet the New Terrorist Threat*, 33 SUFFOLK TRANSNAT'L L. REV. 145, 160 & n.76 (2010) (INTERPOL condemned 9/11 as a crime against humanity); Warren Richey, *Tribunals on Trial*, THE CHRISTIAN SCIENCE MONITOR, Dec. 14, 2001, at 1 (quoting Professor Leila Sadat: "actions of Sept. 11 aren't war crimes, they are civilian crimes, they are crimes against humanity[.]"); Frederic L. Kirgis, *Clarification of Insight on Terrorist Attacks on the World Trade Center and the Pentagon*, ASIL INSIGHTS, Kirgis addendum Sept. 20, 2001, available at <http://www.asil.org/insights/insigh77.htm> (discussing the 9/11 attack); *id.*, Paust, Addendum 2 (regarding prosecution of Mr. bin Laden); *see also* Schabas, *supra* note 11, at 362 (noting views of U.N. High Commissioner for Human Rights Mary Robinson, Geoffrey Robertson, Alain Pellet, and others); *but see* Schabas, *supra* note 11, at 347, 362 (preferring what is an admittedly rare minority view claimed more recently by Professor Bassiouni that al Qaeda and any other non-state actor cannot be guilty of a crime against humanity. *But see* Bassiouni, *supra* note 11 (concerning his recognition in 2002).

Canadian courts have also recognized private actor complicity or leader

the hypothetical could be prosecuted by the ICC as genocide involving murderous targetings of U.S. nationals with the intent to destroy part of such a national group.³⁸ Additionally, non-state terrorists who do not operate under an “organizational” policy while committing customary crimes against humanity would not be covered by the Statute, nor would private perpetrators of slave trading if they were not acting in accordance with a state or organizational policy. In my opinion, none of these limitations on the meaning of “attack” are preferable, but they appear in the Statute and will condition ICC jurisdiction until the Statute is amended.

What is also most curious is that the Rome Statute uses the customary definition of genocide,³⁹ which is known to be a special type of crime against humanity,⁴⁰ and it contains no widespread or

responsibility for crimes against humanity committed by the Sri Lanka insurgent group LLTE. See, e.g., *Sivakumar v. R*, Case No. IMM-1600-95, 1997 WL 1913825, at ¶ 6 (Fed. Ct. Can. Jan. 24, 1997) (leader responsibility); *Pushpanathan v. Canada*, Case No. T93-08842, 2002 WL 31918433, at ¶ 17 (Imm. & Refugee Bd. App. Div. June 4, 2002) (private actor complicity).

38. See Rome Statute, *supra* note 1, art. 6 (defining genocide as killing members of a group in whole or part); Fry, *supra* note 37, at 169-70, 193-94; Frederic Megret, *Justice in Times of Violence*, 14 EUR. J. INT'L L. 327, 344-45 & n.34 (2003) (addressing al Qaeda 9/11 attacks as genocide). However, jurisdiction of the ICC is limited with respect to the date when a crime is committed. See Rome Statute, *supra* note 1, art. 11 (stating that jurisdiction may only be exercised, with exception to Article 12 and 13, for crimes after a State has entered the Statute).

39. Rome Statute, *supra* note 1, art. 6; PAUST, BASSIOUNI, ET AL., *supra* note 10, at 800-01; Jordan J. Paust, *Congress and Genocide: They're Not Going to Get Away With It*, 11 MICH. J. INT'L L. 90, 90-91, 93-94 (1989).

40. See, e.g., ANTONIO CASSESE, *INTERNATIONAL LAW* 442-43 (2d ed. 2005); PAUST, BASSIOUNI, ET AL., *supra* note 10, at 709-10, 714-15, 717, 722, 726, 730; ADAM ROBERTS & RICHARD GUELF, *DOCUMENTS ON THE LAWS OF WAR* 179 (3d ed. 2003); Jordan J. Paust, *Threats to Accountability After Nuremberg: Crimes Against Humanity, Leader Responsibility and National Fora*, 12 N.Y.L.S. J. HUM. RTS. 547 (1995); William A. Schabas, *Punishment of Non-State Actors in Non-International Armed Conflict*, 26 FORDHAM INT'L L.J. 907, 919-20 (2003) (non-state actors can commit “types of crimes against humanity—genocide, apartheid, torture”); Michael Scharf, *The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes*, 59 L. & CONTEMP. PROBS. 41, 54 (1996); Leila Sadat Wexler, *The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again*, 32 COLUM. J. TRANS. L. 289, 360 (1994); *The Prosecutor v. Jelisic*, IT-95-10-T, Trial Chamber Judgment, ¶ 68 (Dec. 14, 1999); *Prosecutor v. Kayishema & Ruzindana*, ICTR-95-1-T, Trial Chamber Judgment, ¶ 89 (May 2, 1999); *Prosecutor v. Tadic*, IT-94-1-AR72, Appeals Chamber Judgment, ¶ 140 (Oct. 2, 1995); see also Christopher L. Blakesley & Dan Stigall, *Wings for Talons: The Case for Extraterritorial Jurisdiction Over Sexual Exploitation of Children Through Cyberspace*, 50 WAYNE L. REV. 109, 135 n.100 (2004) (genocide is a *crimen contra omnes*); *Prosecutor v. Kupreskic*, Case No. IT-96-16-T, Trial Chamber Judgment, ¶ 636 (Jan. 14, 2000) (persecution-type of crime against humanity

systematic requirement, no potentially limiting requirement of an “attack,” no multiple acts requirement for every form of genocide, and no state or organizational policy type of limitation. Moreover, everyone knows that genocide is a crime under customary international law that can be committed by private actors.⁴¹ The fact that genocide is a special type of customary crime against humanity and that the definition of genocide does not contain various limitations set forth with respect to other crimes against humanity in Article 7 of the Rome Statute adds to the recognition that definitions of customary crimes against humanity need not have such limitations and that Article 7 does not cover all crimes against humanity under customary international law.

Within Article 7, one finds another potential limitation that is not found in the customary international legal instruments. Under Article 7(1)(k), inhumane acts must either cause “great suffering,

belongs to the same genus as genocide); *Sarei v. Rio Tinto PLC*, 650 F. Supp.2d 1004, 1021-23 (C.D. Cal. 2009) (regarding actionable claims against an international mining group for “crimes against humanity amounting to genocide and torture”).

