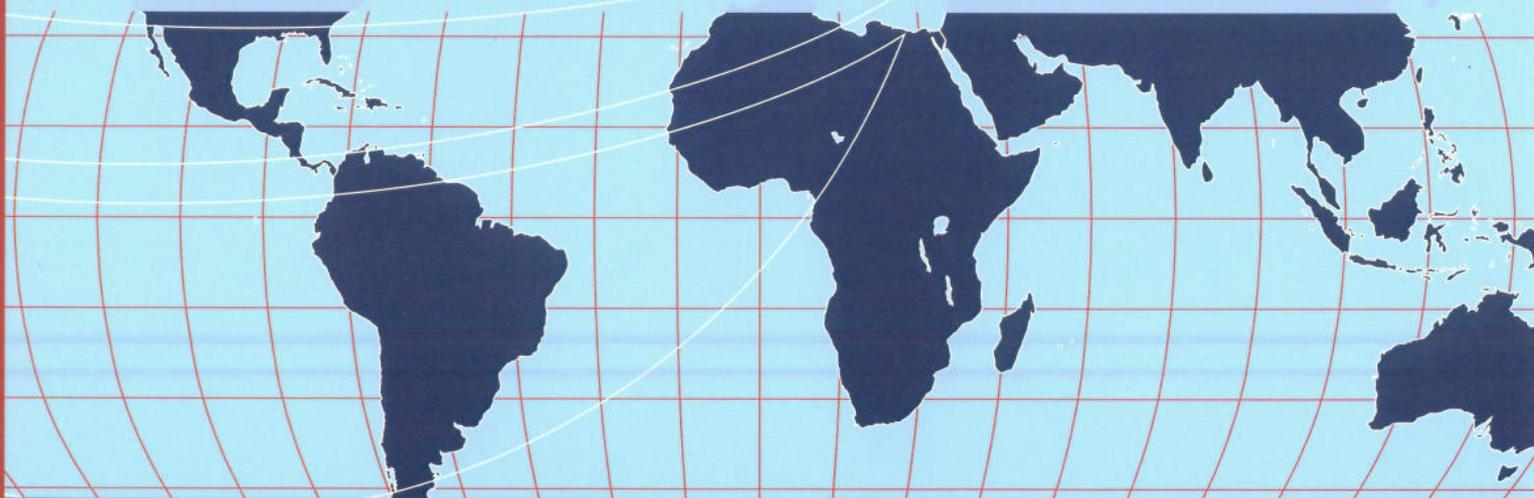


FICJC Publication

Forum for International
Criminal Justice and Conflict

Importing Core International Crimes into National Criminal Law

Morten Bergsmo, Mads Harlem and Nobuo Hayashi (editors)



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Forum for International Criminal Justice and Conflict (FICJC)
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PREFACE BY THE SERIES EDITOR

We started the *Forum for International Criminal Justice and Conflict* as a debate forum open to individuals interested in issues concerning international criminal justice and conflict, with the main aim to identify, and facilitate debate on, key issues in international criminal justice and conflict, including accountability-related measures other than criminal justice. The process to import the core international crimes of genocide, crimes against humanity and war crimes into national criminal law is an issue of critical importance to the emerging system of international criminal justice. The architecture of this system rests on the principle of complementarity, which provides that the International Criminal Court may have to investigate and prosecute cases that are not dealt with genuinely by national criminal justice systems. This entails a two-fold requirement of national preparedness to deal with core international crimes.

First, states should have some *institutional* capacity to investigate and prosecute genocide, crimes against humanity and war crimes cases within the national jurisdiction. If there are insufficient resources to have a separate unit for such crimes, then the state should facilitate that some members of the criminal justice system develop expertise in this area through suitable competence building measures, including training and access to specialized electronic resources.

Secondly, states should develop *legislative* capacity to prosecute and adjudicate core international crimes cases before national courts. This includes provisions in national criminal law explicitly criminalising genocide, crimes against humanity and war crimes. Without such offences in national criminal law it may not be possible to bring cases with the proper international legal classification, forcing prosecutors and judges to fall back on ordinary national crimes which may not adequately capture the interests that are protected by the core international crimes.

The *Forum* held an international seminar in Oslo on 27 October 2006 at the initiative of the Norwegian Red Cross and PRIO to discuss different aspects of the import of core international crimes into national criminal law. The present publication gives a broader audience access to the deliberations at the seminar, in the form of the first issue in the *FICJC Publications* series.

Morten Bergsmo
Series Editor

PREFACE BY THE EDITORS

The 27 October 2006 seminar on importing core international crimes into national criminal law was held, *inter alia*, with a view to raising awareness and momentum in Norway as it prepared to adopt a new penal code. This publication records the proceedings of the event.

The half-day seminar opened with a review of the various approaches and techniques available to national legislators. It then examined the experience of Canada and Germany in incorporating war crimes, crimes against humanity and genocide, including those found in the Rome Statute of the International Criminal Court (ICC), into their penal law. At the plenary, the relevance of the ICC Elements of Crimes document and the treatment of crimes excluded from the ICC Statute became the subject of in-depth discussion.

The seminar attracted numerous participants from Norway and beyond. Their diverse backgrounds – *e.g.*, students, scholars, prosecutors, private practitioners, members of the judiciary and ministerial staffers – contributed to the lively and constructive exchange of ideas. Above all, those present benefited from the expert speakers and panellists with backgrounds in Canada, Germany, Norway and Sweden as well as in the international arena.

This publication contains (a) the final programme, (b) the minutes of the proceedings, (c) a supplementary article by one of the panellists at the plenary, and (d) the English text of the implementing legislations adopted in Canada and Germany. Nobuo Hayashi has edited the minutes of the proceedings in co-operation with the speakers. Despite the primarily Norwegian context in which the seminar took place, its content, as summarised in the following pages, would be of interest to States concerned with ICC national implementation and to those active in the administration of international criminal justice generally.

Special acknowledgement is due to the rapporteurs for their diligent note-taking and for preparing the minutes; the Norwegian Red Cross for providing the rapporteurs with audio-recording assistance; the speakers and panellists for their feedback on earlier drafts of the minutes; and PRIO Information Director Agnete Schjønby for designing, formatting and printing this publication.

*Morten Bergsmo
Nobuo Hayashi
Mads Harlem*

Editors

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FINAL SEMINAR PROGRAMME

- 12:00 *Introduction*, by Trygve Nordby (Secretary-General, Norwegian Red Cross).
- 12:10 *Overview of ways to import core international crimes into national criminal law*, by Stéphane J. Hankins¹ (Legal Adviser, International Committee of the Red Cross).
- 12:40 *The Canadian model*, by Joseph Rikhof² (Senior Counsel, Crimes against Humanity and War Crimes Section, Canadian Department of Justice).
- 13:10 *The German model*, by Professor Claus Kreß³ (Professor, University of Cologne).
- 13:40 Break.
- 14:00 *Discussion on particular problems in connection with the import of core international crimes into national criminal law*, including (but not necessarily limited to):
- (a) Role of the ICC Elements of Crime document (with a short introduction by Joseph Rikhof);

¹ **Stéphane J. Hankins** is a graduate from the Law Faculty of the University of Paris I (Panthéon Sorbonne) and from the Central European University in Prague. He has been working for the International Committee of the Red Cross since 1994 as regional legal adviser based successively in Moscow, Budapest, Bangkok and Kuala-Lumpur. He is currently working with the ICRC Advisory Service on international humanitarian law at ICRC Headquarters in Geneva.

² **Joseph Rikhof** (BCL, University of Nijmegen, The Netherlands; LL.B, McGill University; Diploma in Air and Space Law, McGill University) teaches the course International Criminal Law at the University of Ottawa. He is Senior Counsel, Manager of the Law with the Crimes against Humanity and War Crimes Section of the Department of Justice, Canada. He has also served as Special Counsel and Policy Advisor to the Modern War Crimes Section of the Department of Citizenship & Immigration between 1998 and 2002. His area of expertise lies in the area of the law related to organized crime, terrorism, genocide, war crimes and crimes against humanity, especially in the context of immigration and refugee law. He has written a number of articles exploring these areas of international criminal law and immigration/refugee law and has lectured on the same topics in Canada, the United States, Europe and the Middle East.

³ **Claus Kreß** (Dr. jur. Cologne; LL.M. Cantab.) is Professor for Criminal Law, Criminal Procedure, International Criminal Law and Public International Law. He is Director of the Institute for Criminal Law and Criminal Procedure at Cologne University where he holds the Chair for Criminal Law, Criminal Procedure, European Criminal Law and International Criminal Law. His writings cover most areas of international criminal law and procedure. His prior practice was in the German Federal Ministry of Justice on matters of criminal law and international law. Since 1998 he represents Germany in the negotiations regarding the International Criminal Court. He was member of the Expert Group on the German Code of Crimes under International Law (2000/2001). He acted as War Crimes Expert for the Prosecutor General for East Timor (2001) and as Head of the ICC's Drafting Committee for the Regulations of the Court (2004).

- (b) Modifying elements of crimes when importing core international crimes (Håkan Friman, Deputy Head of Division, Swedish Ministry of Justice); and
 - (c) War crimes not included in the ICC Statute (Mads Harlem, Legal Adviser, Norwegian Red Cross).
- 15:45 *Conclusion*, by Tørris Jæger (Head, International Humanitarian Law Unit, Norwegian Red Cross).

MINUTES OF THE PROCEEDINGS

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Nobuo Hayashi, Legal Advisor, Norwegian Centre for Human Rights

Introduction¹

The seminar opened with remarks by Trygve Nordby, Secretary General of the Norwegian Red Cross. He noted that, for the first time in human history, a universal international criminal court was established in 1998. The Rome Statute confers upon the ICC jurisdiction over the gravest crimes affecting the entire human kind, namely genocide, crimes against humanity and war crimes.

In Kofi Annan's words, there can be no healing without peace, there can be no peace without justice, and there can be no justice without respect for human rights and the rule of law. Justice is an important tool to a lasting peace, and the ICC is an important tool in fighting impunity for the most serious crimes of concern to the international community.

The ICC cannot and should not, however, play this role alone. Ensuring justice is, first and foremost, the responsibility of national courts. For the purposes of a lasting peace, it is crucial that justice take place as close as possible to the place where the crime was committed. States are therefore obligated to exercise their criminal jurisdiction over those responsible for international crimes. The purpose of this seminar is to discuss particular challenges confronting States in their efforts to import core international crimes into their national criminal law.

Nordby highlighted two issues in this regard. First, should national criminal law adopt separate penal provisions for war crimes, crimes against humanity and genocide? It would not be sufficient to criminalise these offences in accordance with the provisions contained in the penal code relating to homicide. As stated by the Appeals Chamber of the International Criminal Tribunal for Rwanda (ICTR), the criminalisation of genocide, unlike that of homicide, is designed to protect a national, ethnical, racial or religious group as such, rather than individuals. There should therefore be specific provisions relating to genocide, crimes against humanity and war crimes in national legislation.

Second, what should constitute war crimes, crimes against humanity or genocide in national legislation? Norway is in the process of drafting a new penal code. Encouragingly, its penal code commission has considered how the penal provisions of the Rome Statute can be incorporated into Norwegian law. Nonetheless, Norway's obligations go beyond the Rome Statute. National penal provisions relating to genocide, crimes against humanity and war crimes should comply not only with the Rome Statute but also with other parts of international law, such as conventions prohibiting the use of certain weapons in armed conflict. The Norwegian government is currently taking an international initiative to regulate the use and ban certain types of cluster bombs, as it did together with non-governmental and other governmental actors some ten to fifteen years ago to ban anti-personnel mines.

The seminar was chaired by Arne Willy Dahl, Judge Advocate General of Norway.

¹ This part of the minutes was prepared by Ellen Stensrud.

Overview of Ways to Import Core International Crimes into National Criminal Law²

Introduction

Stéphane J. Hankins, Legal Advisor for the International Committee of the Red Cross, began his presentation by emphasising its focus on the subject-matter jurisdiction of the ICC and its implications in the national legislation of States Parties.

Hankins recalled that the Rome Statute does not directly obligate its States Parties to incorporate core international crimes into their domestic legal order. This remains the case even though the same States may be bound to do so under other obligations resulting from other international treaties to which they are parties and/or customary international law. It was suggested however that the Rome Statute does set forth an *indirect* obligation flowing from the principle of *complementarity* of jurisdiction between the ICC and domestic courts. According to this principle, the ICC is only a court of last resort. If a national court is "able" and "willing" to prosecute a case, that court shall take priority over the ICC. This presupposes that national courts have the necessary legislation in place. States Parties should therefore review their domestic law in order to ensure that it reflects as closely as possible the terms of the Rome Statute, such as the definition of substantive crimes, the gravity of crimes in the definition of applicable penalties and defences against criminal responsibility which should not be broader than those permitted under the Statute.

Hankins referred in this context to the *Bagaragaza* case in which the Appeals Chamber of the ICTR denied a motion by the Prosecution to transfer a case for trial to Norway. It did so on the grounds that Norway lacked the necessary legislation and jurisdiction to try the accused on charges of grave violations of international law including genocide and that in the absence of domestic legislation, the accused could only be charged for ordinary crimes. This, the Chamber decided, risked trivialising the nature and gravity of the crimes in question. This decision, Hankins concluded, while not entirely relevant to the discussion at hand since the ICC is widely expected to show due deference to the jurisdiction of domestic courts unless there is a clear signal that national proceedings are intended to shield an individual from criminal responsibility, was nevertheless very stimulating. It stood as a strong reminder of the gravity of the crimes concerned and of the responsibility for States under international law to create the conditions within their domestic law to investigate and prosecute the gravest international crimes.

Many of the States Parties to the Rome Statute (102 by the end of October 2006) have adopted, or are intending to adopt, legislation introducing

² This part of the minutes was prepared by Vibeke Muscæus.

the core crimes into their domestic law. Among the wide range of issues the legislator needs to take into consideration are the following:

- Which definitions of the crimes should be adopted (e.g. by reference to the definitions and categorisations of the Rome Statute or by drafting specific definitions; by limiting their consideration to the strict implementation of the Rome Statute crimes; or by looking beyond that to other obligations of the State flowing from other relevant international instruments or customary international law)?
- How, and where in domestic law, should the crimes be stipulated (e.g., within a stand-alone legislation or through amendments to existing domestic penal codes)?
- What penalties should be ascribed?
- On what bases should the State assert jurisdiction (e.g. jurisdiction on the basis of territoriality and/or nationality, or universal jurisdiction; whether to require the presence of the alleged perpetrator on the national territory; and whether jurisdiction should be asserted retrospectively or only prospectively)?
- Should the existing rules on criminal responsibility be amended in light of the provisions of the Rome Statute?
- How, if at all, should the Elements of Crimes document be used?

Methods of reflecting core international crimes in domestic law

Hankins considered a number of ways in which States might define core international crimes within their jurisdictions.

- States may first take the traditional and minimalist approach of *applying existing military or ordinary criminal law* (a method still favoured in several countries, such as Germany prior to the adoption of its Code of Crimes Under International Law of 2002). The disadvantages of this approach are well known. These include the fact that, frequently, the offences concerned correspond only very roughly to the definitions and requirements foreseen under international law and that the penalties provided for in ordinary criminal law may prove inappropriate to the seriousness of international crimes.
- Alternatively — and States are increasingly considering to do so in the process of implementing the Rome Statute —, core international crimes may be the subject of *express and specific incrimination in domestic law*. Within this approach, once again, Hankins identified different options open to the legislator:
 - * The first method of specific incorporation is that of criminalisation through a general and open-ended reference to international treaties to which the State is a Party, to international law in general or to the laws and customs of war, while specifying a range of penalties

for the crimes in question. It was suggested, however, that this may prove insufficient with regard to the principle of legality.

