SUMMARY
THE CONCEPT OF CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW

Some authors argue that crimes against humanity are as old as humanity itself. They likely are, though the legal concept of crimes against humanity (CAH) was first codified in 1945 in the Nuremberg Charter of the International Military Tribunal for the Persecution of the Major War Criminals. The notion 'crimes against humanity' had not suddenly sprung up out of thin air; its origin can be traced to the Preamble of the 1899 and 1907 Hague Conventions, in which the 'Martens Clause' refers to the 'laws of humanity'. The term 'crimes against humanity' appeared for the first time in 1915, in a joint declaration of the governments of Great Britain, France, and Russia describing wartime atrocities and massacres committed against the Armenian population in the Ottoman Empire.

The term 'crimes against humanity' has both a colloquial and a legal meaning. In daily parlance, the term is used in a general and non-legal sense mainly by journalists and pundits to condemn any kind of horrible atrocities being committed all around the world. However, the term 'humanity' in English has a dual nature, meaning both 'mankind' (the human race; the set of all individual humans) and 'humanness' (the quality of being human as well as human behaviour; moral concepts and standards of being human; human nature used in the same sense as the Latin *humanitas*). The Polish official translation of the Rome Statute of the ICC's Article 7 – which encompasses the legal term 'crimes against humanity' – makes use of the notion of *zbrodnie przeciwko ludzkości*. Interestingly, the substantive *ludzkość* in Polish has a much narrower meaning than does the term 'humanity' in English. It refers primarily to humankind as a whole – the human race. The notion of humanity used in English in the latter meaning (humanness) is understood in Polish rather as *człowieczeństwo*. Although the term *ludzkość* encapsulates only one connotation of the English word 'humanity', translating 'crimes against humanity' into Polish with *zbrodnie przeciwko ludzkości* is established in Polish judiciary culture and legal tradition – the tradition which gave rise to the careers of the two most influential international criminal lawyers – Sir Hirsh Lauterpacht and Rafał Lemkin, both of whom studied at the Faculty of Law of Lwów University in Poland.

The legal concept of crimes against humanity through the years has been somewhat shaky and very far from clear. The concept of crimes against humanity appeared in particular historical contexts as a response to massive and widespread state-supported and state-orchestrated crimes committed against civilian populations. The notion of crimes against humanity in a legal sense became one of the three categories of international crime enumerated in the Nuremberg Charter in 1945. Crimes against humanity were for many decades, and still are, an uncodified category of international crime. Unlike the crime of genocide and war crimes, they were never regulated in a special comprehensive international convention. This is all the more reason to welcome the initiative of the International Law Commission (ILC) to draft articles on crimes against humanity, which in time – hopefully in the near future – may become an international convention on the prevention and punishment of crimes against humanity. Importantly, the ILC's work continues to advance – in 2017 the Commission adopted a complete set of draft articles on crimes against humanity for a future UN Convention on the Prevention and Punishment of Crimes against Humanity.

This book consists of six chapters and is organised in the following manner: introduction, chapters 1–6 (main body), and conclusion. In the introduction, the writer discusses in turn 1) the theme and aim of the research; 2) the terminological references – clarification of the terminology adopted and used in the book; 3) the research methodology and research methods used in the work – though the general method of legal interpretation (dogmatic method) prevails; 4) the scope of the study (of the research conducted); and 5) the organization and structure of the book.

In Chapter 1, the writer presents the historical background and traces the origin and birth of the legal concept of crimes against humanity as a new category of international crime which first appeared in positive international law in Article 6(c) of the Charter of the International Military Tribunal. This chapter also presents the subsequent development of the new crime concept and contains an overview of the definitions of crimes against humanity since World War II: the draft codes of offences against the peace and security of mankind drafted by the International Law Commission (ILC Draft Codes), the statutes of the two *ad hoc* tribunals, the statutes of hybrid (internationalized) criminal tribunals, and the Rome Statute of the International Criminal Court (ICC Statute).

Chapter 2 examines the structure of crimes under international law, which differs significantly from the structure of national crimes. This chapter provides a detailed analysis of the three-level structure of international crime by presenting the Rome Statute's standard of individual criminal accountability.

Chapter 3 deals with the overall corpus delicti of crimes against humanity. This part examines the general requirements (chapeau elements) which elevate a single criminal act to a crime against humanity. This part discusses all of the general requirements of crimes against humanity set forth in Art. 7 ICC Statute.

Chapter 4 addresses the respective catalogue of single crimes. These specific underlying offences, if committed in the context set out in the *chapeau* elements, amount to a crime against humanity.

Chapter 5 deals with probably the most controversial and unclear chapeau element of crimes against humanity: policy element. Special attention in this chapter has been paid to the research question, namely, whether non-state actors can satisfy the policy requirement contained in Art. 7(2) ICC Statute and therefore be charged with crimes against humanity.

Chapter 6 takes up the issues surrounding the incorporation of core ICC crimes into national criminal law, particularly in light of the principle of complementarity.