41. See, e.g., Convention on the Prevention and Punishment of the Crime of Genocide, art. IV (“or private individual”), 78 U.N.T.S. 277 (1948); CASSESE, *supra* note 40, at 444; MYRES S. MCDUGAL, HAROLD D. LASSWELL & LUNG-CHU CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER 355 (1980); SEAN D. MURPHY, PRINCIPLES OF INTERNATIONAL LAW 423 (2006); PAUST, BASSIOUNI, ET AL., *supra* note 10, at 784; ELLEN S. PODGOR & ROGER S. CLARK, UNDERSTANDING INTERNATIONAL CRIMINAL LAW 169 (2 ed. 2008); Knox, *supra* note 22, at 19, 27-28; Roht-Arriaza, *supra* note 22; Schabas, *supra* note 40, at 919-20; Zagaris, *supra* note 36; The Prosecutor v. Jelusic, Case No. IT-95-10-A Appeals Chamber Judgment, ¶¶ 66-68 (July 5, 2001) (evidence of “a one-man genocide mission, intent on personally wiping out the protected group in whole or in part” existed to support a conviction); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 n.20 (2004); *Khulumani v. Barclay Nat. Bank, Ltd.*, 504 F.3d 254, 270 n.5, 273, 283 (2d Cir. 2007) (Katzmann, J., concurring); *Doe I v. Unocal Corp.*, 395 F.3d 932, 954 (9th Cir. 2002); *Kadic v. Karadzic*, 70 F.3d 232, 241-42 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996); *Sarei v. Rio Tinto PLC*, 650 F. Supp.2d at 1021-23; *Almog v. Arab Bank, PLC*, 471 F. Supp.2d 257, 271, 274-78, 289, 293 (E.D.N.Y. 2007) (also recognizing private actor conduct as crimes against humanity and genocide and private actor complicity with respect to each international crime); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp.2d 289, 305-06, 327 (S.D.N.Y. 2003); *Bodner v. Banque Paribas*, 114 F. Supp.2d 117, 128 (E.D.N.Y. 2000); U.N. G.A. Res. 96(I), 1 U.N. GAOR, U.N. Doc. A/64/Add.1, at 188-89 (1946) (whether the actors are “private individuals, public officials or statesmen”). There is absolutely no requirement that genocide be committed by state actors or by private actors who engage in conduct as part of a state plan or policy or with the consent or acquiescence of a state or public official. See also CASSESE, *supra* note 40, at 444 (there is no requirement of a widespread or systematic practice, a plan or policy, or involvement of governmental authorities). For additional U.S. cases finding genocide to be actionable for civil sanction purposes, see, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. at 762-63 (Breyer, J., concurring); *Mehinovic v. Vuckovic*, 198 F. Supp.2d 1322, 1354-55 (N.D. Ga. 2002).

or serious injury to body or to mental or physical health.”⁴² It would be completely out of line with trends in judicial decision and general patterns of expectation concerning the meaning of inhumane or inhuman treatment of human beings to require “great suffering,”⁴³ but what saves this provision from being far too restrictive is the fact that inhumane treatment is necessarily “serious.”⁴⁴

Additional limitations are contained in paragraph 2(e) and (i) that do not reflect customary international law. Article 7(2)(e) provides a restrictive limitation with respect to torture. The limitation relates to victims and only covers “a person in the custody or under the control of the accused”⁴⁵ Clearly, however, complicity in “torture” under customary international law can occur with respect to a person aiding and abetting another person who has control of a direct victim and the complicitor who lacks custody or control will be an “accused.”⁴⁶ Dereliction of duty of a leader with respect to “torture” can occur even though the leader who is an “accused” does not have custody or control of the direct victim.⁴⁷ An “accused” can also be a member of a joint criminal enterprise and be an accused without having custody or control of the direct victim.⁴⁸ Additionally, the direct perpetrator of torture could be a person who does not have custody or control of the victim, e.g., one who directs a robotic torture machine to torture a victim in the custody or control of someone else. The ICC limitation will simply leave jurisdictional competence and

42. Rome Statute, *supra* note 1, art. 7(1)(k).

43. Concerning inhumane or inhuman treatment and the fact that “great” suffering is not required, see, e.g., Jordan J. Paust, *The Absolute Prohibition of Torture and Necessary and Appropriate Sanctions*, 43 VAL. U. L. REV. 1535, 1558, n.73 (2009) quoting *Mehinovic v. Vuckovic*, 198 F. Supp.2d 1322, 1347-49 (N.D. Ga. 2002) (noting that some degrading and inhumane sexual acts may not be severe suffering, but are nonetheless unlawful) [hereinafter Paust, *Torture*], available at <http://ssrn.com/abstract=1331159>; Jordan J. Paust, *Above the Law: Unlawful Executive Authorizations Regarding Detainee Treatment, Secret Renditions, Domestic Spying, and Claims to Unchecked Executive Power*, 2007 UTAH L. REV. 345, 408-10 (2007) (noting tests or criteria regarding humiliating and degrading treatment) [hereinafter Paust, *Above the Law*], available at <http://ssrn.com/abstract=1485024>.

44. See, e.g., PAUST, BASSIOUNI, ET AL., *supra* note 10, at 666, 675, 676 n.20, 775, 820 n.5; Rome Statute, *supra* note 1, art. 1 (the crimes listed within the jurisdiction of the ICC are all “most serious.” Thus, for example, inhuman acts covered in Article 8(2)(a)(ii) are necessarily “serious”).

45. Rome Statute, *supra* note 1, art. 7(2)(e).

46. See PAUST, BASSIOUNI, ET AL., *supra* note 10, at 44-49; Paust, *Torture*, *supra* note 43, at 1544-45, 1559-67, 1569 (addressing aiding or abetting). As the materials cited clearly demonstrate, complicity does not require substantial assistance or facilitation. Rome Statute, *supra* note 1, art. 25(3)(c)-(d).

47. See PAUST, BASSIOUNI, ET AL., *supra* note 10, at 52-78.

48. *Id.* at 32-33, 37-38.

responsibility to initiate prosecution of persons with some forms of responsibility with respect to torture to states or some other international criminal tribunal.

Neither the Inter-American Convention on the Forced Disappearance of Persons,⁴⁹ nor the International Convention for the Protection of All Persons from Enforced Disappearance⁵⁰ contain the severely limiting phrase with respect to secret detention that is found in Article 7(2)(i) of the Rome Statute, which declares: “with the intention of removing them from the protection of the law for a prolonged period of time.”⁵¹ There is no “prolonged period of time” limit in either treaty or in the customary prohibition of forced disappearance. Moreover, it is clear that no human being is beyond the protection of the law⁵² and there is absolutely no requirement in other treaties or customary international law that a perpetrator intend such a result.

Another change contained in the Rome Statute involves the elimination of coverage of persecution type crimes against humanity committed against non-civilians such as combatants in the context of an armed conflict, since all crimes against humanity covered under Article 7 must be part of an attack directed against civilians.⁵³ Unlike the customary definitions that had addressed persecution on certain “grounds,”⁵⁴ Article 7(1)(h) of the Rome Statute does not cover persecution on certain grounds as such, but merely persecution “against any identifiable group . . .”⁵⁵ Perhaps the targeting of a few members of the group will suffice as persecution “against” the group, but the persecution will also have to be part of a widespread or systematic attack on civilians involving a multiple commission of acts. Additionally, persecution under the Statute has to involve a “severe” deprivation of fundamental rights “by reason of the identity of the group or collectivity.”⁵⁶ Perhaps every persecution of a human being is severe, but the addition of such a requirement might result in a

49. Inter-American Convention on the Forced Disappearance of Persons art. II, done at Belem do Para, Brazil, June 9, 1994.