- * The second method is to expressly criminalise each and every crime outlined in relevant international treaties and/or recognised under customary international law:
 - "Explicit criminalisation" may firstly take the form of a "static" or "literal" transcription, involving a transcription of the offences into domestic law using an identical wording to that of the international treaty, while setting out the penalties applicable to the crimes in question. "Static transcription" accords with the principle of legality because it sets forth clearly and predictably which conduct is considered criminal and what punishment is envisaged therefore. It also facilitates the task of those responsible for applying the law and relieves them of the burden of researching and interpreting international law. It was noted however that such an approach, if the criminalisation is too detailed and specific, may inhibit the ability of domestic courts to prosecute crimes in consideration of new developments in international law. This "static transcription" method is inherent in the approach of common-law States in implementing international treaties, such as England and Wales. Several States of the civil law tradition have also opted for this approach (such as, for example, the recent French draft law to introduce amendments to the Criminal Code and other relevant legislation).
 - A second option of "explicit criminalisation" is what may be described as "dynamic transcription," whereby the types of conduct constituting offences under the Rome Statute are redefined, reformulated and redrafted in domestic law. This approach assumes that the Statute definitions and categorisations are not fully consistent with conventional or customary international law. On the one hand, "dynamic transcription" enables the legislator to complement the definitions under the ICC Statute in consideration of the list and wording of crimes in related international instruments, such as Additional Protocol I to the Geneva Conventions of 1949. On the other hand, it may prove a major task for the legislator and entail an extensive review of domestic criminal law. Germany and the Netherlands, among others, have adopted such an approach albeit to varying degrees.
 - A third and last option of "explicit criminalisation" is to combine methods. One mixed approach may combine explicit and specific criminalisation of certain international offences with a generic and residual clause covering, for example, other grave or serious violations of international humanitarian law under treaties to which the State is a party. Finnish criminal law (presently undergoing a reform process) may be considered to typify a mixed approach, in which some core international crimes are expressly defined (the Finnish

Criminal Code contains a Chapter 13 on "War Crimes and Crimes against Humanity"), whereas others are incorporated through an open-ended reference to Finland's international obligations (through an express prohibition of any acts which "otherwise violate the provisions of an international agreement on warfare binding upon Finland or the generally acknowledged and established rules and customs of war under public international law"). This mixed approach combines static transcription with dynamic transcription. To put it differently, it combines specific criminalisation with general recourse to relevant international law.

Hankins then examined the form and place of criminalisation. Should the legislator adopt separate enactments covering substantive issues on the one hand and issues related to co-operation with the ICC on the other? Or should one address these matters in a single legislation? Should the crimes be simply inserted into existing penal codes or stipulated separately in a special statute?

Adopting a special, "stand-alone" enactment may notably enable all domestic rules on the implementation of international treaties covering international crimes to be contained in one piece of legislation. This approach also affords an opportunity to bring together under one act both the definition of the crimes and the various general principles of criminal law applicable thereto. In contrast, incorporating international crimes into existing legislation obligates the law-maker to determine the place (e.g. in ordinary criminal codes, military criminal codes, or both) and the form (e.g. as a special section or chapter) of their incorporation. Germany, the Netherlands and Canada are among those States which have adopted the special, "stand-alone" approach in implementation of the Rome Statute crimes, whereas France is currently reforming its domestic criminal law (with amendments foreseen to the Criminal Code, the Code of Military Justice and the French Law on the Freedom of the Press, respectively).

Hankins himself did not express any preference for one approach over the other. He did state however that, at any rate, the legislation in place should allow the State to benefit from the *complementarity* principle and enable domestic courts to assert jurisdiction accordingly. States may also be encouraged to adopt a dynamic approach by extending the jurisdiction of domestic courts in order to both account for other related international obligations and remedy some of the omissions or weaknesses in the Rome Statute.

Jurisdictional bases for the exercise of national jurisdiction

Hankins proceeded with the discussion of whether States should assert jurisdiction on the basis of *universality* or on a more limited basis such as *territoriality* and *nationality*. It was recalled that the matter remains the subject of much debate and was in recent years brought to renewed attention in the context of high profile cases in the domestic courts of several States (e.g. Belgium).

Under customary international law, some offences are considered subject to universal jurisdiction. Treaty provisions expressly provide for universal jurisdiction in respect of certain other offences. It was explained that different States have approached the matter in different ways. In Hankins' view, they should take *inter alia* the following factors into consideration:

- Their obligation to assert universal jurisdiction over certain international crimes;
- The principle of complementarity governing the relationship between the ICC Statute and States Parties thereto, as well as the interests of foreign courts in a given case (which may have a greater interest and facility to adjudicate international crimes); and
- The interests of domestic courts in exercising or declining jurisdiction in a given case.

States such as Germany and the Netherlands have hence sought to combine broad extraterritorial jurisdiction over core crimes with a number of procedural safeguards serving to preserve a degree of discretion for domestic prosecutorial and judicial authorities to proceed with in a given case. These arrangements aim to balance respect for the international obligations of the State, for the jurisdiction of other States and for the jurisdiction of international courts.

General principles of criminal law

Hankins considered whether the general principles of criminal law in Part 3 of the Rome Statute should be duplicated or otherwise incorporated into domestic law.

The Rome Statute does not directly require the States Parties to adopt the general principles defined therein. Nor does the principle of complementarity dictate that national courts try cases in exactly the same manner or according to exactly the same criteria as the ICC would. Most of the systems considered here, including in particular those of Canada, Germany, the Netherlands and the United Kingdom, indicate that, wherever possible, the general principles of ordinary criminal law should apply to international crimes. It would appear that only certain specific aspects of the general principles need transcription in domestic law. Examples of such aspects include:

- The question of statutes of limitation which may exist in domestic law;
- The question of criminal liability of superiors; and
- The question of immunities of foreign officials.

Conclusion

Hankins observed that there is a diversity of approaches to the implementation of core international crimes in the ICC Statute. A key question confronting the legislator is whether to adopt a minimalist approach strictly in keeping

with the requirements of the complementarity principle, or a dynamic approach moving beyond the Rome Statute.

The Canadian Model³

Introduction

According to Joseph Rikhof, Senior Counsel and Manager of the Law in the Crimes against Humanity and War Crimes Section of the Department of Justice, Canada, the Canadian model is based on the implementation of international law rather than the amendment of national law by defining crimes in an international context. Historically, Canadian courts have had difficulties in dealing with core crimes. Experiences before these courts in the 1980s and early 1990s have been unsatisfactory. Each criminal case that was taken to court was lost. These problems were partially due to the fact that Canadian judges did not have a great deal of international law experience, combined with evidentiary frailties inherent in cases pertaining to situations fifty years earlier. Canada has since approached international criminal law with a view to giving some clearer indicators in the legislation which could be useful for both prosecutors and national courts.

History

Rikhof recalled that, by 1987, Canada had incorporated war crimes and crimes against humanity into its legislation. There have been four World War II-related cases in which an effort was made to link national legislation to international law. This effort was not successful; the Supreme Court of Canada in the *Finta* case in 1994 set the bar for proving international offences so high that it became very difficult to attempt further prosecutions for such crimes. The outcome of the *Finta* case and the demise of the other three cases due to the lack of evidence prompted the Canadian government to amend its Criminal Code in the mid-1990s. When the prospect of an international criminal court became a reality in the late 1990s, the government decided to incorporate this latest development in international law into its legislation by passing a separate enactment, the Crimes Against Humanity and War Crimes Act of 2000,⁴ two years after the adoption of the Rome Statute in 1998. The Act draws heavily on the Rome Statute, while ensuring that some of the more undesirable aspects of the *Finta* case were also addressed.

The Crimes Against Humanity and War Crimes Act 2000

The Act marks Canada's first acknowledgement of the crime of genocide. Previously, Canada had incorporated the Genocide Convention only to the extent that *incitement* of genocide was included in the Canadian Criminal Code. The Act also recognised, for the first time, that war crimes can be committed in both international and non-international armed conflicts, while it made superior/command responsibility a specific offense rather than a

³ This part of the minutes was prepared by Cristine M. Delaney.

⁴ For the text of the Act, see Appendix I below.

mode of liability. Canada's earlier recognition of superior/command responsibility was limited to using the concept of aiding and abetting in the commission of war crimes or crimes against humanity.

Prior to 2000, Canadian law distinguished between crimes committed in Canada and those committed outside of Canada. The 1987 legislation only allowed prosecution of the latter. The Act provides for both situations but limits Canada's ability to prosecute core crimes committed within Canada only to acts committed after 2000; it does not, however, impose any such temporal limitations regarding crimes committed in other countries. Any offence committed outside Canada before 2000 can be prosecuted, as long as it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognised by the community of nations at the time of its commission. This exception to the legality/non-retroactivity principle and to the legal rights of accused persons is specifically stated in the Canadian Charter of Rights and Freedoms and reflects the same approach set out in Article 15 of the International Covenant on Civil and Political Rights.

The Act combines two complementary approaches to incorporating international crimes into Canadian law. It refers to international law but also defines specific crimes at times. The three core crimes are defined by immediate reference to customary international law, conventional international law and general principles of law.

Canada's definition of genocide provides the specific *mens rea* set out in both the Genocide Convention and the Rome Statute, but does not describe any *actus reus*. Nor does it include the four types of group associations to which the Genocide Convention refers and, as a result, broadens the crime's scope to include "an identifiable group." For the *actus reus* aspect, a reference is made to international criminal law. As regards crimes against humanity, the Act follows the Rome Statute for the most part in describing the underlying crimes, while referring again to international law for the international or *chapeaux* elements. One notable exception is that the Act does not mention "enforced disappearances" and "apartheid." This was done because the legal status of these two crimes against humanity was considered uncertain under the Rome Statute and has not yet been tested for legality and, in particular, *vis-à-vis* the principle of non-retroactivity. The Act also expands the category of victims by not only using the notion of civilian population as in international criminal law but also by adding the concept of any identifiable group.

While the Act relies partially on the Rome Statute and international law to define genocide and crimes against humanity, it does not define war crimes at all. Rather, it refers to war crimes as a concept; it assumes that international law and practice will serve as the paramount source of judicial guidance regarding these crimes.

The Act has two interpretative provisions to clarify certain aspects of customary international law in relation to Canadian law. First, it explicitly indicates

that the Rome Statute is its primary tool for all definitions in the Act by stating that

for greater certainty, crimes described in articles 6 and 7 and paragraph 2 of article 8 of the Rome Statute are, as of July 17, 1998, crimes according to customary international law, and may be crimes according to customary international law before that date. This does not limit or prejudice in any way the application of existing or developing rules of international law.

This enables the future jurisprudence to use the Rome Statute as a starting point for what constitutes customary international law, while at the same time allowing new developments in this area of international law to be taken into account. Secondly, it addressed an issue regarding customary international law raised by the Supreme Court of Canada in the *Finta* case. That court considered whether crimes against humanity existed during World War II and ruled that it was not convinced of their existence at the time. It did hold however that the terrible nature of the acts justified punishment in any event. In order to settle this issue, the Act states that crimes against humanity are were part of customary international law as of August 8, 1945, the date on which the International Military Tribunal was established in Nuremberg.

The Act is tightly and fundamentally connected to the Rome Statute. For that reason, the Act contains as appendices the text of the Statute's Articles 6, 7 and 8(2), to be used for direct reference.

Current cases

Rikhof referred to one on-going case in Canada in which the suspect was arrested in October 2005. The judge ruled that the suspect must remain in custody until the beginning of his trial in March 2007. This unusually lengthy pre-trial detention was ordered not on the basis of the danger that the suspect would pose to the community or because he would be a flight risk, but solely on the very serious nature of the war crimes for which he had been indicted, namely genocide, war crimes and crimes against humanity. This ruling exemplifies the Act's early impact.

Challenges

Rikhof noted that international criminal law has been and will continue to be in a state of flux. For instance, the elements of the crime against humanity of torture have changed over time. This would mean that, under the present Act in Canada, a prosecution against persons who might be charged for this crime committed in the 1970s will need to prove more elements than for the same crime committed more recently. Conceptually, this might not be easily acceptable to Canadian judges although a similar development with national crimes is not unusual. As well, judges may be reluctant to examine and use definitions developed for crimes in international criminal law which have

their equivalent in Canadian law, such as murder or rape. They will be more naturally inclined to take domestic law as a point of departure and use the domestic definition of a crime rather than its international counterpart. For this latter aspect, another Supreme Court of Canada decision might provide some guidance in that it appears to favour an international approach over a national one. In the case of *Mugesera*, the court examined an immigration case, namely the deportation order against a permanent resident for the crime of hate speech committed in 1992. The speech was directed against Rwandan Tutsis and amounted to an incitement to commit genocide and murder, as well as the commission of the crime against humanity of murder and persecution. The court defined murder in a manner very similar to that found in the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY). Rulings such as this will give some confidence that courts may apply international definitions.

Conclusion

The Canadian approach has both advantages and disadvantages. Its advantage is that, by tying the regulation of core crimes very closely to international criminal law, it will be assured that Canada will never be out of step with new developments in the international sphere. By virtue of this link, these new developments automatically become part of Canadian law without the need of legislative amendments. The disadvantage is that this linkage requires all actors in criminal prosecutions to be continually up to date with changes in the international jurisprudence. As well, the exact relationship between domestic and international law is not certain at this point, including the status of domestic law where it has already gone beyond the requirements of international criminal law such as was done in defining the victims of genocide and crimes against humanity. The Act has not been tested in the courts yet, and these questions will no doubt be answered in the near future.

The German Model⁵

Introduction

Claus Kreß, Professor, University of Cologne, noted that Germany ratified the Rome Statute on 11 December 2000 and its Bundestag and Bundesrat passed the Code of Crimes Under International Law (CCUIL)(*Völkerstrafgesetzbuch*) on 21 June 2002. The CCUIL, which entered into force on 26 June 2002, provides for universal jurisdiction over genocide, crimes against humanity and war crimes.⁶

Code of Crimes Against International Law

Kreß described the CCUIL as comprehensive, elaborate and maximalist. It contains three key elements. First, the CCUIL adopts a stand-alone approach in relation to Germany's existing criminal code. Second, it incorporates crimes under international law through autonomous translation. Third, it does not restrict its scope to the Rome Statute.

Germany decided against incorporating crimes under international law into its ordinary penal code. This decision was based on the difficulties in fitting special principles, such as those on superior orders and command responsibility, into one chapter of the general code. There was also a political rationale. By assembling core international crimes in a separate legal corpus, Germany would enhance their visibility and transmit an important and reassuring signal to the international community as regards the seriousness of these crimes.

While based on the Rome Statute, the CCUIL defines crimes under international law via independent translation. It uses terminology familiar in German law, thereby improving accessibility to German jurists not used to dealing with international criminal standards. Autonomous translation enables German legislators to be more precise than the Rome Statute as regards the definitions of crimes. This approach would also allow for a more convincing structure than that contained in the Rome Statute's substantive law (cf., in particular, the different lists in Article 8).

The CCUIL incorporates not only offences enumerated in the Rome Statute but also those crimes as they are firmly grounded in general customary law. For example, for political reasons, the Rome Statute does not list the use of biological or chemical weapons as one of the core crimes. Yet, this crime under general customary international law is a war crime under Section 12 of the CCUIL.

⁵ This part of the minutes was prepared by Andreas M. Kravik.

⁶ Act Introducing the Code of Crimes Under International Law (*Gesetz zur Einführung des Völkerstrafgesetzbuchs*), BGBl.2002 I, P 2254 (Federal Law Gazette of the Federal Republic of Germany), 26 June 2002. For the text of the Act, including the Code itself, see Appendix II below.

Crimes under the CCUIL and the Rome Statute

Kreß went on to discuss the specific crimes — *i.e.*, genocide, crimes against humanity and war crimes — as they appear in the CCUIL and in the Rome Statute.