The last part of the book (the conclusion) concludes the research by summarising the arguments and provides final concluding remarks on the nature of crimes against humanity. The research was mainly focused on the ICC Statute, since it constitutes the most comprehensive codification of contemporary international criminal law. The main objective of the research was to analyse the subsequent development of the legal concept of crimes against humanity in international criminal law, primarily encompassed in the ICC Statute's definition of crimes against humanity.

CHAPTER 1

Some scholars credit Peter von Hagenbach's prosecution in 1474 for coining the phrase 'law of humanity'. It is interesting to note that Hagenbach's trial for perpetrating atrocities during the occupation of the city of Breisach was probably the first quasi-international criminal trial. Peter von Hagenbach was accused of having violated 'the laws of god and humankind' ('*Verbrechen gegen das Gesetz Gottes und der Menschheit'*).

However, the concept of crimes against humanity first emerged in a legal sense in the 1945 Nuremberg Charter of the International Military Tribunal for the Trial of the Major War Criminals. The legal concept of crimes against humanity emerged in very specific historical context – the very harsh and catastrophic course of world and human history. One of the worst human tragedies in modern

history, beginning with the advance of German armies across the western frontiers of Poland, was tackled at least in a legal sense by the Nuremberg Tribunal trying Nazi German criminals and their horrible and inhuman Third Reich using the newly drafted legal basis and its new legal concepts: crimes against peace and crimes against humanity.

Sir Hersch Lauterpacht – a distinguished Polish–Jewish international law scholar – suggested the name of the new crime to US Supreme Court Justice Robert H. Jackson, appointed by President Truman as chief prosecutor of German war criminals at the trials before the International Military Tribunal in Nuremberg, which happened not to be the first proceedings of German war criminals. The Polish forerunner of the Nuremberg Trials, the trial of Majdanek camp staff as Nazi German war criminals in the partially liberated Poland in 1944, is worth noting. The trial took place while most of the country was still engulfed in war. It lasted from 27 November to 2 December 1944 and was unprecedented in the history of the Polish criminal justice system. Despite the very rich legal scholarship writings on international and national war crimes proceedings, the Majdanek camp staff trial, regrettably, has not received much attention in the legal literature.

On 11 December 1946, the United Nations General Assembly adopted a resolution re-affirming the principles of international law recognised by the Charter of the Nuremberg Tribunal and the Judgement of the Tribunal – the 'Nuremberg Principles'. The definition of crimes against humanity formulated in the Nuremberg Charter was incorporated with some changes in the Tokyo Tribunal Charter and in the Allied Control Council Law No. 10. The next step in the conceptualisation of crimes against humanity was the work of the ILC, which undertook efforts to prepare a draft code of offences against the peace and security of mankind. The ILC prepared several draft codes in which the definitions of crimes against humanity have differed significantly in many respects. The next significant development in the concept of crimes against humanity was in 1993, when the UN Security Council established the International Tribunal for former Yugoslavia in order to prosecute crimes against humanity, among other offences. In 1994, a similar tribunal was established by the Security Council to deal with the aftermath of the genocide in Rwanda.

Undoubtedly, the most significant development in the process of conceptualising crimes against humanity is the Rome Statute, drafted by the delegates assembled at the Rome Conference. In 1998, the international community gathered together at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. The

Rome Statute was adopted on 17 July by a vote of 120 to 7, with 21 countries abstaining. The Rome Statute, which is a multilateral treaty, paved the way for the development of the first permanent international criminal tribunal, which was the first permanent body of international criminal jurisprudence on crimes against humanity.

CHAPTER 2

The structure of crimes under international law varies greatly from the structure of offences typically known in national criminal law. The core international crimes in contrast to ordinary crimes in national legal regimes include what is known as 'contextual elements'. For instance, for war crimes, the criminal conduct must have been committed in the context of an armed conflict or must have some *nexus* to an armed conflict. In crimes against humanity, the criminal conduct must be part of a 'widespread or systematic' attack against a civilian population.

The principle of individual criminal responsibility for criminal conduct is a long-standing rule and the foundation of every legal regime. Understandably, the principle of individual criminal responsibility is a 'general legal principle' applicable to the international criminal law system. The identification and description of the structure of international crime allows the scope of individuals' criminal responsibility for violating international law to be defined. The main methodological problems in describing the structure of international crime is the need for common legal terminology. The Rome Statute of the International Criminal Court was intended to be 'a consensus solution' and even if its drafters intended to avoid the particular terminology derived from and typical of one of the world's major legal systems, in some aspects the language used in the Rome Statute is largely based on common law terminology.[1] Especially when it comes to a court's recognition of the imputability of specific international criminal acts, the

[1] C. Kress, *Die Kristallisation eines Allgemeinen Teils des Völkerrechts: Die Allgemeinen Prinzipien des Strafrechts im Statut des Internationalen Strafgerichtshofes*, 'Humanitäres Völkerrecht' 1999, no. 1, p. 5. G. Werle states that the Rome Statute includes its own model of international crime, which mixes elements common to both of the world's major legal systems, and the adoption of the phrase 'General Principles of Criminal Law' instead of general section in the third section of the Rome Statute *is more typical of common law than the Continental legal traditions (the Romanist–civilist–Germanic family of legal systems). On the other hand, the adoption of the phrase* 'Grounds for excluding criminal responsibility' instead of 'defences' in Art. 31 of the ICC Rome Statute is much closer to the *Continental legal traditions*. *Völkerstrafrecht*, Mohr Siebeck, Tübingen 2007, p. 141.