50. International Convention for the Protection of All Persons from Enforced Disappearance art. 2, adopted by G.A. Res. 61/177, Annex, U.N. Doc. A/RES/61/177/Annex (Dec. 20, 2006).

51. Rome Statute, *supra* note 1, art. 7(2)(i).

52. See, e.g., PAUST, BASSIOUNI, ET AL., *supra* note 10, at 655-56, 816, 825; Paust, *Torture*, *supra* note 43, at 1552-53, 1568 n.98 (noting that torture is prohibited regardless of the status of the victim).

53. Rome Statute, *supra* note 1, art. 7(1)(h); PAUST, BASSIOUNI, ET AL., *supra* note 10, at 769.

54. See, e.g., *supra* text accompanying at notes 11-16 (discussing what is required for persecution).

55. Rome Statute, *supra* note 1, art. 7(1)(h).

56. *Id.* art. 7(2)(g).

limitation of coverage if it is not recognized that persecutions of human beings are necessarily severe.

From the above, it is obvious that the reach of ICC jurisdiction over customary crimes against humanity is limited in several respects. It is also clear that states seeking to enact legislation that can reach all crimes against humanity should not enact legislation that merely copies Article 7 of the Rome Statute. Enactment of legislation that can reach all customary crimes against humanity can be important for a state that prefers to have an option to prosecute an accused person while fulfilling its duty under customary international law *aut dedere aut judicare* (i.e., either to hand over or to initiate prosecution).⁵⁷ Clearly also, if states ever adopt a general or regional multilateral treaty on crimes against humanity as such, definitional elements should not merely reflect those found in Article 7 of the Rome Statute because they are far too limiting and do not reach all forms of customary crimes against humanity. It is also evident that if a new regional international criminal tribunal is created, its constitutive instrument should not contain a definition of crimes against humanity like Article 7 of the Rome Statute.⁵⁸

III. THE LIMITED REACH OF ICC JURISDICTION WITH RESPECT TO WAR CRIMES

The list of war crimes within the jurisdiction of the ICC that is contained in Article 8 of the Rome Statute is extensive. However, it is well-recognized that every violation of the customary laws of war is a war crime⁵⁹ and Article 8's list is not

57. Concerning the duty *aut dedere aut judicare* with respect to crimes under customary international law, see PAUST, BASSIOUNI, ET AL., *supra* note 10, at 10, 12, 17-19, 27, 131-32, 138-42; Paust, *Torture*, *supra* note 43, at 1537-43 (expressing strict adherence); Rome Statute, *supra* note 1, prml. (“Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level, . . . [r]ecalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes . . .”). If a state cannot or will not prosecute, its duty shifts to a duty to extradite an accused to another state or to render an accused to an international tribunal with jurisdiction.

58. Professor Stuart Ford's suggestion concerning a regional extension of the ICC is interesting, but such an extension will necessarily have the same drawback in connection with the limited reach of ICC jurisdiction over customary crimes against humanity under its Statute. Cf Stuart Ford, *The International Criminal Court and Proximity to the Scene of the Crime: Does the Rome Statute Permit All of the International Criminal Court's Trial to Take Place at Local or Regional Chambers*, 43 J. MARSHALL L. REV. 715 (2010), also noting that Professor Burke-White had raised this point. *Id.* at 715 n.1, citing William Burke-White, *Regionalization of International Criminal Law Enforcement: A Preliminary Exploration*, 38 TEX. INT'L L.J. 729, 750-52 (2003).

59. See, PAUST, BASSIOUNI, ET AL., *supra* note 10, at 35, 639, 663

complete.⁶⁰

An initial problem concerning possible limits involves interpretation of the phrase “in particular” in Article 8(1), which declares: “[t]he 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.”⁶¹ Since any violation of the laws of war is a war crime, the quoted language affirms that the ICC will have jurisdiction over war crimes, and thereafter a large number of war crimes are set forth in relative detail in paragraph (2)(a), (b), (c), and (e), it is apparent that the phrase “in particular” is not a limiting phrase, but is one that emphasizes the fact that ICC jurisdiction will exist especially or particularly when crimes are committed as part of a plan or policy or large-scale set of crimes. This is also apparent in view of the fact that treaties are to be interpreted in light of the ordinary meaning of their terms with reference to their object and purpose and relevant international law.⁶² Under customary international law, war crimes do not have to be committed as part of a plan or policy or large-scale set of crimes and it would be illogical and not policy-serving to impose a limitation by interpreting the phrase “in particular” differently than its ordinary meaning.

Another problem concerning the extent of possible limits involves interpretation of the phrase “namely, any of the following acts,” which appears in Article 8(2)(a), (b), (c), and (e) with respect to listed “grave breaches” of Geneva law, other serious violations of the laws of war during an international armed conflict, serious violations of common Article 3 of the Geneva Conventions during an armed conflict not of an international character, and other serious violations of the law of war during an armed conflict not of an international character. The word “namely” is partly ambiguous. It is not clear whether the intent was to provide an exclusive list of acts within the jurisdiction of the Court as opposed to examples of grave or serious violations. Treaty-based and customary war crimes are far more numerous, and so are grave or serious war crimes, but Article 22(2) of the Statute might require

(discussing violations of the customary laws of war).

60. See, e.g., Jordan J. Paust, *Crimes Within the Limited Jurisdiction of the International Criminal Court*, in 3 INTERNATIONAL HUMANITARIAN LAW: PROSPECTS 179-87 (John Carey, William V. Dunlap & R. John Pritchard eds. 2006). The rest of this section is borrowed and partly revised from part of the cited book chapter with permission from BRILL, which holds the copyright from Transnational Publishers, Inc.

61. Rome Statute, *supra* note 1, art. 8(1).

62. See, e.g., Vienna Convention on the Law of Treaties, arts. 31-32, May 23, 1969, 1155 U.N.T.S. 331 (addressing the need to interpret a treaty in view of its ordinary meaning, other relevant international law, and other factors). See also Rome Statute, *supra* note 1, art. 21(1)(b), and (3) (stating the court “shall” apply applicable treaties where appropriate).

that the lists “be strictly construed” and “not . . . extended by analogy[,]” especially “[i]n case of ambiguity[,]” because this would involve interpretation in favor of the accused.⁶³ However, it may be that Article 22(2) merely requires that the crimes listed be strictly construed, not that the list be construed as an exclusive list of crimes covered under various portions of Article 8.