Genocide (CCUIL, Section 6). As regards genocide, Germany's intention has been to remain faithful to the text of the Rome Statute. This is mainly due to the text's long tradition. The Rome Statute reproduces word for word Article II of the Genocide Convention, a provision widely considered to reflect custom. There is one minor difference, however. The wording of the CCUIL allows for genocide to have occurred even if the conduct in question affects only one person (*e.g.* the killing of *a member* of a group; see CCUIL, Section 6(1)(1)). In contrast, the Rome Statute, on the face of it, envisages several persons being affected (*e.g.* the killing of *members* of the group; see Rome Statute, Article (6)(a)).⁷

Crimes against humanity (CCUIL, Section 7). In Kreß's view, this section of the CCUIL is less than perfect. Its imperfections, however, only mirror those of Article 7 of the Rome Statute. To begin with, some species of crimes against humanity are defined by reference to other rules of international law. For example, under Section 7(1)(4) of the CCUIL, it is a crime against humanity to deport or forcibly transfer "a person lawfully present in an area to another State or another area, in contravention of a *general rule of international law*." This formulation is problematic; the principle of specificity requires that criminal provisions be as detailed as possible and clearly indicate the conduct they prohibit. Nevertheless, German legislators found it impossible to attain greater precision than that found in Article 7 of the Rome Statute itself.

Another difficulty relates to the wording of Section 7(1)(7) of the CCUIL. This provision criminalises the causing of a person's enforced disappearance. Its problems emanate from the Elements of Crimes document adopted by the Assembly of States Parties. This offence establishes criminal liability as a result not only of a positive act (*litra a*) but also of an omission (*litra b*). Criminalising an omission implies the existence of an affirmative duty to act. And yet the precise source of law from which this affirmative duty stems remains unclear. Kreß suggested that the crime of enforced disappearance constitutes one instance in the process of incorporating crimes under international law into domestic criminal law where it would seem perfectly acceptable for national legislators first to wait for international case law to develop.

Article 7(1)(k) of the Rome Statute criminalises "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health." According to Kreß, Germany viewed this provision as an invitation to apply criminal prohibitions by analogy. Consequently, Section 8(1)(9) of the CCUIL limits the corresponding offence to threats against a person's physical integrity. Kreß considered this as a successful operation of enhancing legal certainty. Another success, in his opinion, is the

⁷ How the ICC will interpret this provision remains to be seen.

CCUIL's treatment of the crime of apartheid as a special and aggravating instance of at least one other species of crimes against humanity.

War Crimes (CCUIL, Sections 8-12). War crimes can be committed in an international or internal armed conflict. Unlike the Rome Statute, the CCUIL eliminates this distinction as far as possible under customary international law and, to that extent, establishes one comprehensive list of crimes. This approach to the concept of war crimes has enabled Germany to maintain terminological consistency, a quality wanting in the Rome Statute. For example, Articles 8(2)(a)(i) and 8(2)(c)(i) of the Rome Statute use the expressions "wilful killing" and "murder," respectively, to refer to exactly the same act. Moreover, by abolishing the distinction between two separate lists of crimes according to the nature of the armed conflict, German judges need determine only whether one of the two criteria has been fulfilled. This is important, as in many cases the distinction between the two categories of armed conflict can be tenuous.

Concluding remarks

By way of conclusions, Kreß reflected on his experience in the drafting of the CCUIL. The drafting committee consisted of both criminal and public international lawyers. The two groups often presented different perspectives on the relationship between international and domestic law. This led to fruitful discussions and debates, a highly recommendable environment for endeavours of this nature.

Discussion on Particular Problems in Connection with the Import of Core International Crimes into National Criminal Law⁸

The role of the ICC Elements of Crimes document

The discussion opened with a short presentation by Joseph Rikhof on the ICC Elements of Crimes document. The document was developed by the Preparatory Committee following the adoption of the Rome Statute in 1998. While the ICC itself is not duty-bound to apply the elements of crimes as they are formulated in the document, it would be a useful means of interpretation. It would be especially relevant for those States which have provisions of international criminal law in their national legal systems.

One participant in the audience referred to her experience as a prosecutor in Denmark. Denmark has not engaged in any particular discussion on the import of core international criminal crimes into its domestic criminal law. International criminal law has simply not been imported into Danish law. Nor, as a prosecutor, had the participant missed it in her national legal system. She noted that those working directly with international crimes were not as well informed about the Elements of Crimes document as one would wish. As a result, the document was not much used.

In reply, Claus Kreß stressed that one would be ill-advised not to use the Elements of Crimes document when applying international criminal law. The document plays an important role in the codification of international crimes. One must be careful, however. A case in point is the formulation of the mental element in some crimes. For example, prosecuting war crimes against children involves proving intent concerning the victim's age. International criminal law defines the child as a person less than eighteen years of age. Defendants would often claim that they were unaware of the victim's age and therefore his or her status as a child. Should the prosecution fail to prove the defendants' knowledge in this regard, there would be no conviction. In order to overcome this hurdle, a "should have known" standard has been developed. This standard is different from the ICC Statute which requires intent.

According to another participant in the audience, the specific wording of the Rome Statute would not create serious problems as the crimes contained in the Statute are often very similar to those contained in national law. Murder, for instance, will mean the same in national law as in international criminal law. Problems arise when much is left to a judge's discretion.

Håkan Friman, Deputy Head of Division in the Ministry of Justice, Sweden, stated that Sweden plans to introduce a separate act on international crimes into its national law. The Elements of Crime document would be helpful when interpreting the Rome Statute. He was of the view that the use of the document in Nordic countries would provide inspirations for those seeking to clarify

⁸ This part of the minutes was prepared by Ingvild Dønnem Søyseth, Yassin Kaarshe and Andreas Kiaby.

the content of international criminal law which has been imported into national law.

Stéphane J. Hankins argued that judges should take the Elements of the Crime document into account because it can serve as a guideline. The document should also be of significance to national legislators.

Modifying elements of crimes when importing core international crimes

Friman conceded that the elements of core international crimes have not yet been fully developed. Consequently, each State must assess the need of modifying these elements when importing them into its own legal system. There are considerations both in favour of and against modifying the elements of core international crimes. On the one hand, international criminal law becomes more precise through modification and this might prove necessary in order to satisfy the principle of legality in national systems. On the other hand, there will always be a risk of modified provisions departing from the international definitions and of weakening international law as a result.

One comment from the audience raised the prospects of all States modifying the elements of international crimes and, in so doing, adopting different approaches in their domestic law.

Kreß replied that changes might be technical only and ensuing problems might be solved through interpretation. Essentially, there are two approaches to importing international criminal law: one can either accept that there are differences or go back to the legislation and change the law.

Friman agreed that there are difficulties in bringing international and national law together. These difficulties become increasingly acute as international law, including the jurisprudence of international courts, continues to develop.

One member of the audience asked: What kind of international criminal law will one have if every State modifies it?

Kreß was of the opinion that international law might be modified in different ways. Regardless of the approach taken, however, one would always risk adopting provisions that differ from their original. How international criminal law will evolve in the future is a question of great importance, but unfortunately there are no easy answers to it.

Friman stated that introducing modified elements of crimes into domestic law is a political question that every State must consider. He proposed a list of "pros" and "cons" of elements modification. There are two items on the "pro" list:

- Modified crimes fit better within the general penal law and legal tradition of the State in question. This will make them more accessible to domestic courts and practitioners; and
- Modification may provide greater precision to the definition and hence greater compliance with the principle of legality as it is understood in the State concerned (there are differences among different legal traditions as to what the principle of legality requires).

On Friman's contra list were:

- The risk that modified definitions would depart from the definitions in the Rome Statute;
- The risk that various modifications and their interpretations by the States concerned might contribute to the fragmentation of substantive law and the weakening of international law; and
- The risk that modifying definitions might mean failing the complementarity test (while the Rome Statute does not directly obligate States Parties to bring their substantive provisions in line with its own, such an obligation may well stem from other sources of international law).

Friman found it difficult to place some factors in the "pro" or "con" list. For example, there is a disparity among the ICTY jurisprudence, the ICTR jurisprudence and the Rome Statute in the definition of elements. In some respects, the Elements of Crimes document appears to depart from the explicit provisions of the Rome Statute; in other respects, the former does not read very well with the latter or, at least, leaves room for interpretation. Overcoming these uncertainties may promote and enhance the principle of legality. Redrafting problematic provisions may not always generate the desired outcome, however. It may very well result in references to different, but equally fluid, concepts.

Friman went on to state that it is in the interest of States to ensure that they are able to prosecute crimes to the same extent as the ICC would. It is so because they might consider certain cases very sensitive and, rather than to see the ICC intervene, wish to deal with these cases themselves under their own domestic law. However, the "complementarity" test gives States some leeway when deciding how to implement the crimes into domestic law: The Rome Statute contains provisions on admissibility and *non bis in idem* that are arguably more lenient for States than those in the ICTY and ICTR Statutes.

One attendee observed that, once the ICC began relying on the Elements of Crimes document and creating judicial practice, what had originally been considered optional might turn into something more binding. What would be the consequences of such a change for those States which had already modified the elements?

In Kreß's view, the kind of changes Germany has made to the wording is more technical than substantial in nature. Germany's legislation obligates judges to interpret its provisions in conformity not only with international law but also with evolving international case law. The result would be that their rulings fully reflect international case law and comport with the principle of legality, *i.e.*, to the extent allowed by the specific wording adopted in German law.

Nevertheless, Kreß agreed that there are discrepancies which cannot be resolved through interpretation alone. It may well be that international case

law develops in such a way that it can no longer be captured within the specific meaning that the law of a State ascribes to a given definition. National legislatures which do not adopt a global approach to this matter have two political options. One option would be that they accept the discrepancies and decline to convict a person who would otherwise be convicted under the more lenient international standards. The other would be that they turn to their legislatures and inform them that international case law has evolved and that their national text needs to be revised accordingly.

War crimes not included in the ICC Statute

Mads Harlem, Legal Adviser for the Norwegian Red Cross, presented what in his view constituted an overview, rather than a complete catalogue, of crimes not included in the ICC Statute. It was not his intention to offer any conclusion as to whether these crimes should or should not be adopted into national legislation.⁹

Harlem listed the following as examples of crimes not included in the ICC Statute:

- Launching an attack against works or installations containing dangerous forces in the knowledge that such an attack will cause excessive loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, as defined in Article 57(2)(a)(iii), Additional Protocol I (when committed wilfully, in violation of the relevant provisions of the Protocol, and causing death or serious injury to body or health);
- Unjustifiable delay in the repatriation of prisoners of war;
- Acts listed under Article 8(2)(a) of the ICC Statute when committed against persons protected by Additional Protocol I but not the Geneva Conventions;
- Serious violations of Additional Protocol II to the 1954 Hague Convention for the Protection of Cultural Property (they only partially overlap Article 8 of the ICC Statute);
- Grave breaches of Additional Protocol I when committed against: (a) persons in the power of an adverse party who are protected by Articles 44, 45 and 73 of the Protocol; (b) the wounded, sick and shipwrecked of the adverse party who are protected by the Protocol; and (c) those medical or religious personnel, medical units or medical transports which are under the control of the adverse party and are protected by the Protocol;
- Use of certain weapons, including: (a) binding lasers, prohibited by Protocol IV to the Certain Conventional Weapons Convention; (b) anti-personnel landmines, prohibited by the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction; and (c) others, e.g., cluster

⁹ Harlem has prepared a supplementary article entitled "Importing War Crimes into Norwegian Legislation" in which he discusses the situation in Norway. The article is included in this publication; see below.

- munitions, as may be prohibited in some States (if they are prohibited in some States, should they also be prohibited under the ICC Statute?);
- Compulsory recruitment of persons between fifteen and eighteen years of age (States Parties to the Convention on the Rights of the Child are duty-bound to ensure that persons who have not attained the age of fifteen years are not compulsorily recruited into their armed forces; the ICC Statute designates breaches of this obligation as a war crime; the Optional Protocol to the Convention raises the relevant age to eighteen years; should those States which are party both to the Optional Protocol and to the ICC Statute raise the age to eighteen years?);
 - War crimes committed in a non-international armed conflict falling below the threshold of Articles 1 and 2 of Additional Protocol II yet to which common Article 3 applies (Article 8(2)(d) and (f) of the ICC Statute refers to the more restrictive criteria applicable to Additional Protocol II; should the Statute be amended to refer to the broader criteria applicable to common Article 3?); and
 - Misuse of the new emblem protected by Additional Protocol III.

One participant in the audience observed that a basic element had been missing in the discussion so far. An impression has been created that one may decide for oneself, as if from an *a la carte* menu, which crimes should be adopted in the national legislation. Yet there is a big difference between the German model of elaborating on genocide as a crime, on the one hand, and the Canadian model of taking out enforced disappearances, on the other hand. Additions and elaborations are to be welcome, but States ought to be loyal to their commitments. One should proceed with great caution when implementing the ICC obligations and be very careful when taking elements out of the legal catalogue.

Rikhof agreed that taking things out of the legal catalogue could be problematic. However, when, as in the Canadian model, the specific offences in the list of crimes in the Rome Statute are not completely implemented while at the same time there is a general reference to customary international law, it is likely that the entire body of core offences of that Statute is presumed to be part of the domestic legislation. Referring to customary law in effect creates more flexibility in the sense that the crimes in national legislation develop in parallel with customary international law. With respect to the specific crimes against humanity of "enforced disappearance" and "apartheid," there is certainly a strong argument that these crimes are not new. The crime of "enforced disappearance" was mentioned in the Nuremberg judgement under the discussion regarding the "Nacht und Nebel order"; the crime of "apartheid" can be found in the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid. Rikhof recommended the *Tadić*-approach to dealing with customary law and national legislation. The four *Tadić* criteria for defining customary law make it possible to discern new crimes which are not stated in the Rome Statute. It is not a

bad thing to add or clarify new crimes. If several States elaborate and further define core crimes, such elaborations and definitions may give rise to emerging customary law.

Conclusion¹⁰

Tørris Jæger, Head of the International Humanitarian Law Unit of the Norwegian Red Cross, reiterated the purpose of the seminar. The purpose was not only to discuss how to import core international crimes into national criminal law, but also to put the matter on Norway's political agenda.

Jæger recalled that Hankins' presentation outlined the various means of importation and considered different options. The Canadian model, as described by Rikhof, revealed the difficulties and importance of finding solutions and appropriate ways to draft legislation so that it becomes applicable, understood and relevant within the national context. Kreß's explanation of the maximalist approach in Germany highlighted its stand-alone solution and autonomous translation, as well as its scope going beyond treaty rules to encompass customary international law. The plenary discussion which followed these presentations explored the different possibilities, challenges and opportunities that lay ahead. Particular attention was given to the possibility of divergences between the way in which national and international law may develop.

Jæger noted that Canada is currently dealing with cases going back to the 1940's up to the 1990's. It is incumbent upon the Norwegian government to accept the intellectual challenge to which Kreß referred. Jæger expressed his hope that Norway would adopt as maximalist and dynamic as possible an approach when importing core international crimes.

¹⁰ This part of the minutes was prepared by Ellen Stensrud.

IMPORTING WAR CRIMES INTO NORWEGIAN LEGISLATION

Mads Harlem*

1. Introduction

Importing genocide, crimes against humanity and war crimes into national criminal law is significant for several reasons, including those found in treaty law as well as in the law and practice of international criminal jurisdictions. The Rome Statute of the International Criminal Court (ICC) provides in its preamble that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes." States are also obligated under treaties such as the Genocide Convention, the Geneva Conventions and the Torture Convention to enact legislation which gives effect to their prohibitions within national criminal law. The Appeals Chamber of the International Criminal Tribunal for Rwanda (ICTR) decided in *Bagaragaza* that it "cannot sanction the referral of a case to a jurisdiction for trial where the conduct cannot be charged as a serious violation of international humanitarian law."¹ This shows the importance the ICTR attaches to the notion that national jurisdiction characterise the conduct in question as genocide, crimes against humanity and war crimes rather than as ordinary crimes.