Rome Statute's language is closer to the dichotomous division of the crime structure into two elements derived from the common-law family of legal systems: 1) *actus reus* and *mens rea* and 2) *offence/defence*.[2] Even if the language used in the Rome Statute does not directly use the above-mentioned terms, it can generally be stated that the Statute has incorporated the bipartite offence model that is used in common-law tradition countries. The terms *actus reus* and *mens rea* have been replaced by doctrinally more neutral ones, 'material elements' and 'mental elements', respectively.[3]

In order to hold a person criminally responsible and to ascribe individual criminal responsibility for a crime against humanity as one of the international core crimes, a more in-depth analysis of the structure of these crimes is needed. On the basis of the Rome Statute, three elements may be distinguished: 1) material/objective elements (*Verwirklichung der objektiven/äußeren Tatbestandsmerkmale*); 2) mental/subjective elements (*Verwirklichung der subjektiven/inneren Tatbestandsmerkmale*); and 3) grounds for excluding criminal responsibility (*Straffreistellungsgründe*)—excuses (*Entschuldigungsgründe*) and justifications (*Rechtfertigungsgründe*). It should be noted here that the Rome Statute's individual criminal accountability standard is the first such comprehensive international individual criminal responsibility model.

Finally, to hold an offender criminally responsible under the Rome Statute, all the material and mental elements should exist and there must be no grounds for excluding criminal responsibility which may lead to the exclusion of

[2] The structure of offences in Continental-law tradition countries is based on the tripartite model, which distinguishes 1) definition of the criminal act, 2) unlawfulness (wrongfulness), and 3) culpability (blameworthiness). See R. Christopher, *Tripartite structures of criminal law in Germany and other civil law jurisdictions*, 'Cardozo Law Review' 2007, vol. 28, pp. 2675–2676.

[3] There were some suggestions advanced during the negotiations of the Rome Statute to use the phrase 'physical elements of crime'. See: 2nd meeting, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June – 17 July 1998. Official Records, vol. II, Summary records of the plenary meetings and of the meetings of the Committee of the Whole, UN Doc. A/CONF.183/C.1/SR.2, 16 June 1998, p. 143. Some authors state that the constructing and functioning of the desired intercultural universal criminal law doctrine and international criminal law theory face a wide range of practical problems. Due to the language barrier, terminological and doctrinal differences, and the resulting misunderstandings and misinterpretations of the basic criminal law concepts understood in the Continental law countries and in the English-speaking common-law countries, the joint universal international criminal law theory is still in *statu nascendi* and lacks uniformity. See H.J. Hirsch, *Über die Entwicklung einer universalen Strafrechtswissenschaft* [in:] W. Czapliński (ed.), *Prawo w XXI wieku. Księga pamiątkowa 50-lecia Instytutu Nauk Prawnych Polskiej Akademii Nauk*, Wydawnictwo Naukowe Scholar, Warsaw 2006, p. 251.

international individual criminal responsibility – meaning that internationally prohibited acts are legally justified under certain circumstances. Understandably, if a legal justification is inapplicable, the defendant is criminally liable.

Gerhard Werle eloquently stated that the legal framework of crimes against humanity within Art. 7 of the ICC Statute is built on two levels of wrongdoing, which are an individual criminal act ascribable to a perpetrator (*Einzeltat*) and the overall wrong of crimes against humanity – in the overall context of the commission of crimes against humanity (Gesamttat).[4] So, according to this approach crimes against humanity possess dual dimensions of wrong, and the structure of general requirements for crimes against humanity is two-pronged. These two levels of criminality are connected and related to each other. An individual single criminal act – that is a constituent act of crimes against humanity set forth in Art. 7(1)(a–k) of the ICC Statute – is part of the overall context of committing crimes against humanity that constitutes a widespread or systematic attack directed against a civilian population. The summation of individual specific criminal acts make up the widespread or systematic attack directed against a civilian population. Understandably, a specific individual criminal act is part of broader criminal conduct targeting a civilian population. Using the more criminology-related language, one may assert that the rather complicated nature of the legal framework for crimes against humanity is based on two distinct dimensions of micro- and macro-criminality.[5] An analysis of both dimensions may lead to an answer to the key question of whether a crime against humanity has been committed. The macro-criminal dimension draws on the general requirements stipulated in the *chapeau* of the crime's definition in Art. 7 ICC Statute. So, the macro-criminal dimension of wrongfulness is formed by the overall context in which crimes against humanity are committed. That is to say, specific criminal acts – when committed in the context of a widespread or systematic attack directed against any civilian population and when committed with knowledge of this overall context – merely rise to the level of international core crimes labelled crimes against humanity. As eloquently stated by Bernhard Kuschnik, '[t]he macro-criminal context is codified as "widespread or systematic attack directed against any civilian population".'[6] So when the macro-criminal context of criminality is set out by the chapeau element of the definition describing it in Art. 7 ICC Statute as widespread or systematic attack directed against

[4] G. Werle, *Völkerstrafrecht und geltendes deutsches Strafrecht*, 'Juristenzeitung' 2000, vol. 55, no. 15–16, p. 757.