In Article 8(2)(a), there is a list of “grave breaches” of the 1949 Geneva Conventions. In paragraph (2)(b), there is a list of “other serious” war crimes, including other serious breaches of Geneva law. This splitting of “grave breaches” from “other serious” breaches of Geneva law may not seem logical to some, but it is presumably based on the fact that the newer Protocols to the Geneva Conventions contain additional lists of crimes and prohibitions, (some of which are “grave breaches”⁶⁴) that some countries have not ratified either or both of the Protocols (including the United States), and that many but not all of the provisions of each Protocol are customary international law.⁶⁵

Concerning the list of grave breaches of the 1949 Geneva Conventions, there is a confusing placement of a comma in Article 8(2)(a)(iii) between the phrase “wilfully causing great suffering” and “serious injury.” It may well be that with the placement of the comma “serious injury” need not be “wilfully” caused in order to constitute a grave breach within Article 8(2)(a). Two other listed “grave breaches” are tied to the limiting terms “wilful” or “wilfully,”⁶⁶ but five others are not so limited.⁶⁷ Thus, the majority of “grave breaches” need not be wilful or wilfully caused. Article 8(2)(a)(iii) does not contain a previously recommended clarifying phrase “including rape, enforced prostitution and other sexual violence of comparable gravity”⁶⁸ which would have expressly noted certain examples of “great suffering” or “serious injury to body or health.” Nonetheless, there is widespread recognition that such acts would be included in phrases such as “great suffering” and “serious injury to body or health,” as well as in the phrase “torture or inhuman treatment” found in Article 8(2)(a)(ii) and (c)(i) and (ii).⁶⁹ Rape and enforced prostitution, as well as other

63. Rome Statute, *supra* note 1, art. 22(2).

64. *See, e.g.*, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), arts. 75 (7)(b), 85-86, 88, June 8, 1997, 1125 U.N.T.S. 3 [hereinafter Protocol I] (listing specifically, the additional “grave breaches”).

65. *See, e.g.*, PAUST, BASSIOUNI, ET AL., *supra* note 10, at 643, 660, 698 (addressing the provisions which are customary international law).

66. Rome Statute, *supra* note 1, art. 8(2)(a)(i) and (vi).

67. *Id.* art. 8(2)(a)(ii), (iv), (v), (vii), and (viii).

68. *Observations on the Consolidated ICC Text Before the Final Session of the Preparatory Committee, in 13 bis NOUVELLES ÉTUDES PÉNALES* 29, 36 (Leila Sadat Wexler & M. Cherif Bassiouni eds., 1998).

69. PAUST, BASSIOUNI, ET AL., *supra* note 10, at 693-94. Concerning rape

relevant acts, are also expressly prohibited in Article 8(2)(b)(xxii) and (e)(vi), and are war crimes under customary international law.⁷⁰

In Article 8(2)(b), one finds the curious phrase “within the established framework of international law” This phrase is unnecessary with respect to matters covered by the phrase “[o]ther serious violations of the laws and customs applicable in international armed conflict,” since such violations must necessarily be reflected in treaty-based or customary international law.

Article 8(2)(b)(i) (concerning international armed conflicts) and a related provision in paragraph (2)(e)(i) (concerning non-international armed conflicts) properly prohibit attacks on individual civilians “not taking direct part in hostilities.” This latter phrase makes clear that “civilians” who take an active and direct part in hostilities can be lawful military targets.⁷¹ Common Article 3 of the 1949 Geneva Conventions, which reflects the customary standard, does not protect every person, but only those “[p]ersons taking no active part in the hostilities.”⁷² Article 4 of Protocol II to the Geneva Conventions only covers “persons who do not take a direct part or who have ceased to take part in hostilities.”⁷³ Thereafter, Article 13 of Protocol II states that “[t]he civilian population as such, as well as individual civilians, shall

and other forms of sexual violence as torture and cruel treatment, *see, e.g.*, PAUST, *Torture*, *supra* note 43, at 1558 & n.74 (addressing depraving sexual acts). Article 8(2)(c) addresses violations of common Article 3 of the 1949 Geneva Conventions, but only in the context of a non-international armed conflict. This is somewhat problematic because the rights and duties reflected in common Article 3 are part of customary international law that is also applicable during an international armed conflict. *See, e.g.*, JORDAN J. PAUST, *BEYOND THE LAW: THE BUSH ADMINISTRATION'S UNLAWFUL RESPONSES IN THE "WAR" ON TERROR* 2-3, 137-38 n.19 (2007) (noting this point and providing citations); PAUST, BASSIOUNI, ET AL., *supra* note 10, at 649-50; *see also* Hamdan v. Rumsfeld, 548 U.S. 557, 629-31 & nn.57, 63 (2006) (stating Geneva Convention 3 contains a set of minimum customary rights and duties); *id.*, 548 U.S. at 641-42 (Kennedy, J., concurring). Some violations of common Article 3 do not appear as such in Article 8(2)(a) or (b) of the Rome Statute. For example, Article 8(2)(a) and (b) do not expressly prohibit “cruel” treatment and trial in a court that is not “regularly constituted” and does not afford “all judicial guarantees” recognized under customary international law. However, Article 8(2)(a)(ii) covers “inhuman” treatment, which has a lower threshold than “cruel” treatment, and 8(2)(a)(vi) covers willful deprivation of “rights of fair and regular trial.” Rome Statute, *supra* note 1, art. 8.

70. PAUST, BASSIOUNI, ET AL., *supra* note 10, at 691, 693-94.

71. *See infra* note 75 (addressing civilians as military targets).

72. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter GC]; *infra* note 75.

73. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) art. 4, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II].

not be the object of attack.”⁷⁴ It is apparent that Article 4 and Article 13 of Protocol II must be interpreted consistently so that the phrase “individual civilians” is not read too broadly to cover persons who are not entitled to protection under Article 4. The same is true with respect to Article 51 of Protocol I, especially paragraph 3 of Article 51 (which recognizes that civilians lose protection when “and for such time as they take a direct part in hostilities”⁷⁵), although Article 50 of Protocol I contains a presumption of “civilian” status in case of doubt.⁷⁶ This matter may otherwise become confusing in cases where the President, Prime Minister, or Defense Minister of a country are civilians who have *de jure* or *de facto* command authority over the military and would be a proper military target during an international armed conflict. During an insurgency, enemy police, para-military, intelligence agents, guards, and other officials or agents may take an active part in hostilities and be proper military targets.⁷⁷ Words such as “civilian” are not helpful with respect to the propriety of target selection unless these distinctions are kept in mind. Perhaps the words “noncombatant” or “non-fighter” would be more meaningful, but they do not appear to cover all examples of proper military targets (*e.g.*, the President of the United States, Director of the CIA, and Secretary of Defense in case of an international armed conflict during which the United States is engaged in war).

Within Article 8(2)(b)(iv), concerning attacks causing “incidental loss of life or injury to civilians or damage to civilian objects[.]” one finds the only provision containing the delimiting phrase “in the knowledge that such attack will cause”⁷⁸ This

74. *Id.* art. 13.