Many States have already imported core international crimes into national criminal law.² This is in accordance with the spirit of the ICC's complementarity principle according to which the Court should be seized of a case only in the event that national criminal justice systems are "unable or unwilling" to genuinely investigate and prosecute it.³ Conversely, if a national court is "able and willing" to prosecute a case, that court shall take priority over the ICC.

In 2004, Norway's Penal Code Commission proposed that separate provisions on genocide, crimes against humanity and war crimes be inserted into Norwegian criminal law. At a public consultation held in April 2007, the Ministry of Justice made a proposal on such provisions.⁴ The proposal is expected to be presented to Parliament in the autumn of 2007.

* Legal Adviser, Norwegian Red Cross. The article reflects the views of the author alone and not necessarily those of the Norwegian Red Cross.

¹ *Prosecutor v. Michel Bagaragaza*, Case No. ICTR-05-86-AR11bis, *Decision on Rule 11bis Appeal*, 30 August 2006, para. 18.

² See, e.g., Canada's Crimes Against Humanity and War Crimes Act of 2000, c. 24, and Germany's Act to Introduce the Code of Crimes Under International Law (*Völkerstrafgesetzbuch*) of 26 June 2002.

³ See Article 17, ICC Statute. As noted earlier, the ICTR denied a motion to refer the *Bagaragaza* case to Norway for trial. It did so on the ground that Norway would treat the crimes charged as ordinary crimes rather than serious violations of international humanitarian law. The ICC might one day take a similar view and hold that ordinary crimes do not satisfy the "ability" requirement under Article 17 of the ICC Statute.

⁴ This article does not deal with the content of this proposal.

That the process of incorporation has finally begun in Norway is encouraging. It is important to keep in mind, however, that Norway's international law commitments go beyond the crimes covered in the Rome Statute. This paper identifies war crimes which have not been included in the ICC Statute, but still should become part of Norwegian criminal law. It will also be argued that Norway should not limit its definition of war crimes to those defined as such under international law; rather, it should include acts committed in an armed conflict which violate values of warfare that are important to Norway.

2. War crimes as a notion

The distinction between lawful and unlawful acts of war is central when defining war crimes. Combatants are immune from prosecution in respect of lawful acts of war, e.g., killing an able-bodied, non-surrendering enemy combatant without resource to unlawful means and methods of warfare. They remain so even where the same acts otherwise constitute ordinary crimes, e.g., murder.⁵ They are not immune from prosecution, however, in respect of acts in breach of the laws and customs of war. In general, if such acts are regarded as serious, they are defined as war crimes in international criminal law.

However, there is no generally accepted definition of "war crimes" in international law. Rule 156 of the customary international humanitarian law study prepared by the International Committee of the Red Cross (hereinafter, "*Customary Law Study*")⁶ defines war crimes as "serious violations of international humanitarian law."⁷ The four Geneva Conventions of 1949 and their Additional Protocol I of 1977 specify violations of certain provisions as their "grave breaches"; Additional Protocol I, in turn, designates such "grave breaches" as "war crimes."

In *Tadić*, the International Criminal Tribunal for the Former Yugoslavia (ICTY) rendered an interlocutory appeal decision (hereinafter, "*Tadić* Jurisdiction Decision")⁸ in which it stated that:

- (i) A war crime must constitute an infringement of a rule of international humanitarian law;
- (ii) The rule must be customary in nature, or covered by treaty law which is unquestionably binding on the parties at the time of the alleged offence and not in conflict with or derogating from peremptory norms

⁵ Other persons who participate directly in hostilities do not enjoy immunity from prosecution in respect of those acts arising from their participation which constitute ordinary crimes.

⁶ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge University Press, 2005). This publication is the result of a major international study of current State practice with a view to identifying the content of customary international humanitarian law. Presented in two volumes, it analyses the customary rules of international humanitarian law and contains a detailed summary of the relevant treaty law and State practice throughout the world.

⁷ Rule 156, *Customary Law Study*.

⁸ See *Prosecutor v. Duško Tadić a/k/a "Dule"*, Case No. IT-94-1-AR72, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, 2 October 1995 ("*Tadić* Jurisdiction Decision").

of international law including most customary rules of international humanitarian law;

- (iii) The violation must be "serious," that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim; and
- (iv) The violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.⁹

In the same decision, the ICTY gave the following as an example of non-serious violations:

(T)he fact of a combatant simply appropriating a loaf of bread in an occupied village would not amount to a "serious violation of international humanitarian law" although it may be regarded as falling foul of the basic principle laid down in Article 46, paragraph 1, of the Hague Regulations (and the corresponding rule of customary international law) whereby "private property must be respected" by any army occupying an enemy territory.¹⁰

The State practice as laid down in the *Tadić* Jurisdiction Decision and in the *Customary Law Study* indicates that the expression "war crimes" means serious violations of international humanitarian law. It does not exclude the possibility however that a State may define other violations of the laws or customs of war as war crimes as well. Caution is in order when including crimes which are not linked to an armed conflict, lest their inclusion create discrepancies between penal provisions in national and international law. Nevertheless, States should not hesitate to criminalise acts that are linked to an armed conflict and breach important values in warfare.

The list of war crimes enumerated in Article 8 of the ICC Statute is the result of complicated international negotiations. Many acts otherwise regarded as war crimes under treaty law and/or customary law were left out in order to reach the broadest consensus possible. Accordingly, Article 8 does not include all serious violations of international humanitarian law. This should not keep Norway from criminalising these and other violations of international law. On the contrary, in accordance with the *Tadić* Jurisdiction Decision and customary law, Norway's war crimes provisions should include:

1. Serious violations of treaty provisions binding upon Norway in armed conflict;
2. Serious violations of customary law applicable in armed conflict; and
3. Violations of law which are not regarded as serious but still linked to an armed conflict and in breach of important values of warfare.

⁹ See *Tadić* Jurisdiction Decision, paras. 94 and 143.

¹⁰ *Tadić* Jurisdiction Decision, para. 94.

3. War crimes not included in the ICC Statute

3.1. Preliminary remarks

The war crimes listed below are to a large extent based on the four Geneva Conventions of 1949, their Additional Protocols I and II of 1977 and Rule 156 of the *Customary Law Study*.¹¹

In order for given conduct to amount to a war crime, it must have a link to an armed conflict. International humanitarian law has traditionally distinguished between international armed conflicts including situations of military occupation, on the one hand, and non-international armed conflicts, on the other hand. An international armed conflict is defined as fighting between the armed forces of at least two States. The Geneva Conventions, Additional Protocol I and customary international humanitarian law apply to such a conflict. A non-international armed conflict is defined as fighting on the territory of a State between the regular armed forces and identifiable armed groups, or between such groups. Rules applicable to non-international armed conflicts include Article 3 common to the four Geneva Conventions, Additional Protocol II and a growing body of customary international humanitarian law.¹²

The Geneva Conventions and Additional Protocol I designate specific acts as their "grave breaches" and explicitly obligate the High Contracting Parties to repress them criminally.¹³ These breaches will be elaborated below.

Unlike the Geneva Conventions and Additional Protocol I, neither common Article 3 nor Additional Protocol II contains any express obligation to repress their breaches. In recent years, however, it has become increasingly common for a given treaty both to apply the same body of rules to international and non-international armed conflicts and to provide for sanctions in the event of their serious violations.¹⁴ Also, customary law has clearly affirmed an obligation for States to repress serious violations of international humanitarian law committed in non-international armed conflicts. Even though this customary obligation may not extend to all violations, Norway should still define as war crimes serious violations committed in both international and non-international armed conflicts alike. As will be argued in Section 4, Norway

¹¹ Rule 156 of the *Customary Law Study* states: "Serious violations of international law constitute war crimes." For crimes not mentioned in Rule 156 but regarded as serious violations of international humanitarian law and elaborated in the summary of that rule, see *Customary Law Study*, Volume I: Rules, pp. 568-603. Reference will also be made below to several other international humanitarian law treaties, including Protocol II of 1999 to the 1954 Hague Cultural Property Convention and various weapons conventions.

¹² Additional Protocol II of 1977 has a more restrictive scope of application than that of Article 3 common to the four Geneva Conventions. See below, under Section 3.2.2.

¹³ See Article 49, Geneva Convention I; Article 50, Geneva Convention II; Article 129, Geneva Convention III; Article 146, Geneva Convention IV; and Article 85, Additional Protocol I.

¹⁴ See, e.g., Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 annexed to the Certain Conventional Weapons Convention of 1980.

should as far as possible eliminate the distinction between international and non-international armed conflicts in its war crimes provisions.

International case-law indicates that the mental state generally required for war crimes is wilfulness, *i.e.*, either intention or recklessness. The precise mental element varies from war crime to war crime, however. This article does not consider the matter further.

3.2. List of war crimes not included in the ICC Statute

3.2.1. Threshold for the application of war crimes enumerated in Article 8(1)

Article 8(1) provides that the ICC shall have jurisdiction in respect of war crimes "in particular when committed as part of plan or policy or as part of a large-scale commission of such crimes." This is a threshold for the Court's jurisdiction rather than an additional element of the crimes listed in Article 8. This threshold is intended to prevent the ICC from being overburdened with minor or isolated cases. The expression "in particular" indicates that the ICC does retain jurisdiction over war crimes *not* committed "as part of a plan or policy or as part of a large-scale commission of such crimes." Hence, there is no reason for this threshold to be included in the Norwegian provisions on war crimes.

3.2.2. The term "non-international armed conflict" in the ICC Statute

Article 8(2)(c) of the ICC Statute is based on common Article 3. Common Article 3 regulates non-international armed conflicts and is considered customary. The threshold for the application of common Article 3 is very low. One would expect that Article 8(2)(c) has a similarly low threshold of application.

According to Article 8(2)(d) of the ICC Statute, however, Article 8(2)(c) "does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature." This language is taken from Article 1(2) of Additional Protocol II, an instrument which otherwise "develops and supplements (common Article 3) without modifying its existing conditions of application."¹⁵ In other words, Article 8(2)(d) of the ICC Statute effectively raises the application threshold of Article 8(2)(c), which criminalises violations of the rules contained in common Article 3, to that of Additional Protocol II. This higher threshold should be removed in Norwegian legislation.

Nor should Article 8(3) of the ICC Statute be incorporated into Norwegian law. This provision was inserted as a result of the pressure from a number of States opposed to the inclusion of war crimes committed during internal armed conflicts.

3.2.3. Protected persons and Property under Article 8(2)(a) of the ICC Statute

Article 8(2)(a) covers certain offences committed against persons or property protected under the relevant Geneva Conventions. Within the meaning of

¹⁵ Article 1(1), Additional Protocol II.

Geneva Conventions I and II, protected persons and objects are the sick, wounded and shipwrecked, as well as medical personnel and equipment. Geneva Conventions III and IV protect prisoners of war (POWs) and certain categories of civilian persons,¹⁶ respectively.

Additional Protocol I enlarges the groups of persons and property protected in international armed conflict to include:

1. Persons who have taken part in hostilities and have fallen into the power of an adverse Party within the meaning of Articles 44 (combatants and POWs) and 45 (protection of persons who have taken part in hostilities) of Additional Protocol I. This definition is broader than that of POWs in Geneva Convention III.
2. Refugees and stateless persons within the meaning of Article 73 of Additional Protocol I. Article 75 entitles them to protection under Geneva Convention IV.
3. The wounded, sick and shipwrecked of the adverse Party. Article 8(a) and (b) of Additional Protocol I enlarges the corresponding categories as defined in Geneva Conventions I and II.
4. Medical or religious personnel, medical units and transports under the control of the adverse Party. Article 8(c), (d), (e) and (g) of Additional Protocol I broadens the protection of these groups of persons and property compared to the Geneva Conventions. The expression "under the control of the adverse Party" is justified by the fact that such persons and objects may come from a non-belligerent State, an aid society recognised and authorised by such a State or even an impartial international humanitarian organisation.

Article 8(2)(a) of the ICC Statute contains grave breaches of the Geneva Conventions but not grave breaches of Additional Protocol I. This is so because Additional Protocol I has not as a whole enjoyed the same universal acceptance as the Geneva Conventions. However, Norway is a party to the Protocol. Thus, there is no reason why Norway should not criminalise conduct mentioned in Article 8(2)(a) of the ICC Statute when it is committed against persons or objects protected under Additional Protocol I.

3.2.4. Violations of international humanitarian law not included in the list of war crimes under Article 8(2)(b) and (e) of the ICC Statute

i. Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe to the natural environment which would be clearly excessive in relation to the concrete and direct overall mili-

¹⁶ Geneva Convention IV protects civilians who are not entitled to POW status and, at any given moment and in any manner whatsoever, find themselves, in the case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals. See Article 4, Geneva Convention IV.

tary advantage anticipated. When such an attack is launched during an international armed conflict, it constitutes a war crime under Article 8(2)(b)(iv) of the ICC Statute. The word "overall" is neither contained in Articles 51 and 85 of Additional Protocol I, nor found in the corresponding rules of customary international law as they have been identified in Rule 14 of the *Customary Law Study*. According to the same study, the word "overall" does not add an extra element¹⁷; it could therefore be kept in Norway's war crimes provisions.

Additional Protocol II does not explicitly refer to the principle of proportionality. Rule 14 of the *Customary Law Study* states however that it is a customary rule applicable in non-international armed conflicts.

The ICC Statute does not list an intentional violation of this principle committed in non-international armed conflicts as a war crime. Nor is it, as such, defined as a grave breach in any treaty provisions or considered a serious violation of customary law. However, Article 14(2) of Amended Protocol II to the 1980 Convention on Certain Conventional Weapons obligates its States parties, including Norway, to punish persons who wilfully kill civilians or cause serious injury to them. Article 3(8)(c) of the same Protocol espouses the principle of proportionality in attacks. Launching attacks in breach of the principle in a non-international armed conflict appears as a war crime in Section 11(1)(3) of Germany's Act to Introduce the Code of Crimes Under International Law. Since the said conduct in a non-international armed conflict is inconsistent with important values of warfare, Norway should also treat it as a war crime.

ii. Making a person the object of attack in the knowledge that he is hors de combat. Article 8(2)(b)(vi) of the ICC Statute criminalises only the killing or wounding of combatants who have surrendered at discretion. By virtue of Article 85(3)(e) of Additional Protocol I, however, making a person the object of attack in the knowledge that he is *hors de combat* constitutes a grave breach of that Protocol. The *Customary Law Study* also identifies it as a war crime.¹⁸ Norway should follow the approach taken in this study.

The same conduct committed in a non-international armed conflict is covered in Article 8(2)(c) of the ICC Statute.

iii. Making medical or religious personnel, medical units or medical transports the object of attack. Under the ICC Statute, this act constitutes a war crime only if the personnel, units or objects concerned use the distinctive emblems of the Geneva Conventions.¹⁹ Additional Protocol I treats such conduct as its grave breach, however, regardless of the use of the said emblems. Medical or religious personnel are also protected under Articles 9 and 11 of Additional Protocol II. The *Customary Law Study* identifies making medical or

¹⁷ See *Customary Law Study*, Volume I: Rules, p. 577.

¹⁸ See *Customary Law Study*, Volume I: Rules, pp. 575-576.