[5] B. Kuschnik, *Humaneness, humankind and crime against humanity*. 'Göttingen Journal of International Law' 2010, vol. 2, no. 2, p. 519.

[6] Ibidem.

any civilian population, the micro-criminal dimension refers to an actor's single specific criminal act. The micro-criminal dimension is reflected in the phrase 'any of the following acts', which refers to the criminal acts enumerated in the list of underlying offences – punishable acts listed in Art. 7 of the ICC Statute's catalogue of crimes. The phrase 'committed as part of … with knowledge of the attack' is meant to be a nexus element between the macro- and micro-criminal dimensions of crimes against humanity.[7] The single specific acts fitting into the broader context of an attack directed against any civilian population just acquire a new dimension of wrongfulness (*Unrechtsdimension*) that is a threat to the minimal standards of human existence.[8]

The overall context an attack committed against any civilian population consists of multiple instances of single criminal acts listed in the catalogue of crimes in Art. 7 ICC Statute. The single criminal act is a backdrop of the broader context of the overall wrong and it is committed in the context of large-scale violence targeting civilians. One also should not overlook the fact that the single criminal act is directed particularly against civilians and, likewise, the overall attack is directed against any civilian population meant as a broader group of civilians.

The point remains, however, that in every domestic criminal justice system there are crimes such as rape and murder, but they are not crimes against humanity under international criminal law as embodied in the Rome Statute, unless they are committed on a large scale as part of broader, widespread or systematic criminal conduct targeting any civilian population. The fundamental hallmark of crimes against humanity is the fact that they are usually committed in the context of organised large-scale violence targeting civilians.

To review, in order to hold an individual accountable for crimes against humanity three main conditions have to be met: 1) material elements (the objective or external elements of a crime), also called *actus reus; 2) mental elements (the* subjective or internal elements of a crime), also called *mens rea* – an individual shall be criminally responsible and liable for punishment for a crime only if the material elements are committed with intent and knowledge; and 3) no grounds for excluding criminal responsibility. The applicability of the grounds for excluding criminal responsibility must be determined. An individual shall not be criminally responsible if, at the time of that person's conduct, the ICC considered grounds for excluding criminal responsibility. Moreover, no person

[7] See ibidem.

[8] B. Schöbener (ed.), *Völkerrecht. Lexikon zentraler Begriffe und Themen. Grundbegriffe des Rechts*, C.F. Müller, Heidelberg 2014, p. 492.

shall be tried before the ICC if the prerequisites for a court case (*Strafverfolgungsvoraussetzungen) are not met. In order not to delve into all* the complexity of the complementarity principle on which the ICC's jurisdiction is based at this stage of the research, let us observe that if the case is not admissible before the ICC, then the Court is absolutely barred from initiating an investigation, even though a criminal act under the law has been committed. To put it another way, under the circumstances set forth in Arts. 20(1) and 26 ICC Statute, there does exist an absolute bar against proceeding before the Court even if the conduct in question is unlawful and prohibited. See the breakdown below, illustrating the structure of crime under international law and the Rome Statute's ascription standard for international individual criminal responsibility.

As was just highlighted, the simplified criminal theory distinguishes between *actus reus* (material/objective elements, the external side of criminal conduct [*objektive/äußere Tatseite des Verbrechens*]) and *mens rea* (mental/subjective elements, the internal side of criminal conduct [subjektive/innere Tatseite des Vebrechens]). Actus reus evinces the actual and physical commissioning of the criminal conduct. The actus reus description contains all the circumstances constituting the external manifestation of a person's conduct.[9] Taking a longer view, actus reus is indeed the fulfilment of the actor's intention to commit an offence. All of the actions are aimed at achieving a certain result of certain actions. Consequently, the action is the fulfilment of the actor's intent. So, the actus reus refers to and describes the prohibited criminal behaviour, while the mens rea comes down to the actor's mental relationship to the act committed.

On the basis of the Rome Statute, the external side of international crimes (material elements) can be split into conduct, consequences, and circumstances, from the point of view of their objective structure.[10] As a matter of fact, every international crime consists of an actor's punishable conduct codified in its legal definition. This punishable conduct may take the form of a singular act or multiple acts of internationally prohibited conduct. The criminal conduct is described by an international law that imposes certain rules prohibiting and criminalising it. Clearly, consequences are the effects caused by the actor's criminalised conduct (for instance, causing the victim's death or causing grievous bodily harm to the victim). The requirement of a causation *nexus* between the conduct and its consequences constitutes a prerequisite for the conduct's criminality.[11]

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[9] M. Królikowski, P. Wiliński, J. Izydorczyk, *Podstawy prawa karnego międzynarodowego*. Wolters Kluwer, Warsaw 2008, p. 161.

[10] A. Cassese, *International Criminal Law*, Oxford University Press, Oxford 2008, p. 55; G. Werle, *Völkerstrafrecht*, op. cit., pp. 143–145.