75. Protocol I, *supra* note 64, art. 51(3). Concerning “civilians” who lose such protection, *see, e.g.*, MICHAEL BOTHE, KARL JOSEF PARTSCH, WALDEMAR A. SOLF, NEW RULES FOR VICTIMS OF ARMED CONFLICTS 301-04 (1982); NILS MELZER, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 79-80 (ICRC, 2009) available at [http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0990/\\$File/ICRC_002_0990.pdf](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0990/$File/ICRC_002_0990.pdf); NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW 56, 319-20, 327-28, 345 (2009); Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT’L L. & POL’Y (forthcoming), available at <http://ssrn.com/abstract=1520717>; *see also infra* note 76 (defining civilians in this context).

76. Protocol I, *supra* note 64, art. 50(1).

77. *See also* Jordan J. Paust, *An Introduction to and Commentary on Terrorism and the Law*, 19 CONN. L. REV. 697, 744 & n.183 (1987); *supra* note 75 (discussing civilians and also targeted killings).

78. Rome Statute, *supra* note 1, art. 8(2)(b)(iv). The ICC Elements with respect to this provision states that the perpetrator “knew that the attack would cause . . . and that such death, injury or damage would be of such an extent as to be clearly excessive” International Criminal Court, *Elements of Crimes*, art. 8(2)(b)(iv), U.N. Doc. PCNICC/2000/1/Add.2 (Nov. 2, 2000), reprinted in JORDAN J. PAUST ET AL., INTERNATIONAL CRIMINAL LAW

is an improper standard or threshold with respect to all forms of relevant criminal liability and, therefore, is another indication of the limited reach of ICC jurisdiction. The phrase “in the knowledge or in wanton disregard that such attack may cause” would have reached other serious war crimes, but it was not chosen. Instead, the limiting phrase within Article 8(2)(b)(iv) assures that an entire area of criminal responsibility attaching to wanton or reckless disregard of consequences will not be addressed by the ICC unless it falls within other portions of Article 8(2), which is possible depending on the language used in other subparagraphs and various features of context. Sometimes the *mens rea* standard concerning customary war crimes is reflected in the words “wilful,” “wilfully,” or “deliberate,” as used in Article 147 of the 1949 Geneva Civilian Convention⁷⁹ or used a few times with respect to certain customary war crimes found in the 1919 List of War Crimes prepared by the Responsibilities Commission,⁸⁰ but sometimes the standard includes “wanton” or “wantonly,” as in Article 147 of the Geneva Civilian Convention⁸¹ and certain crimes

DOCUMENTS SUPPLEMENT 328, 338 (2006) [hereinafter ICL DOCS.]. Professor Roger Clark rightly notes that the ICC Elements should also be consulted for a through consideration of *mens rea* standards, but that the Elements can create (and at times have created) more ambiguity leading either to a limiting or an expanding potential liability with respect to aspects of *mens rea* or “intent and knowledge,” and in particular with respect to differences between *dolus directus* in the first degree (direct intent), *dolus directus* of the second degree (awareness of an inevitable outcome), and *dolus eventualis* (reaching recklessness). Roger S. Clark, *Elements of Crimes in Early Confirmation Decisions of Pre-Trial Chambers of the International Criminal Court*, 6 NEW ZEALAND YRBK. INT’L L. 209 (2008). He also notes that there is a “default rule” in Article 30 of the Rome Statute that must also be interpreted and applied. *Id.* at 212. This is undoubtedly true, but it is not the purpose of this article to consider what might be the most thorough and proper interpretation of Article 30 and the relevant Elements *vis a vis* particular portions of Article 8 addressed here as opposed to the purpose of alerting the reader to the fact that Article 8 has some notable limits of liability for wanton or reckless conduct as opposed to that covered by the customary laws of war. However, I accept the point that judges will have to consider specific portions of Article 8, applicable Elements, and delightfully puzzling aspects of the Article 30 “default rule” necessarily contained in phrases such as “[u]nless otherwise provided . . . intent . . . means to engage in . . . or is aware[,]” and “knowledge means awareness . . .” Rome Statute, *supra* note 1, art. 30(1)-(3).

79. GC, *supra* note 72, art. 147.

80. List of War Crimes Prepared by the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Presented to the Preliminary Peace Conference, Paris, 29 March 1919, crimes numbers 19 and 23 [hereinafter 1919 List of War Crimes], *reprinted in* PAUST, BASSIOUNI, ET AL., *supra* note 10, at 36.

81. GC, *supra* note 72, art. 147; *see also* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 50, Oct. 21, 1950, 75 U.N.T.S. 31 (using the language “wilfully” and “wantonly”); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 51,

in the 1919 List. Both instruments are evidence of the fact that the two standards are different, that their drafters knew how to set higher or lower thresholds of criminal responsibility, and that they chose to set higher thresholds only in certain instances. Indeed, the same points pertain with respect to Article 8 of the Rome Statute.

More generally with respect to wanton or reckless disregard, it is informative that Article 44 of the customary 1863 Lieber Code proscribed “[a]ll wanton violence” and Article 16 addressed “wanton devastation.”⁸² “Wanton devastation and destruction” was also the standard used in crimes numbers 18 and 20 in the 1919 List of War Crimes prepared by the Responsibilities Commission.⁸³ With respect to World War II prosecutions, the Report of Justice Robert H. Jackson to the President of the United States identified “wanton destruction” as among the “[a]trocities and offenses against persons or property” to be addressed at Nuremberg.⁸⁴ Similarly, *United States v. List, et al.*⁸⁵ noted that “military necessity . . . does not admit the wanton devastation of a district”⁸⁶ The crime of “wanton destruction of cities, towns or villages” was also expressly recognized in Article 6(b) of the Charter of the International Military Tribunal at Nuremberg.⁸⁷ Thereafter, the Principles of the Nuremberg Charter and Judgment formulated by the International Law Commission and adopted by the U.N. General Assembly affirmed that “[v]iolations of the laws or customs of war . . . include, but are not limited to . . . wanton destruction of cities, towns, or villages”⁸⁸ The same crime was also recognized in Article 3(2)(d) of the Bangladesh International Crimes (Tribunals) Act of 1973.⁸⁹ More recently, the Indictment of Radovan Karadzic and Ratko Mladic issued by the ICTY addressed crimes involving “wantonly appropriated and

Oct. 21, 1950 75 U.N.T.S. 85 (using the same language).

82. Instructions for the Government of Armies of the United States in the Field, General Orders No. 100 (1863), arts. 16, 44 [hereinafter 1863 Lieber Code], *reprinted in* ICL DOCS., *supra* note 78, at 101, 102-03.

83. 1919 List of War Crimes, *supra* note 80, crimes numbers 18 (“Wanton devastation and destruction of property”) and 20 (“Wanton destruction of religious, charitable, educational and historic buildings and monuments”), *reprinted in* PAUST, BASSIOUNI, ET AL., *supra* note 10, at 36.