¹⁹ See Article 8(2)(b)(xxiv) and (e)(ii), ICC Statute.

religious personnel, medical units or medical transports the object of attack as a war crime in both international and non-international armed conflict.²⁰

Other than the ICC Statute, no relevant treaty provision binding on Norway refers to the use of the distinctive emblems of the Geneva Conventions as an element of this offence. It should therefore not be kept in Norway's war crimes provisions.

iv. Pillage or other taking of property contrary to international humanitarian law. Under Article 8(2)(b)(xvi) and (e)(v) of the ICC Statute, only "pillaging a town or place, even when taken by assault," is regarded as a war crime. In contrast, Article 33, second paragraph, of Geneva Convention IV prohibits pillage *as such* in international armed conflict; so does Article 4(2) of Additional Protocol II in non-international armed conflict. Even though pillage or other taking of property contrary to international humanitarian law does not constitute a grave breach of any treaty, it does, according to the *Customary Law Study*, constitute a war crime in both international and non-international armed conflict.²¹ Norway should import this war crime into its legislation.

v. Unjustifiable delay in the repatriation of POWs or civilians. This war crime is not mentioned in the ICC Statute but should nevertheless be imported into Norwegian legislation. Article 85(4)(b) of Additional Protocol I describes unjustifiable delay in the repatriation of POWs or civilians as a grave breach of the Protocol; the *Customary Law Study* identifies it as a war crime if committed in an international armed conflict.²²

Under both customary law and treaty law, this war crime only applies to international armed conflicts. This is so because the POW status only exists in international armed conflicts. According to Rule 128(c) of the *Customary Law Study*, however, persons deprived of their liberty in relation to a non-international armed conflict must be released as soon as the reasons for the deprivation of their liberty cease to exist. Even though customary law does not regard violations of this rule as a war crime, Norway should still do so in its national legislation since they violate values of warfare that are important to Norway.

vi. Making improper use of a flag of truce, of the flag or the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury. This is regarded as a war crime in Article 8(2)(b)(vii) of the ICC Statute. According to Article 85(3)(f) of Additional Protocol I, the perfidious use of the distinctive emblem of the Red Cross, Red Crescent or Red Lion and Sun or other protective signs recognised by the Geneva Conventions or the Protocol, constitutes a grave breach of that Protocol.

²⁰ See *Customary Law Study*, Volume I: Rules, pp. 575-576 and 593-597.

²¹ See *Customary Law Study*, Volume I: Rules, pp. 575-576 and 591-593.

²² See *Customary Law Study*, Volume I: Rules, pp. 586-588.

The ICC Statute does not criminalise this conduct in non-international armed conflicts; nor does the *Customary Law Study* identify it as a war crime in such conflicts. Insofar as the underlying prohibition protects important values of warfare, however, Norway should still treat violations of this prohibition as a war crime if committed in a non-international armed conflict.

In the ICC Statute, only the improper use of the Geneva Convention emblems is regarded as a war crime. This means that making improper use of the new emblem adopted in Additional Protocol III of 2005 falls outside the scope of the ICC Statute. According to the Protocol's Article 6(1), however, those provisions of the Geneva Conventions and, where applicable, Additional Protocols I and II, which govern the prevention and repression of misuse of the distinctive emblems, shall apply equally to the Additional Protocol III emblem. Even though this rule is not customary, Norway is still a party to Additional Protocol III. The war crimes provisions in Norway should therefore also cover both the new and existing emblems or signs designed to protect people or objects in armed conflict.

vii. Using starvations of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies. Under Article 8(2)(b)(xxv) of the ICC Statute, this is regarded as a war crime only in an international armed conflict.

Even in non-international armed conflicts, however, using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies, is in breach of Articles 14 and 18 of Additional Protocol II and identified as a war crime in the *Customary Law Study*.²³ Thus, it should be imported into Norway's war crimes provisions for both international and non-international armed conflicts.

viii. Making non-defended localities and demilitarised zones the object of attack. Attacking such localities and zones is not mentioned as a war crime in the ICC Statute but appears in Article 85(3)(d) of Additional Protocol I as its grave breach. According to the *Customary Law Study*, the act constitutes a war crime in both international and non-international armed conflict.²⁴ This should be included in the Norwegian war crimes legislation.

ix. Slavery and deportation to slave labour. Neither slavery nor deportation to slave labour is mentioned in Article 8 of the ICC Statute. The *Customary Law Study*, however, identifies such practice as a war crime in both international and non-international armed conflict.²⁵ The crime should therefore be imported into Norwegian legislation.

²³ See *Customary Law Study*, Volume I: Rules, pp. 599-603.

²⁴ See *Customary Law Study*, Volume I: Rules, pp. 576-578 and 599-603.

²⁵ See *Customary Law Study*, Volume I: Rules, pp. 586 and 599-602.

x. *Collective punishment.* The ICC Statute does not mention this crime. Collective punishment is prohibited, however, under Geneva Conventions III and IV as well as Article 4(2)(b) of Additional Protocol II. It is also identified as a war crime in the *Customary Law Study*.²⁶ Norway should therefore incorporate this crime for both international and non-international armed conflicts.

xi. *Despoliation of the wounded, sick, shipwrecked or dead.* Despoliation of the wounded, sick, shipwrecked or dead is not mentioned in the ICC Statute but should be part of Norway's war crimes provisions. Whether in an international or non-international armed conflict, States are obligated to take all possible measures to protect the wounded, sick and shipwrecked from pillage and ill-treatment.²⁷ Whereas none of the Geneva Conventions, nor Additional Protocol I, describes despoliation of the wounded, sick, shipwrecked or dead as a grave breach, it is regarded as a war crime under customary law in an international armed conflict.²⁸ The *Customary Law Study* does not identify this as a war crime in a non-international armed conflict. Norway should still treat it as such in both international and non-international armed conflicts because it is contrary to important values of warfare.

xii. *Attacking or ill-treating a parlementaire or bearer of the flag of truce.* This conduct is not criminalised under the ICC Statute. Nevertheless, it is a violation of the Hague Regulations and of customary international law.²⁹ Norway should treat it as a war crime in both international and non-international armed conflicts.

xiii. *Launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects.* The ICC Statute does not enumerate this crime. It does appear, however, as a grave breach in Article 85(3)(c) of Additional Protocol I and as a customary war crime in the *Customary Law Study*.³⁰ Article 15 of Additional Protocol II prohibits attacks against works or installations containing dangerous forces. Norwegian legislation should designate this conduct as a war crime in both international and non-international armed conflict since it breaches important values of warfare.

xiv. *Using human shields.* Article 8(2)(b)(xxiii) of the ICC Statute criminalises the use of human shields in an international armed conflict. The Statute contains no comparable provisions for non-international armed conflict, however. Norway's war crimes provisions should still incorporate it for non-

²⁶ See *Customary Law Study*, Volume I: Rules, pp. 586-587 and 599-603.

²⁷ See Article 15, first paragraph, Geneva Convention I; Article 8, Additional Protocol II.

²⁸ See *Customary Law Study*, Volume I: Rules, pp. 586-588.

²⁹ See *Customary Law Study*, Volume I: Rules, p. 586.

³⁰ See *Customary Law Study*, Volume I: Rules, pp. 586-590.

international armed conflict, in accordance with the findings of the *Customary Law Study*.³¹

xv. *Making civilian objects the object of attack.* This constitutes a war crime under the ICC Statute only if committed during an international armed conflict. The *Customary Law Study*, however, identifies it as a war crime also in a non-international armed conflict.³² Norway should follow the approach taken by the *Customary Law Study* on this offence.

xvi. *Use of prohibited weapons.* The ICC Statute criminalises the use of weapons only if they are prohibited under customary law. The Statute does not criminalise the use of any specific weapons during a non-international armed conflict.

Norway should treat as a war crime not only the use of weapons banned under customary international law but also the use of weapons banned by conventions to which it has acceded. Section 107 of Norway's Military Penal Code applies to the latter but not the former. A provision should be included in Norwegian legislation on war crimes so that the ban has a general application. The following wording could rectify the situation:

Use of weapons, projectiles and equipment and methods of warfare which have been banned in accordance with Norway's international legal obligations.

xvii. *Serious violations of Protocol II to the 1954 Hague Cultural Property Convention.* The ICC Statute does not cover all of the acts punishable under Protocol II to the 1954 Hague Convention. Examples include theft, pillage or misappropriation of, or acts of vandalism directed against, cultural property protected under the Protocol in both international and non-international armed conflict. Such acts should be included in the Norwegian provision on war crimes.

xviii. *Child soldiers.* Conscripting or enlisting children under fifteen into national armed forces, or using them to participate actively in hostilities, constitutes a war crime under Article 8(2)(b)(xxvi) of the ICC Statute. This was an extremely controversial topic during the negotiations, and the age adopted was based on the minimum standards contained in Article 77(2) and (3) of Additional Protocol I.³³

Norway is party to Additional Protocol II to the Convention on the Rights of the Child which defines child soldiers as those under eighteen. Norway's war crimes provisions should follow this definition.

³¹ See *Customary Law Study*, Volume I: Rules, pp. 599-602.

³² See *Customary Law Study*, Volume I: Rules, pp. 597-598.

³³ See the bill before the Norwegian Parliament (St prp no. 24 (1999-2000)), p. 86.

4. Methods of incorporating war crimes into Norwegian legislation

War crimes can be committed in both international and non-international armed conflicts. The substantive definitions of these crimes are more or less the same. Unlike the ICC Statute, Norwegian legislation should eliminate the distinction between war crimes committed in international armed conflict and those committed in non-international armed conflict.

There are various ways in which war crimes might be incorporated into Norwegian penal legislation. This could be done through the adoption of generic provisions or specific provisions enumerating all conduct mentioned in Section 3 above and in the ICC Statute.

Adopting generic provisions is simple. No new national legislation will be needed when existing treaties are amended, when Norway becomes a party to a new treaty or when new customary law has been identified. Generic provisions would absorb new treaties to which Norway could become a party and new customary law which could become binding on it in the future. For the reasons discussed earlier, this approach is particularly suitable for criminalising the use of prohibited weapons. It could also be used for several of the other crimes listed above.

At the same time, however, generic provisions may prove problematic *vis-à-vis* the principle of legality. Norway would ensure greater respect for this principle by specifying the entire list of offences in its war crimes provisions. One major setback of specific criminalisation is that it requires considerable research and drafting; this would be a major task for the legislator. Furthermore, excessive detail and specificity might deprive Norway of the flexibility needed to incorporate relevant developments in international law at a later stage.

A mixed approach would probably be more effective when importing war crimes into Norwegian legislation. Such an approach involves criminalisation through generic provisions combined with the explicit and specific criminalisation of certain serious offences. This combination permits Norway to carry out all its treaty obligations concerning the repression of breaches of international humanitarian law without undermining its respect for the principle of legality.

5. Conclusion

Norway ratified the ICC Statute on 16 February 2000. The Statute establishes a permanent International Criminal Court vested with the authority to institute criminal proceedings against and judge individuals for genocide, crimes against humanity and war crimes.

As argued in this article, States should enact separate penal provisions for these crimes in their national legislation. It is not sufficient to penalise such offences in accordance with ordinary criminal provisions relating to rape, coercion, threats, the deprivation of liberty, murder, and the like.

The ICC was established as a result of complicated international negotiations. States should not hesitate to include offences other than those mentioned in the relevant crime categories of the ICC Statute.

It appears that the war crimes provisions proposed by the Norwegian Ministry of Justice correspond to the ICC Statute in their definition of war crimes. Moreover, they criminalise other serious violations of the laws and customs of war as well. It is hoped that Norway will soon fully comply with all its international obligations elaborated in this article.

APPENDIX I

CRIMES AGAINST HUMANITY AND WAR CRIMES ACT OF 2000

CANADA

Crimes Against Humanity and War Crimes Act

2000, c. 24

C-45.9

(Assented to June 29th, 2000)

An Act respecting genocide, crimes against humanity and war crimes and to implement the Rome Statute of the International Criminal Court, and to make consequential amendments to other Acts

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

SHORT TITLE

Short title

1. This Act may be cited as the *Crimes Against Humanity and War Crimes Act*.

INTERPRETATION

Definitions

- 2.(1) The definitions in this subsection apply in this Act.

"conventional international law"
«*droit international conventionnel*»

"conventional international law" means any convention, treaty or other international agreement

- (a) that is in force and to which Canada is a party; or
- (b) that is in force and the provisions of which Canada has agreed to accept and apply in an armed conflict in which it is involved.

"International Criminal Court"
«*Cour pénale internationale*»

"International Criminal Court" means the International Criminal Court established by the Rome Statute.

"official"
«*fonctionnaire*»

"official", in respect of the International Criminal Court, means the Prosecutor, Registrar, Deputy Prosecutor and Deputy Registrar, and the staff of the organs of the Court.

"Rome Statute"
«*Statut de Rome*»

"Rome Statute" means the Rome Statute of the International Criminal Court adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on July 17, 1998, as corrected by the *procès-verbaux* of November 10, 1998, July 12, 1999, November 30, 1999 and May 8, 2000, portions of which are set out in the schedule.

Words and Expressions

- (2) Unless otherwise provided, words and expressions used in this Act have the same meaning as in the *Criminal Code*.

HER MAJESTY

Binding on Her Majesty

3. This Act is binding on Her Majesty in right of Canada or a province.

OFFENCES WITHIN CANADA

Genocide, etc., committed in Canada

- 4.(1) Every person is guilty of an indictable offence who commits
- (a) genocide;
 - (b) a crime against humanity; or
 - (c) a war crime.

Conspiracy, attempt, etc.

- (1.1) Every person who conspires or attempts to commit, is an accessory after the fact in relation to, or counsels in relation to, an offence referred to in subsection (1) is guilty of an indictable offence.

Punishment

- (2) Every person who commits an offence under subsection (1) or (1.1)
- (a) shall be sentenced to imprisonment for life, if an intentional killing forms the basis of the offence; and
 - (b) is liable to imprisonment for life, in any other case.

Definitions

(3) The definitions in this subsection apply in this section.

"crime against humanity"
«*crime contre l'humanité*»

"crime against humanity" means murder, extermination, enslavement, deportation, imprisonment, torture, sexual violence, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.

"genocide"
«*génocide*»

"genocide" means an act or omission committed with intent to destroy, in whole or in part, an identifiable group of persons, as such, that, at the time and in the place of its commission, constitutes genocide according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.

"war crime"
«*crime de guerre*»

"war crime" means an act or omission committed during an armed conflict that, at the time and in the place of its commission, constitutes a war crime according to customary international law or conventional international law applicable to armed conflicts, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.

Interpretation—customary international law

(4) For greater certainty, crimes described in Articles 6 and 7 and paragraph 2 of Article 8 of the Rome Statute are, as of July 17, 1998, crimes according to customary international law. This does not limit or prejudice in any way the application of existing or developing rules of international law.

Breach of responsibility by military commander

***5.(1)** A military commander commits an indictable offence if

- (a) the military commander
 - (i) fails to exercise control properly over a person under their effective command and control or effective authority and control, and as a result the person commits an offence under section 4, or

- (ii) fails, after the coming into force of this section, to exercise control properly over a person under their effective command and control or effective authority and control, and as a result the person commits an offence under section 6;
- (b) the military commander knows, or is criminally negligent in failing to know, that the person is about to commit or is committing such an offence; and
- (c) the military commander subsequently
 - (i) fails to take, as soon as practicable, all necessary and reasonable measures within their power to prevent or repress the commission of the offence, or the further commission of offences under section 4 or 6, or
 - (ii) fails to take, as soon as practicable, all necessary and reasonable measures within their power to submit the matter to the competent authorities for investigation and prosecution.

* (Note: Section 5 in force October 23, 2000, see SI/2000-95.)

Breach of responsibility by a superior

* (2) A superior commits an indictable offence if

- (a) the superior
 - (i) fails to exercise control properly over a person under their effective authority and control, and as a result the person commits an offence under section 4, or
 - (ii) fails, after the coming into force of this section, to exercise control properly over a person under their effective authority and control, and as a result the person commits an offence under section 6;
- (b) the superior knows that the person is about to commit or is committing such an offence, or consciously disregards information that clearly indicates that such an offence is about to be committed or is being committed by the person;
- (c) the offence relates to activities for which the superior has effective authority and control; and
- (d) the superior subsequently
 - (i) fails to take, as soon as practicable, all necessary and reasonable measures within their power to prevent or repress the commission of the offence, or the further commission of offences under section 4 or 6, or
 - (ii) fails to take, as soon as practicable, all necessary and reasonable measures within their power to submit the matter to the competent authorities for investigation and prosecution.

* (Note: Section 5 in force October 23, 2000, see SI/2000-95.)

Conspiracy, attempt, etc.