[11] G. Werle, *Völkerstrafrecht*, op. cit., p. 147.

FIGURE 1. Elements comprising the structure of crime under international law and international individual criminal responsibility under the ICC Rome Statute

<table>
<tr><th colspan="2">International Individual Criminal Responsibility</th></tr>
<tr><th colspan="2">I. Material elements (actus reus)</th></tr>
<tr><td>Perpetration</td><td>Extent of criminal responsibility</td></tr>
<tr><td>• direct perpetration (Art. 25(3)(a) ICC Statute)
• co-perpetration, joint criminal enterprise (Art. 25(3)(a) ICC Statute)
• perpetration by means (Art. 25(3)(a) ICC Statute)
• different forms of participation, such as ordering, soliciting, or inducing (Art. 25(3)(b) ICC Statute)
• other assistance, such as aiding, abetting, or other assistance (Art. 25(3)(c) ICC Statute)</td><td>• superior responsibility (Art. 28 ICC Statute)
• attempt to commit a crime (Art. 25(3)(f) ICC Statute)
• contribution in any other way to the commission or attempted commission of such a crime by a group of persons acting with a common purpose (Art. 25(3)(d) ICC Statute)</td></tr>
<tr><th colspan="2">II. Mental elements (mens rea)</th></tr>
<tr><td colspan="2">• intent (Art. 30(2) ICC Statute)
• knowledge, i.e. awareness (Art. 30(3) ICC Statute)
• ‘unless otherwise provided’ – a clause which adds certain specific elements set forth in the definition’s chapeau element of the respective crime:
a) genocide – an intent to destroy, in whole or in part, a national, ethnical, racial, or religious group (dolus specialis, Art. 6 ICC Statute)
b) crimes against humanity – knowledge of a widespread or systematic attack directed against any civilian population (Art. (1) ICC Statute)</td></tr>
<tr><th colspan="2">III. Negative element – grounds for excluding criminal responsibility (defences)</th></tr>
<tr><td>Substantive grounds (general part of the grounds, related to criminal law)</td><td>Procedural grounds (grounds related to criminal procedure)</td></tr>
<tr><td>• mental disease or defect (Art. 31(1)(a) ICC Statute)
• state of intoxication (Art. 31(1)(b) ICC Statute)
• self-defence, defence of other persons, or state of necessity (Art. 31(1)(c) ICC Statute)
• act caused by duress resulting from the threat of imminent death or of continuing or imminent serious bodily harm (Art. 31(1)(d) ICC Statute)
• mistake of fact (Art. 32(1) ICC Statute)
• mistake of law (Art. 31(2) ICC Statute)
• superior orders and prescription of law (Art. 33 ICC Statute)</td><td>• the non bis in idem principle (Art. 20(1) ICC Statute)
• exclusion of jurisdiction over persons under the age of eighteen (Art. 26 ICC Statute)</td></tr>
<tr><td colspan="2">Other grounds for excluding criminal responsibility</td></tr>
<tr><td colspan="2">• grounds for excluding criminal responsibility other than those referred to in Art. 31(3) ICC Statute</td></tr>
</table>

By and large, the *actus reus* of crimes against humanity is fulfilled if the material elements of at least one of the constituent crimes enumerated in the ICC Statute's catalogue of crimes – e.g. murder, torture, or rape – are met. Simultaneously, a single constituent criminal act must be committed in the specific context of macro-criminal wrongfulness, as described by the general requirements (the chapeau elements) laid down in the definition of Art. 7(1) ICC Statute. As stipulated in the definition's chapeau element of Art. 7(1) ICC Statute, the overall attack of which the single criminal act is part must be widespread or systematic in nature.

For a defendant to be guilty of a crime, there must be both actus reus ('guilty act') and mens rea ('guilty mind').[12] The term mens rea contains all of the offenders' inner feelings about his/her conduct and his/her mental relationship to the criminal conduct and its consequences. Mens rea includes the whole set of the offender's mental experiences and mental states leading to the commission of the crime. On the basis of the Rome Statute, a perpetrator is only criminally responsible and liable for punishment for a crime within the jurisdiction of the ICC if the material elements are committed with intent and knowledge.

The structure of the *mens rea* of crimes against humanity is two-pronged. It consists of two levels of the mental element, namely, single and general. Firstly, in order to satisfy Art. 7's mental element requirements, the perpetrator must carry out the criminal conduct with intent and knowledge (single level, Art. 30 ICC Statute). Secondly, the perpetrator must be aware of a widespread or systematic attack directed against any civilian population and must have knowledge/awareness that his/her criminal act is part of this mass attack on civilians (general level, Art. 7(1) ICC Statute). Therefore, the mental element requirements are met only if the perpetrator intentionally commits one or more of the single, punishable acts listed in Art. 7(1)(a–k) ICC Statute with the knowledge that his/her act is part of a widespread or systematic attack directed against any civilian population.