84. *Reprinted in* PAUST, BASSIOUNI, ET AL., *supra* note 10, at 704.

85. *United States v. List (The Southeast [Hostages] Case)*, 11 TRIALS OF MAJOR WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 757 (1950), *reprinted in* PAUST, BASSIOUNI, ET AL., *supra* note 10, at 688.

86. *Id.* at 1253.

87. Charter of the International Military Tribunal at Nuremberg, *supra* note 11, art. 6(b).

88. Principles of the Nuremberg Charter and Judgment, *supra* note 14, princ. VIb.

89. *Reprinted in* ICL DOCS., *supra* note 78, at 177, 178.

looted” property and “wanton and unlawful destruction of” property.⁹⁰ The Statute of the ICTY had also identified crimes involving “extensive destruction and appropriation of property . . . carried out unlawfully and wantonly” and “wanton destruction of cities, towns or villages.”⁹¹ Interestingly, Article 8(2)(b)(xiii) and (e)(xii) of the Rome Statute assures that the ICC will be able to address “[d]estroying or seizing the enemy’s property” without limiting words such as “intentionally” or “wantonly.”⁹² In order to constitute a “grave breach” within the meaning of the Rome Statute, however, Article 8(2)(a)(iv) requires “[e]xtensive destruction and appropriation of property . . . [that is] carried out unlawfully and wantonly.”⁹³

Article 51(5) of Protocol I to the Geneva Conventions also provides a standard with a lower *mens rea* threshold when using the phrase “an attack which may be *expected* to cause incidental loss.”⁹⁴ Similarly, the phrase “intended, or may be *expected*, to cause” found in Article 35(3) of Protocol I⁹⁵ includes a standard of responsibility far less than “in the knowledge that such . . . will cause.” The “or may be expected” language also appears in the preamble to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects.⁹⁶

A contextually-oriented word implicating a lower threshold than “in the knowledge that such attack will cause” can also be found in Article 23(b) of the Annex to the 1907 Hague Convention No. IV,⁹⁷ assuring that it is “especially forbidden . . . to kill or wound *treacherously*.”⁹⁸ This crime is also listed in Article 8(2)(b)(xi) and (e)(ix) of the Rome Statute. Similarly, the phrase

90. The Prosecutor of the Tribunal v. Radovan Karadzic, Ratko Mladic, Indictment: the International Criminal Tribunal for the Former Yugoslavia (July 24, 1995), ¶¶ 27, 41, 44, *reprinted in* PAUST, BASSIOUNI, ET AL., *supra* note 10, at 89, 93-94, 97-98.

91. Statute of the ICTY, *supra* note 21, arts. 2(d) and 3(b).

92. The relevant Elements do not either and, in relevant parts, they merely require that the perpetrator was “aware” of factual circumstances that established the status of the property. ICL DOCS, *supra* note 78, at 342, 353.

93. Rome Statute, *supra* note 1, art. 8(2)(a)(iv). The Elements for this provision include the need for destruction or appropriation that “was extensive and carried out wantonly.” ICL DOCS., *supra* note 78, at 336. *But see* Rome Statute, *supra* note 1, art. 30 (seeming to require only awareness in some instances).

94. Protocol I, *supra* note 64, art. 51(5) (emphasis added).

95. *Id.* art. 35(3) (emphasis added).

96. U.N. Doc. A/CONF.95/15 (Dec. 2, 1980), *reprinted in* 19 I.L.M. 1523 (1980); *see also* Jordan J. Paust, *Controlling Prohibited Weapons and the Illegal Use of Permitted Weapons*, 28 MCGILL L.J. no. 3, 608, 617 & n.43 (1983) (using identical language).

97. HC IV, *supra* note 19.

98. *Id.*, Annex, art. 23(b) (emphasis added).

“unless such destruction . . . be *imperatively demanded*[,]” found in Article 23(g) of the 1907 Hague Convention is also found in Article 8(2)(b)(xiii) and (e)(xii) of the Rome Statute and requires contextual inquiry concerning responsibility and can at least implicate wanton or reckless disregard. Even more generally, military and civilian leader responsibility can be based on criminal negligence under the “knew or should have known” standard under customary international law,⁹⁹ a standard that is also generally reflected in Article 28(1) of the Rome Statute concerning military commanders¹⁰⁰ but that was not used for ICC prosecution of civilian leaders.¹⁰¹

A related problem concerning ICC coverage of customary crime involves the oft-repeated phrase “intentionally directing attacks” that is found in Article 8(2)(b)(i)-(iii), (ix), (xxiv), and (e)(i)-(iv). For reasons noted above with respect to criminal responsibility for wanton or reckless disregard, such language used in the Rome Statute requiring intentionally directed attacks clearly does not reach all customary criminal responsibility. However, other language involving the crime of “intentionally directing attacks against the civilian population as such”¹⁰² seems appropriate because attacks directed at civilians as such would necessarily involve the intent to direct an attack against civilians as such. This is a special crime, different even from the use of indiscriminate weaponry or indiscriminate attacks—both of which include responsibility for wanton disregard of consequences.

In Article 8(2)(b)(ii), (v), (ix), and (e)(iv), concerning prohibited attacks against objects, buildings, towns, and such, one finds the requirement that, in context, they “are not military objectives.” It should be clear that the requirement applies only when such objects, buildings, towns, and such are proper military objectives under international law, not when an accused or adversary improperly considers them to be military objectives. Whether or not such are proper military objectives would have to be tested contextually and in view of objective standards and generally shared expectations of the international community. As noted, international law is a necessary background for interpretation of any treaty.¹⁰³ Article 21(1)(b) and (3) of the Statute also assures this approach.

Article 8(2)(b)(vii) does not fully reflect Geneva law. It is quite limiting of the ICC’s jurisdiction because deportation or transfer of all “or parts” of a population, as set forth in (2)(b)(vii), is far more

99. PAUST, BASSIOUNI, ET AL., *supra* note 10, at 52-81.

100. Rome Statute, *supra* note 1, art. 28(1).

101. *Id.* art. 28(2). This gap means that some civilian leaders will have to be prosecuted in domestic courts or other international fora.

102. *Id.* art. 8(2)(b)(i) and (e)(i).

103. *See supra* note 62 (discussing how treaties should be interpreted).

limiting than Article 49 of the Geneva Civilian Convention, which explicitly prohibits “[i]ndividual or mass forcible transfers, as well as deportations of protected persons from occupied territory”¹⁰⁴ “[U]nlawful deportation or transfer . . . of a protected person” is also a grave breach of the Geneva Civilian Convention.¹⁰⁵ Crime number 7 of the customary 1919 List of War Crimes also proscribes “[d]eportation of civilians,” which appears to be broader than “deportation . . . of all or parts of the population.”¹⁰⁶

Article 8(2)(b)(xi) concerning treacherous killing and wounding contains words limiting the direct victims to those “belonging to the hostile nation or army.” During a belligerency, as opposed to a Geneva common Article 3 insurgency, all of the customary laws of war apply¹⁰⁷ and, therefore, they also prohibit the treacherous killing or wounding of any individual belonging to a “belligerent” military force or unit whether or not the belligerent constitutes a “nation” under international law or has an “army.”