(2.1) Every person who conspires or attempts to commit, is an accessory after the fact in relation to, or counsels in relation to, an offence referred to in subsection (1) or (2) is guilty of an indictable offence.

Punishment

(3) Every person who commits an offence under subsection (1), (2) or (2.1) is liable to imprisonment for life.

Definitions

(4) The definitions in this subsection apply in this section.

"military commander"
«*chef militaire*»

"military commander" includes a person effectively acting as a military commander and a person who commands police with a degree of authority and control comparable to a military commander.

"superior"
«*supérieur*»

"superior" means a person in authority, other than a military commander.

OFFENCES OUTSIDE CANADA

Genocide, etc., committed outside Canada

6.(1) Every person who, either before or after the coming into force of this section, commits outside Canada

- (a) genocide,
- (b) a crime against humanity, or
- (c) a war crime,

is guilty of an indictable offence and may be prosecuted for that offence in accordance with section 8.

Conspiracy, attempt, etc.

(1.1) Every person who conspires or attempts to commit, is an accessory after the fact in relation to, or counsels in relation to, an offence referred to in subsection (1) is guilty of an indictable offence.

Punishment

- (2) Every person who commits an offence under subsection (1) or (1.1)
- (a) shall be sentenced to imprisonment for life, if an intentional killing forms the basis of the offence; and
 - (b) is liable to imprisonment for life, in any other case.

Definitions

- (3) The definitions in this subsection apply in this section.

"crime against humanity"
«*crime contre l'humanité*»

"crime against humanity" means murder, extermination, enslavement, deportation, imprisonment, torture, sexual violence, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.

"genocide"
«*génocide*»

"genocide" means an act or omission committed with intent to destroy, in whole or in part, an identifiable group of persons, as such, that at the time and in the place of its commission, constitutes genocide according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.

"war crime"
«*crime de guerre*»

"war crime" means an act or omission committed during an armed conflict that, at the time and in the place of its commission, constitutes a war crime according to customary international law or conventional international law applicable to armed conflicts, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.

Interpretation—customary international law

- (4) For greater certainty, crimes described in articles 6 and 7 and paragraph 2 of article 8 of the Rome Statute are, as of July 17, 1998, crimes according to customary international law, and may be crimes according to customary international law before that date. This does not limit or prejudice in any way the application of existing or developing rules of international law.

Interpretation—crimes against humanity

- (5) For greater certainty, the offence of crime against humanity was part of customary international law or was criminal according to the general principles of law recognized by the community of nations before the coming into force of either of the following:
- (a) the Agreement for the prosecution and punishment of the major war criminals of the European Axis, signed at London on August 8, 1945; and
 - (b) the Proclamation by the Supreme Commander for the Allied Powers, dated January 19, 1946.

Breach of responsibility by military commander

7.(1) A military commander commits an indictable offence if

- (a) the military commander, outside Canada,
 - (i) fails to exercise control properly over a person under their effective command and control or effective authority and control, and as a result the person commits an offence under section 4, or
 - (ii) fails, before or after the coming into force of this section, to exercise control properly over a person under their effective command and control or effective authority and control, and as a result the person commits an offence under section 6;
- (b) the military commander knows, or is criminally negligent in failing to know, that the person is about to commit or is committing such an offence; and
- (c) the military commander subsequently
 - (i) fails to take, as soon as practicable, all necessary and reasonable measures within their power to prevent or repress the commission of the offence, or the further commission of offences under section 4 or 6, or
 - (ii) fails to take, as soon as practicable, all necessary and reasonable measures within their power to submit the matter to the competent authorities for investigation and prosecution.

Breach of responsibility by a superior

(2) A superior commits an indictable offence if

- (a) the superior, outside Canada,
 - (i) fails to exercise control properly over a person under their effective authority and control, and as a result the person commits an offence under section 4, or
 - (ii) fails, before or after the coming into force of this section, to exercise control properly over a person under their effective authority and control, and as a result the person commits an offence under section 6;
- (b) the superior knows that the person is about to commit or is committing such an offence, or consciously disregards information that clearly indicates that such an offence is about to be committed or is being committed by the person;

- (c) the offence relates to activities for which the superior has effective authority and control; and
- (d) the superior subsequently
 - (i) fails to take, as soon as practicable, all necessary and reasonable measures within their power to prevent or repress the commission of the offence, or the further commission of offences under section 4 or 6, or
 - (ii) fails to take, as soon as practicable, all necessary and reasonable measures within their power to submit the matter to the competent authorities for investigation and prosecution.

Conspiracy, attempt, etc.

- (2.1) Every person who conspires or attempts to commit, is an accessory after the fact in relation to, or counsels in relation to, an offence referred to in subsection (1) or (2) is guilty of an indictable offence.

Jurisdiction

- (3) A person who is alleged to have committed an offence under subsection (1), (2) or (2.1) may be prosecuted for that offence in accordance with section 8.

Punishment

- (4) Every person who commits an offence under subsection (1), (2) or (2.1) is liable to imprisonment for life.

Application before coming into force

- * (5) Where an act or omission constituting an offence under this section occurred before the coming into force of this section, subparagraphs (1)(a)(ii) and (2)(a)(ii) apply to the extent that, at the time and in the place of the act or omission, the act or omission constituted a contravention of customary international law or conventional international law or was criminal according to the general principles of law recognized by the community of nations, whether or not it constituted a contravention of the law in force at the time and in the place of its commission.

* (Note: Section 7 in force October 23, 2000, see SI/2000-95.)

Definitions

- (6) The definitions in this subsection apply in this section.

"military commander"
«*chef militaire*»

"military commander" includes a person effectively acting as a military commander and a person who commands police with a degree of authority and control comparable to a military commander.

"superior"
«supérieur»

"superior" means a person in authority, other than a military commander.

Jurisdiction

- 8.** A person who is alleged to have committed an offence under section 6 or 7 may be prosecuted for that offence if
- (a) at the time the offence is alleged to have been committed,
 - (i) the person was a Canadian citizen or was employed by Canada in a civilian or military capacity,
 - (ii) the person was a citizen of a state that was engaged in an armed conflict against Canada, or was employed in a civilian or military capacity by such a state,
 - (iii) the victim of the alleged offence was a Canadian citizen, or
 - (iv) the victim of the alleged offence was a citizen of a state that was allied with Canada in an armed conflict; or
 - (b) after the time the offence is alleged to have been committed, the person is present in Canada.

PROCEDURE AND DEFENCES

Place of trial

- 9.(1)** Proceedings for an offence under this Act alleged to have been committed outside Canada for which a person may be prosecuted under this Act may, whether or not the person is in Canada, be commenced in any territorial division in Canada and the person may be tried and punished in respect of that offence in the same manner as if the offence had been committed in that territorial division.

Presence of accused at trial

- (2) For greater certainty, in a proceeding commenced in any territorial division under subsection (1), the provisions of the Criminal Code relating to requirements that an accused appear at and be present during proceedings and any exceptions to those requirements apply.

Personal consent of Attorney General

- (3) No proceedings for an offence under any of sections 4 to 7 of this Act, or under section 354 or subsection 462.31(1) of the Criminal Code in relation to property or proceeds ob-

tained or derived directly or indirectly as a result of the commission of an offence under this Act, may be commenced without the personal consent in writing of the Attorney General or Deputy Attorney General of Canada, and those proceedings may be conducted only by the Attorney General of Canada or counsel acting on their behalf.

Consent of Attorney General

- (4) No proceedings for an offence under section 18 may be commenced without the consent of the Attorney General of Canada.

2000, c. 24, s. 9; 2001, c. 32, s. 59.

Evidence and procedure

- *10.** Proceedings for an offence alleged to have been committed before the coming into force of this section shall be conducted in accordance with the laws of evidence and procedure in force at the time of the proceedings.

* (Note: Section 10 in force October 23, 2000, see SI/2000-95.)

Defences

- 11.** In proceedings for an offence under any of sections 4 to 7, the accused may, subject to sections 12 to 14 and to subsection 607(6) of the Criminal Code, rely on any justification, excuse or defence available under the laws of Canada or under international law at the time of the alleged offence or at the time of the proceedings.

When previously tried outside Canada

- 12.(1)** If a person is alleged to have committed an act or omission that is an offence under this Act, and the person has been tried and dealt with outside Canada in respect of the offence in such a manner that, had they been tried and dealt with in Canada, they would be able to plead *autrefois acquit*, *autrefois convict* or pardon, the person is deemed to have been so tried and dealt with in Canada.

Exception

- (2) Despite subsection (1), a person may not plead *autrefois acquit*, *autrefois convict* or pardon in respect of an offence under any of sections 4 to 7 if the person was tried in a court of a foreign state or territory and the proceedings in that court
- (a) were for the purpose of shielding the person from criminal responsibility; or
 - (b) were not otherwise conducted independently or impartially in accordance with the norms of due process recognized by international law, and were conducted in a manner that, in the circumstances, was inconsistent with an intent to bring the person to justice.

Conflict with internal law

- 13.** Despite section 15 of the Criminal Code, it is not a justification, excuse or defence with respect to an offence under any of sections 4 to 7 that the offence was committed in obedience to or in conformity with the law in force at the time and in the place of its commission.

Defence of superior orders

- 14.(1)** In proceedings for an offence under any of sections 4 to 7, it is not a defence that the accused was ordered by a government or a superior — whether military or civilian — to perform the act or omission that forms the subject-matter of the offence, unless
- (a) the accused was under a legal obligation to obey orders of the government or superior;
 - (b) the accused did not know that the order was unlawful; and
 - (c) the order was not manifestly unlawful.

Interpretation—manifestly unlawful

- (2) For the purpose of paragraph (1)(c), orders to commit genocide or crimes against humanity are manifestly unlawful.

Limitation—belief of accused

- (3) An accused cannot base their defence under subsection (1) on a belief that an order was lawful if the belief was based on information about a civilian population or an identifiable group of persons that encouraged, was likely to encourage or attempted to justify the commission of inhumane acts or omissions against the population or group.

PAROLE ELIGIBILITY

Parole eligibility

- 15.(1)** The following sentence shall be pronounced against a person who is to be sentenced to imprisonment for life for an offence under section 4 or 6:
- (a) imprisonment for life without eligibility for parole until the person has served 25 years of the sentence, if a planned and deliberate killing forms the basis of the offence;
 - (b) imprisonment for life without eligibility for parole until the person has served 25 years of the sentence, if an intentional killing that is not planned and deliberate forms the basis of the offence, and
 - (i) the person has previously been convicted of an offence under section 4 or 6 that had, as its basis, an intentional killing, whether or not it was planned and deliberate, or
 - (ii) the person has previously been convicted of culpable homicide that is murder, however described in the Criminal Code;

- (c) imprisonment for life without eligibility for parole until the person has served at least 10 years of the sentence or any greater number of years, not being more than 25, that has been substituted for it under section 745.4 of the Criminal Code, if an intentional killing that is not planned and deliberate forms the basis of the offence; and
- (d) imprisonment for life with normal eligibility for parole, in any other case.

Parole eligibility

- (1.1) The sentence pronounced against a person who is to be sentenced to imprisonment for life for an offence under section 5 or 7 shall be imprisonment for life with normal eligibility for parole.

Provisions of Criminal Code apply

- (2) Sections 745.1 to 746.1 of the Criminal Code apply, with any modifications that the circumstances require, to a sentence of life imprisonment imposed under this Act, and, for the purpose of applying those provisions,
 - (a) a reference in sections 745.1, 745.3, 745.5 and 746.1 of the Criminal Code to first degree murder is deemed to be a reference to an offence under section 4 or 6 of this Act when a planned and deliberate killing forms the basis of the offence;
 - (b) a reference in sections 745.1 to 745.5 and 746.1 of the Criminal Code to second degree murder is deemed to be a reference to an offence under section 4 or 6 of this Act when an intentional killing that is not planned and deliberate forms the basis of the offence;
 - (c) a reference in sections 745.4 and 746 of the Criminal Code to section 745 of that Act is deemed to be a reference to subsection (1) or (1.1) of this section;
 - (d) a reference in section 745.6 of the Criminal Code to the province in which a conviction took place is deemed, in respect of a conviction that took place outside Canada, to be a reference to the province in which the offender is incarcerated when the offender makes an application under that section; and
 - (e) a reference in section 745.6 of the Criminal Code to murder is deemed to be a reference to an offence under section 4 or 6 of this Act when an intentional killing forms the basis of the offence.

Minimum punishment

- (3) For the purpose of Part XXIII of the Criminal Code, the sentence of imprisonment for life prescribed by sections 4 and 6 is a minimum punishment when an intentional killing forms the basis of the offence.

OFFENCES AGAINST THE ADMINISTRATION OF JUSTICE

Obstructing justice

- 16.(1)** Every person who wilfully attempts in any manner to obstruct, pervert or defeat the course of justice of the International Criminal Court is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years.

When deemed to have obstructed justice

- (2) Without restricting the generality of subsection (1), every person is deemed wilfully to attempt to obstruct, pervert or defeat the course of justice who in an existing or proposed proceeding of the International Criminal Court
- (a) dissuades or attempts to dissuade a person by threats, bribes or other corrupt means from giving evidence; or
 - (b) accepts, obtains, agrees to accept or attempts to obtain a bribe or other corrupt consideration to abstain from giving evidence.

Obstructing officials

- 17.** Every person who resists or wilfully obstructs an official of the International Criminal Court in the execution of their duty or any person lawfully acting in aid of such an official
- (a) is guilty of an indictable offence and liable to imprisonment for a term of not more than two years; or
 - (b) is guilty of an offence punishable on summary conviction.

Bribery of judges and officials

- 18.** Every person is guilty of an indictable offence and is liable to imprisonment for a term of not more than 14 years who
- (a) being a judge or an official of the International Criminal Court, corruptly accepts, obtains, agrees to accept or attempts to obtain for themselves or any other person any money, valuable consideration, office, place or employment
 - (i) in respect of anything done or omitted or to be done or omitted by them in their official capacity, or
 - (ii) with intent to interfere in any other way with the administration of justice of the International Criminal Court; or
 - (b) gives or offers, corruptly, to a judge or an official of the International Criminal Court, any money, valuable consideration, office, place or employment
 - (i) in respect of anything done or omitted or to be done or omitted by them in their official capacity, or
 - (ii) with intent to interfere in any other way with the administration of justice of the International Criminal Court.

Perjury

19.(1) Subject to subsection (5), every person commits perjury who, with intent to mislead, makes a false statement under oath or solemn affirmation, by affidavit, solemn declaration or deposition or orally, knowing that the statement is false, before a judge of the International Criminal Court or an official of that Court who is authorized by the Court to permit statements to be made before them.

Video links, etc.

(2) Subject to subsection (5), every person who gives evidence under subsection 46(2) of the Canada Evidence Act, or gives evidence or a statement under an order made under section 22.2 of the Mutual Legal Assistance in Criminal Matters Act, commits perjury who, with intent to mislead, makes a false statement knowing that it is false, whether or not the false statement was made under oath or solemn affirmation in accordance with subsection (1), so long as the false statement was made in accordance with any formalities required by the law of the place outside Canada in which the person is virtually present or heard.

Punishment

(3) Every person who commits perjury is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years.

Application

(4) Subsection (1) applies whether or not a statement is made in a judicial proceeding of the International Criminal Court.

Application

(5) Subsections (1) and (2) do not apply to a statement that is made by a person who is not specially permitted, authorized or required by law to make that statement.

Witness giving contradictory evidence

20.(1) Every person who, being a witness in a proceeding of the International Criminal Court, gives evidence with respect to any matter of fact or knowledge and who later, in a proceeding of that Court, gives evidence that is contrary to their previous evidence, and who, in giving evidence in either proceeding, intends to mislead, is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years, whether or not the prior or later evidence is true.