All national criminal justice systems in both civil and common-law systems widely accept grounds for excluding criminal responsibility (in common-law tradition: defences). The grounds for excluding criminal responsibility could be divided into three general categories: 1) substantive grounds (general part related to criminal law); 2) procedural grounds (related to criminal procedure); and 3) other grounds for excluding criminal responsibility. The grounds for excluding

[12] *Actus reus non facit reum nisi mens sit rea*, which translates literally from Latin as 'an act does not make a defendant guilty without a guilty mind'.

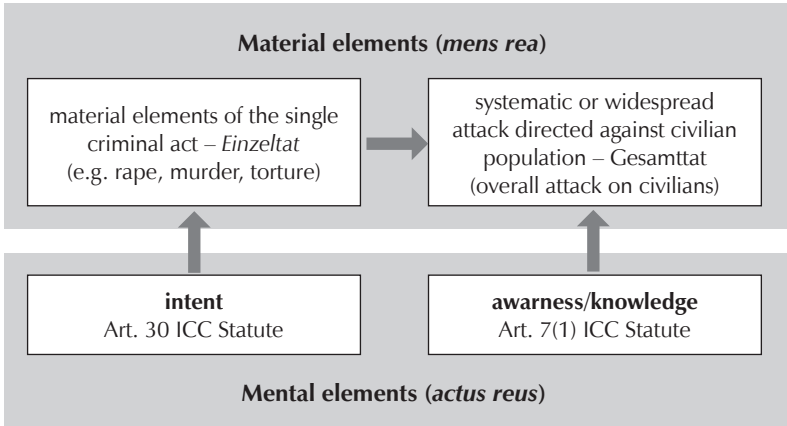

FIGURE 2. Diagram illustrating the relationship between the mental and material elements of crimes against humanity according to the ICC Rome Statute

criminal responsibility lead to the exclusion of criminal responsibility of committed conduct despite its *per se* criminal character being contrary to international law. When a criminal act is committed and there are no substantive grounds for excluding criminal responsibility, the perpetrator will still be released from criminal liability if there are procedural grounds for the exclusion of jurisdiction (the *non bis in idem* principle; e.g., the alleged perpetrator's age). Such grounds might be considered bars for a court case (*Strafverfolgungshindernisse* or *Prozesshindernisse*), and while not negating the punishability of the conduct they refer to admissibility of prosecution (*Zulässigkeit der Strafverfolgung*).

CHAPTER 3

The definition of crimes against humanity contained in the Rome Statute can be divided into two parts or layers. The first part/layer, the introductory paragraph, contains the *chapeau* elements (also called general requirements or constitutive elements) of crimes against humanity. The *chapeau* elements describe the context and condition under which the commission of individual, specific acts – underlying offences (listed beneath the *chapeau* in the catalogue of crimes set forth in Art. 7(1)(a–k) ICC Statute) – amount to a crime against humanity. The second layer contains a list of these single, punishable criminal acts that when committed knowingly within the context set out in the *chapeau* (as part of a widespread or systematic attack directed against any civilian population) arise to crimes against humanity. The element of a widespread or systematic attack

has a major and central role in the definition of crimes against humanity, but interestingly, the term 'attack' is not limited to conduct of military hostilities, but it also encompasses any abuse or mistreatment of the civilian population. The attack in this context means the course of conduct involving the commission of acts of violence. In this respect, it is worth recalling that the primary object of the attack must be the civilian population regardless of its nationality or ethnicity. The 'widespread or systematic' nature of the attack is an element that distinguishes common, domestic, ordinary crimes from mass crimes which amount to crimes against humanity and raises them to the level of international crimes. The term 'widespread' should be understood as a quantitative element that requires a large-scale action involving a large number of victims. The term 'systematic' pertains to the official and organised nature of the attack and should be understood as a criterion of quality. Moreover, there must be a link between the acts perpetrated by the accused and the overall attack directed against the civilian population, so that the respective act is committed as part of the widespread attack targeting civilians. At the same time, the policy element has to be met. This element requires that there be a link between the charged offence as a crime against humanity and a state or organisational plan or policy.

Although the dominant view presented in the writings of scholars is that the policy element, being the most controversial and unclear part of the definition of crimes against humanity under the Rome Statute, serves to distinguish crimes against humanity from ordinary municipal crimes. Art. 7(1) of the ICC Statute also requires that the perpetrator has knowledge (i.e., awareness) of the widespread or systematic attack directed against civilians.

CHAPTER 4

This chapter deals with the catalogue of crimes, the specific (underlying) offences. The list of inhumane acts was traditionally divided into two types of crimes against humanity: 1) murder-like crimes, such as murder, extermination, or inhumane acts and 2) persecution-type crimes, such as persecution on discriminatory grounds. The author rejects this traditional classification and suggests another approach. The proposed functional classification is partially based on the classification contained in the Polish Penal Code from 1997 and it distinguishes between five types of crimes against humanity: 1) crimes against persons (against life and health), such as murder, extermination, and torture; 2) crimes against liberty and freedom, such as enslavement, imprisonment, or other severe deprivation of physical liberty in violation of the fundamental

rules of international law, the enforced disappearance of individuals, and the deportation or forcible transfer of a population; 3) crimes against sexual liberty and autonomy (sexual violence and gender-based crimes), such as rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; 4) crimes on discriminatory grounds (discrimination and hate crimes), such as persecution and the crime of apartheid; and 5) other inhumane acts contained in the catch-all clause (Art. 7(1)(k) ICC Statute), such as other inhumane acts of a similar nature intentionally causing great suffering or serious personal, mental, or physical injury.