Article 8(2)(b)(xiv) contains a crime involving abolishment, suspension, or inadmissibility “in a court of law [of] the rights and actions of the nationals of the hostile party.”¹⁰⁸ The prohibition may beg the question regarding what “rights” an enemy national might have in time of war—especially as a prisoner of war, detainee, or person subject to laws concerning occupied territory. The prohibition should be interpreted logically and consistently with international law to prohibit a declared abolition or suspension of “whatever rights” an enemy national might otherwise actually have had.

The “use” or “employment” of poison or poisoned weapons is proscribed under customary international law.¹⁰⁹ For this reason,

104. GC, *supra* note 72, art. 49; *see also* Statute of the ICTY, *supra* note 21, art. 2(g) (“unlawful deportation or transfer or unlawful confinement of a civilian.”); Paust, *Torture*, *supra* note 43, at 1567-68 (this was one of many notorious war crimes and grave breaches authorized, abetted, and/or engaged in by several highest level members of the Bush Administration).

105. GC, *supra* note 72, art. 147.

106. 1919 List of War Crimes, *supra* note 80, crime number 7, *reprinted in* PAUST, BASSIOUNI, ET AL., *supra* note 10, at 36.

107. *See, e.g.*, PAUST, BASSIOUNI, ET AL., *supra* note 10, at 645, 648, 651, 673 (discussing “belligerency” and customary laws of war); FM 27-10, *supra* note 10, at 9, ¶ 11a. A “belligerency” occurring even entirely within one state is an armed conflict of an international character, partly because of the status of the “belligerent” actor under international law. PAUST, BASSIOUNI, ET AL., *supra* note 10, at 648, 651, 673.

108. Rome Statute, *supra* note 1, art. 8(2)(b)(xiv). This mirrors a customary provision in the 1907 Hague Convention No. IV. HC IV, *supra* note 19, Annex, art. 23(h). *See also* Paust, *Above the Law*, *supra* note 43, at 413-14 n.199 (stating that the 2006 Military Commissions Act violates this law of war).

109. *See, e.g.*, 1863 Lieber Code, *supra* note 82, arts. 16, 70 (excluding poison explicitly); 1868 Declaration of St. Petersburg (“employment”), *reprinted in* PAUST, BASSIOUNI, ET AL., *supra* note 10, at 679; 1919 List of War Crimes, *supra* note 80, crime number 32 (also see number 27 regarding “use” of

it is appropriate that Article 8(2)(b)(xvii) uses the term “[e]mploying” and does not contain an additional threshold of “calculated” or “intentionally.” Similarly, the “[e]mploying” of certain gases and analogous liquids, materials or devices; certain bullets; and certain other weapons is recognizably within the jurisdiction of the ICC without further limiting language, as noted in Article 8(b)(2)(xviii)-(xx).

Article 8(2)(b)(xx) contains language concerning prohibited weaponry and methods of warfare derived from the customary prohibitions in Article 23(e) of the Annex to the 1907 Hague Convention No. IV.¹¹⁰ The French text of the 1907 Hague Convention is authoritative,¹¹¹ and the relevant phrase adopted in Article 8 properly reads “of a nature as to cause superfluous injury or unnecessary suffering” as opposed to an earlier draft phrase “calculated to cause unnecessary suffering.”¹¹² The word “calculated” would have imposed a higher *mens rea* threshold than required by customary international law reflected in the authoritative French text. This is so because one can be criminally responsible, for example, for the use or “employing” of weaponry in a wanton or reckless disregard of the consequences of such use, even though actual consequences involving unnecessary death, injury, and suffering are not “calculated.” The phrase “of such a nature” is contextually-oriented and can involve inquiry into what sort of weaponry objectively or foreseeably in particular contexts can cause unnecessary death, injury, or suffering. Furthermore, it is informing that Article 35(2) of Protocol I to the Geneva Conventions contains the standard “of a nature to cause superfluous injury or unnecessary suffering.”¹¹³ Therefore, Protocol I reflects the authoritative customary standard and Protocol I also lacks the higher threshold of criminal responsibility attached to a word such as “calculated.”

In Article 8(2)(b)(xxiv) and (e)(ii), there is incomplete coverage of the crime of using medicine or medical supplies as a weapon.

prohibited bullets); HC IV, *supra* note 19, Annex, art. 23(a) (“employ”); PAUST, BASSIOUNI, ET AL., *supra* note 10, at 664, 679-82, 695, 699.

110. HC IV, *supra* note 19, Annex, art. 23(e).

111. See, e.g., U.S. DEP’T OF ARMY, PAMPHLET 27-1, TREATIES CONCERNING LAND WARFARE i (1956) (“the only official text of the Hague Conventions of 18 October 1907 is the French text which must be consulted and accepted as controlling”); PAUST, BASSIOUNI, ET AL., *supra* note 10, at 680-81.

112. PAUST, BASSIOUNI, ET AL., *supra* note 10, at 680-81; Jordan J. Paust, *Does Your Police Force Use Illegal Weapons? A Configurative Approach to Decision Integrating International and Domestic Law*, 18 HARV. INT’L L.J. 19, 30 n.43 (1977); ICRC, *War Crimes Under the Rome Statute of the International Criminal Court and Their Source in International Humanitarian Law*, available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/war-crimes-factsheet311008/\\$File/EN%20-%20War_Crimes_Comparative_Table.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/war-crimes-factsheet311008/$File/EN%20-%20War_Crimes_Comparative_Table.pdf), at 14, Oct. 31, 2008.

113. Protocol I, *supra* note 64, art. 35(2).

Only medicine and medical supplies “using the distinctive emblems of the Geneva Conventions” are covered, but customary and treaty-based prohibitions are much broader.¹¹⁴

There is language in Article 8(2)(b)(xxv) addressing the customary crime of “intentionally using starvation.” The use of starvation as a strategy or policy of denial of food clearly involves responsibility when starvation is intentional or deliberate. Crime number 4 on the 1919 List of War Crimes uses the phrase “[d]eliberate starvation”¹¹⁵ and the United Nations Security Council has condemned the “deliberate impeding of the delivery of food and medical supplies False”¹¹⁶ A policy of denial and neglect involving starvation can also constitute other violations of humanitarian law when used wantonly or in reckless disregard of consequences. The indiscriminate use of food as a weapon is covered under Articles 51(4) (“[i]ndiscriminate attacks”) and 54(1) (“[s]tarvation of civilians as a method of warfare”) and, especially, 54(2) of Protocol I, as well as under Article 14(1) of Protocol II. A

114. See, e.g., GC, *supra* note 72, arts. 3, 23, 38, 55, 56, 59, 60; Protocol I, *supra* note 64, art. 75; Protocol II, *supra* note 73, art. 4; 4 COMMENTARY, GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 40-41, 180 (Jean S. Pictet ed., ICRC 1958); PAUST, BASSIOUNI, ET AL., *supra* note 10, at 695-96.