Evidence in specific cases

(2) Evidence given under section 714.1, 714.2, 714.3 or 714.4 of the Criminal Code or subsection 46(2) of the Canada Evidence Act or evidence or a statement given under an order made under section 22.2 of the Mutual Legal Assistance in Criminal Matters Act, is

deemed to be evidence given by a witness in a proceeding for the purpose of subsection (1).

Meaning of "evidence"

- (3) Despite the definition "evidence" in section 118 of the Criminal Code, for the purpose of this section, "evidence" does not include evidence that is not material.

Proof of former trial

- (4) If a person is charged with an offence under this section, a certificate that specifies with reasonable particularity the proceeding in which the person is alleged to have given the evidence in respect of which the offence is charged, is evidence that it was given in a proceeding of the International Criminal Court, without proof of the signature or official character of the person by whom the certificate purports to be signed, if it purports to be signed by the Registrar of that Court or another official having the custody of the record of that proceeding or by their lawful deputy.

Fabricating evidence

- 21.** Every person who, with intent to mislead, fabricates anything with intent that it be used as evidence in an existing or proposed proceeding of the International Criminal Court, by any means other than perjury or incitement to perjury, is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years.

Offences relating to affidavits

- 22.** Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than two years who, in respect of an existing or proposed proceeding of the International Criminal Court,
- (a) signs a writing that purports to be an affidavit or statutory declaration and to have been sworn or declared before them when the writing was not so sworn or declared or when they know that they have no authority to administer the oath or declaration;
 - (b) uses or offers for use any writing purporting to be an affidavit or statutory declaration that they know was not sworn or declared, as the case may be, by the affiant or declarant or before a person authorized to administer the oath or declaration; or
 - (c) signs as affiant or declarant a writing that purports to be an affidavit or statutory declaration and to have been sworn or declared by them, as the case may be, when the writing was not so sworn or declared.

Intimidation

- 23.** Every person who, wrongfully and without lawful authority, for the purpose of compelling another person to abstain from doing anything that the person has a lawful right to do, or to do anything that the person has a lawful right to abstain from doing, in relation to a proceeding of the International Criminal Court, causes the person reasonably, in all the circumstances, to fear for their safety or the safety of anyone known to them

- (a) is guilty of an indictable offence and liable to imprisonment for a term of not more than five years; or
- (b) is guilty of an offence punishable on summary conviction.

Meaning of "internationally protected person"

- 24.** For greater certainty, the definition "internationally protected person" in section 2 of the Criminal Code includes judges and officials of the International Criminal Court.

Offences against the International Criminal Court—outside Canada

- 25.(1)** Every person who, being a Canadian citizen, commits outside Canada an act or omission in relation to the International Criminal Court that if committed in Canada would be an offence under any of sections 16 to 23, or would be contempt of court by virtue of section 9 of the Criminal Code, is deemed to have committed that act or omission in Canada.

Offences against the International Criminal Court—outside Canada

- (2) Every person who, being a Canadian citizen, commits outside Canada an act or omission that if committed in Canada would constitute conspiring or attempting to commit, being an accessory after the fact in relation to, or counselling in relation to, an act or omission that is an offence or a contempt of court under subsection (1) is deemed to have committed that act or omission in Canada.

Retaliation against witnesses—outside Canada

- 26.(1)** Every person who, being a Canadian citizen, commits outside Canada an act or omission against a person or a member of the person's family in retaliation for the person having given testimony before the International Criminal Court, that if committed in Canada would be an offence under any of sections 235, 236, 264.1, 266 to 269, 271 to 273, 279 to 283, 430, 433 and 434 of the Criminal Code, is deemed to have committed that act or omission in Canada.

Retaliation against witnesses—outside Canada

- (2) Every person who, being a Canadian citizen, commits outside Canada an act or omission that if committed in Canada would constitute conspiring or attempting to commit, being an accessory after the fact in relation to, or counselling in relation to, an act or omission that is an offence under subsection (1) is deemed to have committed that act or omission in Canada.

- 27. to 29.** (Repealed, 2001, c. 32, s. 60)

CRIMES AGAINST HUMANITY FUND

Fund established

30.(1) There is hereby established a fund, to be known as the Crimes Against Humanity Fund, into which shall be paid

- (a) all money obtained through enforcement in Canada of orders of the International Criminal Court for reparation or forfeiture or orders of that Court imposing a fine;
- (b) all money obtained in accordance with section 31; and
- (c) any money otherwise received as a donation to the Crimes Against Humanity Fund.

Payment out of Fund

(2) The Attorney General of Canada may make payments out of the Crimes Against Humanity Fund, with or without a deduction for costs, to the International Criminal Court, the Trust Fund established under article 79 of the Rome Statute, victims of offences under this Act or of offences within the jurisdiction of the International Criminal Court, and to the families of those victims, or otherwise as the Attorney General of Canada sees fit.

Regulations

(3) The Governor in Council may make regulations respecting the administration and management of the Crimes Against Humanity Fund.

Credits to Fund

31. The Minister of Public Works and Government Services shall pay into the Crimes Against Humanity Fund

- (a) the net amount received from the disposition of any property referred to in subsections 4(1) to (3) of the Seized Property Management Act that is
 - (i) proceeds of crime within the meaning of subsection 462.3(1) of the Criminal Code, obtained or derived directly or indirectly as a result of the commission of an offence under this Act, and
 - (ii) forfeited to Her Majesty and disposed of by that Minister; and
- (b) any amount paid or recovered as a fine imposed under subsection 462.37(3) of the Criminal Code in substitution for the property referred to in paragraph (a).

2000, c. 24, s. 31; 2001, c. 32, s. 61.

Partial exclusion of Seized Property Management Act

32. Paragraphs 9(d), (e) and (f) and sections 10, 11 and 13 to 16 of the Seized Property Management Act do not apply in respect of any property, proceeds of property or amounts referred to in section 31.

CONSEQUENTIAL AMENDMENTS

33. to 75. (Amendments)

CONDITIONAL AMENDMENT

76. and 76.1 (Amendments)

COMING INTO FORCE

Coming into force

***77.** The provisions of this Act and the provisions of any Act enacted or amended by this Act come into force on a day or days to be fixed by order of the Governor in Council.

* (Note: Act in force October 23, 2000, see SI/2000-95.)

SCHEDULE

(Subsection 2(1))

PROVISIONS OF ROME STATUTE

ARTICLE 6

Genocide

For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) killing members of the group;
- (b) causing serious bodily or mental harm to members of the group;
- (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) imposing measures intended to prevent births within the group;
- (e) forcibly transferring children of the group to another group.

ARTICLE 7

Crimes against humanity

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) murder;
 - (b) extermination;
 - (c) enslavement;
 - (d) deportation or forcible transfer of population;
 - (e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
 - (f) torture;
 - (g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
 - (h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
 - (i) enforced disappearance of persons;
 - (j) the crime of apartheid;
 - (k) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.
2. For the purpose of paragraph 1:
- (a) "attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;
 - (b) "extermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;
 - (c) "enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;
 - (d) "deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;
 - (e) "torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;
 - (f) "forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;
 - (g) "persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;
 - (h) "the crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;
 - (i) "enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

PARAGRAPH 2 OF ARTICLE 8

War crimes

2. For the purpose of this Statute, "war crimes" means:
 - (a) grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
 - (i) wilful killing;
 - (ii) torture or inhuman treatment, including biological experiments;
 - (iii) wilfully causing great suffering, or serious injury to body or health;
 - (iv) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
 - (v) compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
 - (vi) wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
 - (vii) unlawful deportation or transfer or unlawful confinement;
 - (viii) taking of hostages.
 - (b) other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:
 - (i) intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
 - (ii) intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
 - (iii) intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
 - (iv) intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
 - (v) attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
 - (vi) killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;
 - (vii) making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;

- (viii) the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
- (ix) intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
- (x) subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
- (xi) killing or wounding treacherously individuals belonging to the hostile nation or army;
- (xii) declaring that no quarter will be given;

- (xiii) destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;
- (xiv) declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
- (xv) compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;
- (xvi) pillaging a town or place, even when taken by assault;
- (xvii) employing poison or poisoned weapons;
- (xviii) employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
- (xix) employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
- (xx) employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;
- (xxi) committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- (xxii) committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2(f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;
- (xxiii) utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;
- (xxiv) intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
- (xxv) intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;
- (xxvi) conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

- (c) in the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:
 - (i) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - (ii) committing outrages upon personal dignity, in particular humiliating and degrading treatment;
 - (iii) taking of hostages;
 - (iv) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

- (d) paragraph 2(c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

- (e) other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:
 - (i) intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
 - (ii) intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
 - (iii) intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
 - (iv) intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
 - (v) pillaging a town or place, even when taken by assault;
 - (vi) committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2(f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;
 - (vii) conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;
 - (viii) ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
 - (ix) killing or wounding treacherously a combatant adversary;
 - (x) declaring that no quarter will be given;
 - (xi) subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which

- cause death to or seriously endanger the health of such person or persons;
- (xii) destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;
- (f) paragraph 2(e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

APPENDIX II

ACT INTRODUCING THE CODE OF CRIMES UNDER INTERNATIONAL LAW, INCLUDING THE CODE OF CRIMES UNDER INTERNATIONAL LAW (CCUIL) (*VÖLKERSTRAFGESETZBUCH*) OF 2002*

GERMANY

* Auswärtiges Amt und Bundesministerium der Justiz; Kai Ambos, Co-ordinator, Brian Duffett, Translator.

Act to Introduce the Code of Crimes against International Law* of 26 June 2002

The Federal Parliament has passed the following Act:

Article 1 Code of Crimes against International Law (CCAIL)

Part 1 General provisions

Section 1 Scope of application

This Act shall apply to all criminal offences against international law designated under this Act, to serious criminal offences¹ designated therein even when the offence was committed abroad and bears no relation to Germany.

Section 2 Application of the general law

The general criminal law shall apply to offences pursuant to this Act so far as this Act does not make special provision in sections 1 and 3 to 5.

Section 3 Acting upon orders

Whoever commits an offence pursuant to Sections 8 to 14 in execution of a military order or of an order comparable in its actual binding effect shall have acted without guilt so far as the perpetrator does not realise that the order is unlawful and so far as it is also not manifestly unlawful.

Section 4 Responsibility of military commanders and other superiors

- (1) A military commander or civilian superior who omits to prevent his or her subordinate from committing an offence pursuant to this Act shall be punished in the same way as a

* Translation Brian Duffett.

¹ In German law the term "serious criminal offence" ("Verbrechen") is used to denote criminal offences ("Straftaten") that are punishable with not less than one year of imprisonment. Mitigating (and aggravating) circumstances — as regulated for instance in section 8 subsection (5) — are to be disregarded in this respect (section 12 German Criminal Code). As a result, all criminal offences in the present Draft Code are "serious criminal offences" ("Verbrechen") with the sole exception of the criminal offences in sections 13 and 14 (see the Explanations: B. Article 1, section 1). Please note that the terminological differentiation between "criminal offences" ("Straftaten") and "serious criminal offences" ("Verbrechen") is, for technical reasons, not reflected everywhere in this translation.

perpetrator of the offence committed by that subordinate. Section 13 subsection (2) of the Criminal Code shall not apply in this case.

- (2) Any person effectively giving orders or exercising command and control in a unit shall be deemed equivalent to a military commander. Any person effectively exercising command and control in a civil organisation or in an enterprise shall be deemed equivalent to a civilian superior.

Section 5
Non-applicability of statute of limitations

The prosecution of serious criminal offences² pursuant to this Act and the execution of sentences imposed on their account shall not be subject to any statute of limitations.

Part 2
Crimes against International Law

Chapter 1
Genocide and crimes against humanity

Section 6
Genocide

- (1) Whoever with the intent of destroying as such, in whole or in part, a national, racial, religious or ethnic group
1. kills a member of the group,
 2. causes serious bodily or mental harm to a member of the group, especially of the kind referred to in section 226 of the Criminal Code,
 3. inflicts on the group conditions of life calculated to bring about their physical destruction in whole or in part,
 4. imposes measures intended to prevent births within the group,
 5. forcibly transfers a child of the group to another group

shall be punished with imprisonment for life.

- (2) In less serious cases referred to under subsection (1), numbers 2 to 5, the punishment shall be imprisonment for not less than five years.

Section 7
Crimes against humanity

- (1) Whoever, as part of a widespread or systematic attack directed against any civilian population,
1. kills a person,
 2. inflicts, with the intent of destroying a population in whole or in part, conditions of life on that population or on parts thereof, being conditions calculated to bring about its physical destruction in whole or in part,

² Cf. footnote to section 1.

3. traffics in persons, particularly in women or children, or whoever enslaves a person in another way and in doing so arrogates to himself a right of ownership over that person,
4. deports or forcibly transfers, by expulsion or other coercive acts, a person lawfully present in an area to another State or another area in contravention of a general rule of international law,
5. tortures a person in his or her custody or otherwise under his or her control by causing that person substantial physical or mental harm or suffering where such harm or suffering does not arise only from sanctions that are compatible with international law,
6. sexually coerces, rapes, forces into prostitution or deprives a person of his or her reproductive capacity, or confines a woman forcibly made pregnant with the intent of affecting the ethnic composition of any population,
7. causes a person's enforced disappearance, with the intention of removing him or her from the protection of the law for a prolonged period of time,
 - (a) by abducting that person on behalf of or with the approval of a State or a political organisation, or by otherwise severely depriving such person of his or her physical liberty, followed by a failure immediately to give truthful information, upon inquiry, on that person's fate and whereabouts, or
 - (b) by refusing, on behalf of a State or of a political organisation or in contravention of a legal duty, to give information immediately on the fate and whereabouts of the person deprived of his or her physical liberty under the circumstances referred to under letter (a) above, or by giving false information thereon,
8. causes another person severe physical or mental harm, especially of the kind referred to in section 226 of the Criminal Code,
9. severely deprives, in contravention of a general rule of international law, a person of his or her physical liberty, or
10. persecutes an identifiable group or collectivity by depriving such group or collectivity of fundamental human rights, or by substantially restricting the same, on political, racial, national, ethnic, cultural or religious, gender or other grounds that are recognised as impermissible under the general rules of international law

shall be punished, in the cases referred to under numbers 1 and 2, with imprisonment for life, in the cases referred to under numbers 3 to 7, with imprisonment for not less than five years, and, in the cases referred to under numbers 8 to 10, with imprisonment for not less than three years.

- (2) In less serious cases under subsection (1), number 2, the punishment shall be imprisonment for not less than five years, in less serious cases under subsection (1), numbers 3 to 7, imprisonment for not less than two years, and in less serious cases under subsection (1), numbers 8 and 9, imprisonment for not less than one year.
- (3) Where the perpetrator causes the death of a person through an offence pursuant to subsection (1), numbers 3 to 10, the punishment shall be imprisonment for life or for not

less than ten years in cases under subsection (1), numbers 3 to 7, and imprisonment for not less than five years in cases under subsection (1), numbers 8 to 10.

- (4) In less serious cases under subsection (3) the punishment for an offence pursuant to subsection (1), numbers 3 to 7, shall be imprisonment for not less than five years, and for an offence pursuant to subsection (1), numbers 8 to 10, imprisonment for not less than three years.
- (5) Whoever commits a crime pursuant to subsection (1) with the intention of maintaining an institutionalised regime of systematic oppression and domination by one racial group over any other shall be punished with imprisonment for not less than five years so far as the offence is not punishable more severely pursuant to subsection (1) or subsection (3). In less serious cases the punishment shall be imprisonment for not less than three years so far as the offence is not punishable more severely pursuant to subsection (2) or subsection (4).