CHAPTER 5

In Chapter 5 the issue of a dogmatic interpretation of the policy element is addressed. From these findings, the writer presents a hypothesis that the phrase 'organizational policy' in Art. 7(2) ICC Statute also refers to all types of non-state actors. Therefore, it is the author's firm conviction that any groups, including non-state actors and non-state-like organisations which have the capacity to perform acts that infringe on basic human rights and values, can be charged with crimes against humanity.

Under Art. 7(2)(a) of the ICC Statute, crimes against humanity require that a widespread or systematic attack on a civilian population be committed 'pursuant to or in furtherance of a State or organisational policy to commit such attack'. The interpretation of the term 'organisation', in particular, is controversial and has provoked an interesting debate in legal scholarship in recent years. The author strongly advocates the view that the term 'organisation' should be understood as including any association of persons with an established structure, not limiting the term only to state actors or state-like actors. Understandably, the contextual, policy element distinguishes crimes against humanity from ordinary, domestic crimes. It is clear that crimes against humanity may be committed by non-state actors such as paramilitaries, armed civilian bands, guerrillas, criminal gangs, and other violence-prone groups. Any groups and entities which are capable of perpetrating crimes of mass violence by virtue of their plan, ideology, or policy to do so on a widespread or systematic basis might fall within the definition of the term 'organisation'. Because of technological advancement, worldwide high technologies and special weapons are more accessible even to ordinary offenders and criminals without any connection to the state apparatus, and they might be able to commit horrible attacks directed against civilians. Such attacks as the 2011 terror attacks committed in Norway would have never been possible

50 years ago (committed by only one perpetrator). The Nuremberg model of crimes against humanity, attributing the ability to commit these crimes only to state actors is now simply anachronistic and outdated. Therefore, it is the author's firm conviction that not only state or state-like actors can satisfy the policy requirement contained in Art. 7(2) ICC Statute, thus being able to stand trial for crimes against humanity. To put it more bluntly, in the author's opinion, non-state actors can in any case be indicted in the International Criminal Court for committing crimes against humanity. As a matter of fact, a restrictive interpretation of the policy element would lead to impunity for criminals committing international crimes against humanity. The author supports an extensive approach, interpreting the policy element more broadly – though the broadest possible interpretation does not mean to erode the threshold set by the policy element because behind crimes against humanity there always lies an organised structure, entity, or formation. These might be state agents, state-like entities, or simply non-state actors. To put it simply, behind crimes against humanity there are always some pseudo-intellectual anti-values in the form of policy, ideology, a plan, a strategy, or tactics which are aimed at launching attacks directed against a civilian population.

CHAPTER 6

The question of the national implementation of ICC crimes as adopted by the Rome Statute, particularly in the light of the principle of complementarity, is in any case worth exploring more thoroughly. In fact, the obligation to prosecute international crimes is mentioned only in the Preamble of the Statute, which stipulates that 'it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'.

Although the fundamental principle of ICC jurisdiction – the principle of complementarity – leaves the primary responsibility for prosecuting international crimes to national criminal justice systems. It should be pointed out that the Rome Statute leaves unanswered the question of whether the States parties to the Rome Statute are under international legal obligation to incorporate the ICC core crimes' definitions into their domestic criminal law. Prior to the adoption of the Rome Statute in 1998, only a few states had used terms such as 'genocide', 'crimes against humanity', 'war crimes', or 'crime of aggression' to label such crimes in their national penal codes. One example of this is Poland, where the penal code from 1997 was amended in 2010 to explicitly cover all core international crimes defined in the Rome Statue of the International Criminal Court.