115. 1919 List of War Crimes, *supra* note 80, crime number 4, *reprinted in* PAUST, BASSIOUNI, ET AL., *supra* note 10, at 36.

116. See, e.g., U.N. S.C. Res. 787, U.N. SCOR, 47th Sess., 3137th mtg., U.N. Doc. S/RES/787 (1992) (condemning as violations of humanitarian law the deliberate impeding of the delivery of food and medical supplies to the civilian population in Bosnia-Herzegovina); U.N. S.C. Res. 771, U.N. SCOR, 47th Sess., 3106th mtg., U.N. Doc. S/RES/771 (1992) (same); U.N. S.C. Res. 794, U.N. SCOR, 47th Sess., 3145th mtg., U.N. Doc. S/RES/794 (1992) (“Strongly condemns all violations of international humanitarian law occurring in Somalia, including in particular the deliberate impeding of the delivery of food and medical supplies essential for the survival of the civilian population”); see also Declaration on the Protection of Women and Children in Emergency and Armed Conflict, Dec. 14, 1974, U.N. G.A. Res. 3318 (XXIX), U.N. GAOR, 29th Sess., ¶ 6 (1974) (“women and children belonging to the civilian population . . . shall not be deprived of shelter, food, medical aid or other inalienable rights . . .”), quoted more fully in Donald E. Buckingham, *A Recipe for Change: Towards an Integrated Approach to Food Under International Law*, 6 PACE INT’L L. REV. 285, 298 n.53 (1994); Report of the Secretary-General, *supra* note 20, ¶ 6 (violations of humanitarian law include “impeding the delivery of food and medical supplies to the civilian population”); 1995 Indictment of Karadzic and Mladic by the International Criminal Tribunal for Former Yugoslavia, ¶ 22 (regarding inadequate food and medical care for civilians detained in camps, including women, children, and elderly persons), *reprinted in* PAUST, BASSIOUNI, ET AL., *supra* note 10, at 92; Buckingham, *supra* at 296-301; Jordan J. Paust, *The Human Rights to Food, Medicine and Medical Supplies and Freedom from Arbitrary and Inhumane Detention and Controls in Sri Lanka*, 31 VAND. J. TRANSNAT’L L. 617 (1998) [hereinafter Paust, *Human Rights to Food, Medicine*]; Jordan J. Paust, *Applicability of International Criminal Laws to Events in the Former Yugoslavia*, 9 AM. U.J. INT’L L. & POL. 499, 516-17 & n.62 (1994).

policy of denial and neglect involving starvation can also result in violations, for example, of Articles 3, 16, 23, 24, and 147 of the Geneva Civilian Convention. Such a policy should also be prosecutable, for example, under Article 8(2)(a)(ii), (iv), (b)(x), (xi), (xiii), (xvi), (xxi), (c)(i)-(ii), and (e)(v), (ix), (xi), and (xii) of the Rome Statute even if starvation is not intentional. In my opinion, food, like medicine and medical supplies, should always be treated as neutral property during an armed conflict. Starvation, even of enemy combatants, seems necessarily inhumane and to involve unnecessary and lingering death and suffering.¹¹⁷

Moreover, Article 8(2)(b)(xxv), addressing starvation, is too limited for a different reason. Not all means of starvation are addressed, but only starvation perpetuated "by depriving them of objects indispensable to their survival"¹¹⁸ The latter phrase should at least be interpreted logically and in view of a plain meaning to include starvation by depriving persons of food and any other "object" that in context is indispensable to the survival of civilians. Article 54(1) and (2) of Protocol I to the Geneva Conventions lists starvation of civilians and the deprivation of objects indispensable to their survival as separate crimes.¹¹⁹ In any event, "starvation of civilians," by any means, is already proscribed under customary international law.¹²⁰

IV. CONCLUSION

The International Criminal Court does not have jurisdiction over all international crimes and it is understood that definitions or lists of crimes that are within the jurisdiction of the ICC are not meant to be exclusive or to limit in any way the customary definitions of crimes against humanity and war crimes or the reach more generally of customary international law. Parts II and III of this Article provide significant detail with respect to differences between crimes against humanity and war crimes covered under the Rome Statute and those covered under the broader reach of customary international law. These differences are important for several reasons. For example, if future efforts are made to create a general or regional multilateral treaty proscribing crimes against humanity, the significant limits with respect to crimes against humanity set forth in Article 7 of the Rome Statute should not simply be copied. The same point

117. See, generally, Paust, *Human Rights to Food, Medicine*, *supra* note 116 (discussing the deprivation of such necessities during armed conflict).

118. Rome Statute, *supra* note 1, art. 8(2)(b)(xxv).

119. Protocol I, *supra* note 64, art. 54(1)-(2).

120. 1919 List of War Crimes, *supra* note 80, crime number 4; PAUST, BASSIOUNI, ET AL., *supra* note 10, at 36, 695-96; see generally, Paust, *Human Rights to Food, Medicine*, *supra* note 116 (addressing the prohibition of starvation).

pertains with respect to national legislation that attempts to cover all crimes against humanity under dynamic customary international law.¹²¹ Every attempt to set new limits to criminal responsibility threatens accountability for violations of underlying human rights.¹²²

Similarly, national legislation regarding war crimes should not merely mirror Article 8 of the Statute, but should also contain a general savings clause that covers all other violations of the customary laws of war. Additionally, when judges in national and international fora opine on the nature and reach of customary international crimes, they should not pretend that ICC definitions and lists are complete. It is also generally understood that the International Criminal Court will not be able to address even all of the crimes that are within its jurisdictional competence,¹²³ that the Prosecutor will have to be selective in bringing cases to trial,¹²⁴ and that enforcement of international criminal law will remain the primary responsibility of states.

121. In another writing, I have recommended appropriate federal legislation for the United States that can incorporate customary crimes against humanity by reference in a manner similar to piracy and war crime legislation that the Supreme Court has recognized is constitutionally permissible. See Jordan J. Paust, *The Need for New U.S. Legislation for Prosecution of Genocide and Other Crimes Against Humanity*, 33 VT. L. REV. 717, 727 (2009), available at <http://ssrn.com/abstract=1481827> (proposing new legislation).

122. See, e.g., *supra* note 22 (covering the issue of why a “plan or policy” is not a requirement).

123. Rome Statute, *supra* note 1, art. 17(1)(d).

124. *Id.* art. 53(1)(c), (2)(c).