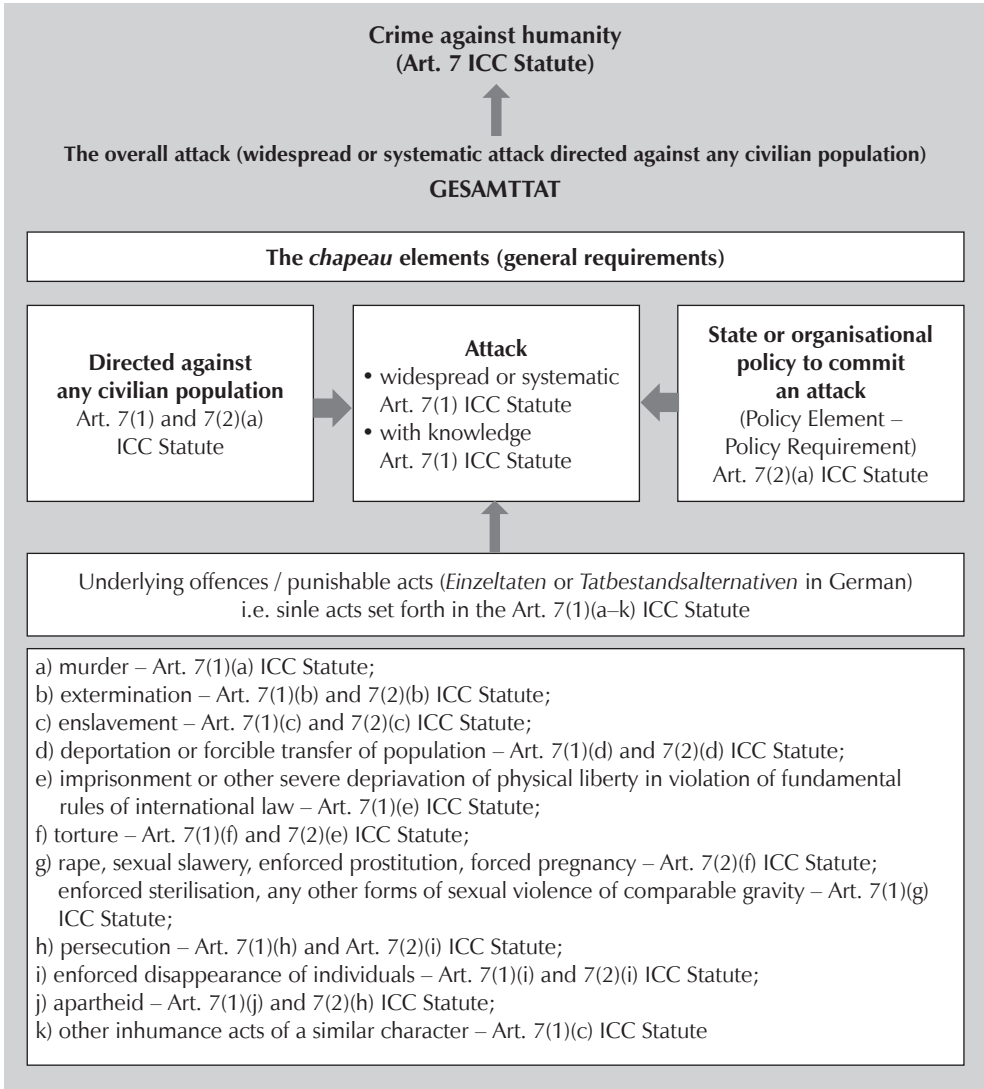

FIGURE 3. Diagram illustrating the structure of crime against humanity

In 2013, at George Washington University a comparative study was conducted which found that up only about 66% (80 out of 121) of the Rome Statute parties have some form of national legislation relating to the prohibition of CAH.[13]

[13] The George Washington University Law School, International Human Rights Clinic. Comparative Law Study and Analysis of National Legislation Relating to Crimes Against Humanity and Extraterritorial Jurisdiction. July 2013, pp. 3–4.

Undeniably, there is no provision in the Rome Statute designating a legal obligation to implement the core ICC crimes into national criminal legislation.

Therefore, even if the Rome Statute does not establish an obligation for ICC State parties to implement the core international crimes as defined in the Statute, the best way to put the principle of complementary ICC jurisdiction into practice and to secure ICC member states' jurisdiction over the Rome Statute's core crimes is to implement them into national criminal legislation. It is not a technical issue concerning the names and titles used in national penal codes, but a question of whether the national crimes' definitions contain the same types of crimes encompassed in Arts. 6–8 *bis* of the ICC Statute. One can hardly believe that an ordinary national crime definition would cover all types of criminal acts defined as CAH and listed in Art. 7(1)(a–k) ICC Statute. What is internationally labelled as 'crimes against humanity' has a whole range encompassing the 18 types of CAH enumerated in Art. 7(1)(a–k) ICC Statute. It is simply very hard to imagine a domestic ordinary crime definition containing such a comprehensive and complex structure as Art. 7 ICC Statute has. Besides, domestic, ordinary crime definitions do not reflect the mass scale and gravity of international crimes. Further, national crime definitions typically do not include the contextual elements that are characteristic of international crimes.

The final chapter of the book contains concluding and closing remarks. To sum up, crimes against humanity are particularly odious offences which constitute a serious attack on human dignity or a grave humiliation of the human race. Despite some doctrinal considerations and interpretation ambiguities, the majority of academics and specialists in international criminal law consider the concept of crimes against humanity under the ICC Rome Statute to be a significant contribution to the development of international criminal law. It should be noted that Art. 7 of the ICC Statute sets forth the most clarified, comprehensive, and precise definition of crimes against humanity ever drafted.

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This book is a revised and updated version of my PhD thesis, titled *The concept of crimes against humanity in the light of the Rome Statute of the International Criminal Court*, which was submitted in 2018 to the Institute of Law Studies of the Polish Academy of Sciences in Warsaw for the Degree of Doctor of Laws. Without pretending to be exhaustive, I hope that the book will elucidate some aspects of the legal concept of crimes against humanity in international criminal law up to its post-Rome Statute development. I have limited my research to

source material available up to 1 June 2019. The structural schema of crimes against humanity is shown in Table 3.

The book is dedicated to the memory of my beloved, wonderful father Jan Kazimierz Filipek (1931–2019).

Warsaw, June 2019