Chapter 2 *War crimes*

Section 8 War crimes against persons

- (1) Whoever in connection with an international armed conflict or with an armed conflict not of an international character
 1. kills a person who is to be protected under international humanitarian law,
 2. takes hostage a person who is to be protected under international humanitarian law,
 3. treats a person who is to be protected under international humanitarian law cruelly or inhumanly by causing him or her substantial physical or mental harm or suffering, especially by torturing or mutilating that person,
 4. sexually coerces, rapes, forces into prostitution or deprives a person who is to be protected under international humanitarian law of his or her reproductive capacity, or confines a woman forcibly made pregnant with the intent of affecting the ethnic composition of any population,
 5. conscripts children under the age of fifteen years into the armed forces, or enlists them in the armed forces or in armed groups, or uses them to participate actively in hostilities,
 6. deports or forcibly transfers, by expulsion or other coercive acts, a person who is to be protected under international humanitarian law and lawfully present in an area to another State or another area in contravention of a general rule of international law,
 7. imposes on, or executes a substantial sentence in respect of a person who is to be protected under international humanitarian law, in particular the death penalty or imprisonment, without that person having been sentenced in a fair and regular trial affording the legal guarantees required by international law,

8. exposes a person who is to be protected under international humanitarian law to the risk of death or of serious injury to health
 - (a) by carrying out experiments on such a person, being a person who has not previously given his or her voluntary and express consent, or where the experiments concerned are neither medically necessary nor carried out in his or her interest,
 - (b) by taking body tissue or organs from such a person for transplantation purposes so far as it does not constitute removal of blood or skin for therapeutic purposes in conformity with generally recognised medical principles and the person concerned has previously not given his or her voluntary and express consent, or
 - (c) by using treatment methods that are not medically recognised on such person, without this being necessary from a medical point of view and without the person concerned having previously given his or her voluntary and express consent, or
9. treats a person who is to be protected under international humanitarian law in a gravely humiliating or degrading manner

shall be punished, in the cases referred to under number 1, with imprisonment for life, in the cases referred to under number 2, with imprisonment for not less than five years, in the cases referred to under numbers 3 to 5, with imprisonment for not less than three years, in the cases referred to under numbers 6 to 8, with imprisonment for not less than two years, and, in the cases referred to under number 9, with imprisonment for not less than one year.

- (2) Whoever in connection with an international armed conflict or with an armed conflict not of an international character, wounds a member of the adverse armed forces or a combatant of the adverse party after the latter has surrendered unconditionally or is otherwise placed hors de combat shall be punished with imprisonment for not less than three years.
- (3) Whoever in connection with an international armed conflict
 1. unlawfully holds as a prisoner or unjustifiably delays the return home of a protected person within the meaning of subsection (6), number 1,
 2. transfers, as a member of an Occupying Power, parts of its own civilian population into the occupied territory,
 3. compels a protected person within the meaning of subsection (6), number 1, by force or threat of appreciable harm to serve in the forces of a hostile Power or
 4. compels a national of the adverse party by force or threat of appreciable harm to take part in the operations of war directed against his or her own country

shall be punished with imprisonment for not less than two years.

- (4) Where the perpetrator causes the death of the victim through an offence pursuant to subsection (1), numbers 2 to 6, the punishment shall, in the cases referred to under subsection (1), number 2, be imprisonment for life or imprisonment for not less than ten years, in the cases referred to under subsection (1), numbers 3 to 5, imprisonment for not less than five years, and, in the cases referred to under subsection (1), number 6, imprisonment for not less than three years. Where an act referred to under subsection (1), number 8, causes death or serious harm to health, the punishment shall be imprisonment for not less than three years.

- (5) In less serious cases referred to under subsection (1), number 2, the punishment shall be imprisonment for not less than two years, in less serious cases referred to under subsection (1), numbers 3 and 4, and under subsection (2) the punishment shall be imprisonment for not less than one year, in less serious cases referred to under subsection (1), number 6, and under subsection (3), number 1, the punishment shall be imprisonment from six months to five years.
- (6) Persons who are to be protected under international humanitarian law shall be
1. in an international armed conflict: persons protected for the purposes of the Geneva Conventions and of the Protocol Additional to the Geneva Conventions (Protocol I) (annexed to this Act), namely the wounded, the sick, the shipwrecked, prisoners of war and civilians;
 2. in an armed conflict not of an international character: the wounded, the sick, the shipwrecked as well as persons taking no active part in the hostilities who are in the power of the adverse party;
 3. in an international armed conflict and in an armed conflict not of an international character: members of armed forces and combatants of the adverse party, both of whom have laid down their arms or have no other means of defence.

Section 9

War crimes against property and other rights

- (1) Whoever in connection with an international armed conflict or with an armed conflict not of an international character pillages or, unless this is imperatively demanded by the necessities of the armed conflict, otherwise extensively destroys, appropriates or seizes property of the adverse party contrary to international law, such property being in the power of the perpetrator's party, shall be punished with imprisonment from one to ten years.
- (2) Whoever in connection with an international armed conflict and contrary to international law declares the rights and actions of all, or of a substantial proportion of, the nationals of the hostile party abolished, suspended or inadmissible in a court of law shall be punished with imprisonment from one to ten years.

Section 10

War crimes against humanitarian operations and emblems

- (1) Whoever in connection with an international armed conflict or with an armed conflict not of an international character
1. directs an attack against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under international humanitarian law, or
 2. directs an attack against personnel, buildings, material, medical units and transport, using the distinctive emblems of the Geneva Conventions in conformity with international humanitarian law

shall be punished with imprisonment for not less than three years. In less serious cases, particularly where the attack does not take place by military means, the punishment shall be imprisonment for not less than one year.

- (2) Whoever in connection with an international armed conflict or with an armed conflict not of an international character makes improper use of the distinctive emblems of the Geneva Conventions, of the flag of truce, of the flag or of the military insignia or of the uniform of the enemy or of the United Nations, thereby causing a person's death or serious personal injury (section 226 of the Criminal Code) shall be punished with imprisonment for not less than five years.

Section 11

War crimes consisting in the use of prohibited methods of warfare

- (1) Whoever in connection with an international armed conflict or with an armed conflict not of an international character
1. directs an attack by military means against the civilian population as such or against individual civilians not taking direct part in hostilities,
 2. directs an attack by military means against civilian objects, so long as these objects are protected as such by international humanitarian law, namely buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, or against undefended towns, villages, dwellings or buildings, or against demilitarised zones, or against works and installations containing dangerous forces,
 3. carries out an attack by military means and definitely anticipates that the attack will cause death or injury to civilians or damage to civilian objects on a scale out of proportion to the concrete and direct overall military advantage anticipated,
 4. uses a person who is to be protected under international humanitarian law as a shield to restrain a hostile party from undertaking operations of war against certain targets,
 5. uses starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival or impedes relief supplies in contravention of international humanitarian law,
 6. orders or threatens, as a commander, that no quarter will be given, or
 7. treacherously kills or wounds a member of the hostile armed forces or a combatant of the adverse party

shall be punished with imprisonment for not less than three years. In less serious cases under number 2 the punishment shall be imprisonment for not less than one year.

- (2) Where the perpetrator causes the death or serious injury of a civilian (section 226 of the Criminal Code) or of a person who is to be protected under international humanitarian law through an offence pursuant to subsection (1), numbers 1 to 6, he shall be punished with imprisonment for not less than five years. Where the perpetrator intentionally causes death, the punishment shall be imprisonment for life or for not less than ten years.
- (3) Whoever in connection with an international armed conflict carries out an attack by military means and definitely anticipates that the attack will cause widespread, long-term and severe damage to the natural environment on a scale out of proportion to the concrete and direct overall military advantage anticipated shall be punished with imprisonment for not less than three years.

Section 12

War crimes consisting in employment of prohibited means of warfare

- (1) Whoever in connection with an international armed conflict or with an armed conflict not of an international character
1. employs poison or poisoned weapons,
 2. employs biological or chemical weapons or
 3. employs bullets which expand or flatten easily in the human body, in particular bullets with a hard envelope which does not entirely cover the core or is pierced with incisions

shall be punished with imprisonment for not less than three years.

- (2) Where the perpetrator causes the death or serious injury of a civilian (section 226 of the Criminal Code) or of a person protected under international humanitarian law through an offence pursuant to subsection (1), he shall be punished with imprisonment for not less than five years. Where the perpetrator intentionally causes death, the punishment shall be imprisonment for life or for not less than ten years.

Chapter 3 Other crimes

Section 13

Violation of the duty of supervision

- (1) A military commander who intentionally or negligently omits properly to supervise a subordinate under his or her command or under his or her effective control shall be punished for violation of the duty of supervision if the subordinate commits an offence pursuant to this Act, where the imminent commission of such an offence was discernible to the commander and he or she could have prevented it.
- (2) A civilian superior who intentionally or negligently omits properly to supervise a subordinate under his or her authority or under his or her effective control shall be punished for violation of the duty of supervision if the subordinate commits an offence pursuant to this Act, where the imminent commission of such an offence was discernible to the superior without more and he or she could have prevented it.
- (3) Section 4 subsection (2) shall apply mutatis mutandis.
- (4) Intentional violation of the duty of supervision shall be punished with imprisonment for not more than five years, and negligent violation of the duty of supervision shall be punished with imprisonment for not more than three years.

Section 14

Omission to report a crime

- (1) A military commander or a civilian superior who omits immediately to draw the attention of the agency responsible for the investigation or prosecution of any offence pursuant to this Act, to such an offence committed by a subordinate, shall be punished with imprisonment for not more than five years.
- (2) Section 4 subsection (2) shall apply mutatis mutandis.

Annex

(to Section 8 subsection (6) number 1)

For the purposes of this Act the term "Geneva Conventions" shall constitute a reference to the following:

- I. Geneva Convention of 12 August 1949 for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Federal Law Gazette 1954 II page 781, 783),
- II. Geneva Convention of 12 August 1949 for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Federal Law Gazette 1954 II page 781, 813),
- III. Geneva Convention of 12 August 1949 relative to the Treatment of Prisoners of War (Federal Law Gazette 1954 II page 781, 838) and
- IV. Geneva Convention of 12 August 1949 relative to the Protection of Civilian Persons in Time of War (Federal law Gazette 1954 II page 781, 917).

For the purposes of this Act Protocol I shall constitute a reference to the following:

Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977 (Federal Law Gazette 1990 II page 1550, 1551).

Article 2

Amendment to the Criminal Code

The Criminal Code in the version published on 13 November 1998 (Federal Law Gazette I page 3322), as last amended by Article 11, number 13, of the Act of 20 June 2002 (Federal Law Gazette I page 1946), shall be amended as follows:

1. In the Table of Contents the indications in respect of sections 220 and 220a shall be amended as follows:
"Sections 220 and 220a (Deleted)".
2. Section 6, number 1, shall be hereby repealed.
3. In section 78 subsection (2) the words "under Section 220a (genocide) and" shall be deleted.
4. In section 79 subsection (2) the words "punishments for genocide (Section 220a) and of" shall be deleted.
5. In section 126 subsection (1), number 2, the words "murder, manslaughter or genocide (Sections 211, 212 or 220a)" shall be replaced by the words "murder (Section 211), manslaughter (Section 212) or genocide (section 6 of the Code of Crimes against International Law) or a crime against humanity (section 7 of the Code of Crimes against International Law) or a war crime (sections 8, 9, 10, 11 or 12 of the Code of Crimes against International Law)".
6. In section 129a subsection (1), number 1, the words "murder, manslaughter or genocide (Sections 211, 212 or 220a)" shall be replaced by the words "murder (Section 211) or

manslaughter (Section 212) or genocide (section 6 of the Code of Crimes against International Law) or crimes against humanity (section 7 of the Code of Crimes against International Law) or war crimes (sections 8, 9, 10, 11 or 12 of the Code of Crimes against International Law)".

7. In section 130 subsection (3) the words "Section 220a subsection (1)" shall be replaced by the words "section 6 subsection (1) of the Code of Crimes against International Law".
8. In section 138 subsection (1), number 6, the words "murder, manslaughter or genocide (Sections 211, 212 or 220a)" shall be replaced by the words "murder (Section 211) or manslaughter (Section 212) or genocide (section 6 of the Code of Crimes against International Law) or a crime against humanity (section 7 of the Code of Crimes against International Law) or a war crime (sections 8, 9, 10, 11 or 12 of the Code of Crimes against International Law)".
9. In section 139 subsection (3), number 2, the words "Section 220a subsection (1), number 1," shall be replaced by the words "section 6 subsection (1), number 1, of the Code of Crimes against International Law or a crime against humanity in the cases under section 7 subsection (1), number 1, of the Code of Crimes against International Law or a war crime in the cases under section 8 subsection (1), number 1, of the Code of Crimes against International Law)".
10. Section 220a shall be hereby repealed.

Article 3 **Amendment to the Code of Criminal Procedure**

The Code of Criminal Procedure in the version published on 7 April 1987 (Federal Law Gazette I page 1074, 1319), as last amended by Article 3 of the Act of 21 June 2002 (Federal Law Gazette I page 2144), shall be amended as follows:

1. In section 100a, first sentence, number 2, the words "murder, manslaughter or genocide (sections 211, 212, 220a Criminal Code)" shall be replaced by the words "murder, manslaughter (sections 211, 212 Criminal Code) or genocide (section 6 Code of Crimes against International Law)".
2. In section 100c subsection (1), number 3 (a), the words "murder, manslaughter or genocide (sections 211, 212 and 220a Criminal Code) shall be replaced by the words "murder, manslaughter (sections 211, 212 Criminal Code) or genocide (section 6 Code of Crimes against International Law)".
3. In section 112 subsection (3) the words "section 6 subsection (1), number 1, of the Code of Crimes against International Law or" shall be inserted after the words "of a criminal offence pursuant to", and the words "section 220a subsection (1), number 1, Sections" shall be deleted.
4. Section 153c shall be amended as follows:
 - a) Subsection (1) shall be amended as follows:
 - aa) In number 2 the comma shall be replaced by a full stop.
 - bb) The following sentence shall be inserted after number 2:

"Section 153f shall apply to offences punishable pursuant to the Code of Crimes against International Law."

- cc) The previous number 3 shall become subsection (2), and the words "The public prosecution office may dispense with prosecuting an offence" shall be inserted after the subsection mark.

b) The previous subsections (2) to (4) shall become subsections (3) to (5).

5. The following section 153f shall be inserted after section 153e:

"Section 153f

- (1) In the cases referred to under Section 153c subsection (1), numbers 1 and 2, the public prosecution office may dispense with prosecuting an offence punishable pursuant to sections 6 to 14 of the Code of Crimes against International Law, if the accused is not present in Germany and such presence is not to be anticipated. If in the cases referred to under Section 153c subsection (1), number 1, the accused is a German, this shall however apply only where the offence is being prosecuted before an international court or by a state on whose territory the offence was committed or whose national was harmed by the offence.
- (2) In the cases referred to under Section 153c subsection (1), numbers 1 and 2, the public prosecution office can, in particular, dispense with prosecuting an offence punishable pursuant to sections 6 to 14 of the Code of Crimes against International Law, if
1. there is no suspicion of a German having committed such offence,
 2. such offence was not committed against a German,
 3. no suspect in respect of such offence is residing in Germany and such residence is not to be anticipated and
 4. the offence is being prosecuted before an international court or by a state on whose territory the offence was committed, whose national is suspected of its commission or whose national was harmed by the offence.

The same shall apply if a foreigner accused of an offence committed abroad is residing in Germany but the requirements pursuant to the first sentence, numbers 2 and 4, have been fulfilled and transfer to an international court or extradition to the prosecuting state is permissible and is intended.

- (3) If in the cases referred to under subsection (1) or (2) public charges have already been preferred, the public prosecution office may withdraw the charges at any stage of the proceedings and terminate the proceedings.

Article 4 **Amendment to the Courts Constitution Act**

In section 120 subsection (1), number 8, of the Courts Constitution Act in the version published on 9 May 1975 (Federal Law Gazette I page 1077), as last amended by Article 4 of the Act of 21 June 2002 (Federal Law Gazette I page 2144), the words "(section 220a Criminal Code)" shall be replaced by the words "(section 6 Code of Crimes against International Law)".

Article 5
Amendment to the Act Amending the Introductory Act
to the Courts Constitution Act

In Article 2 paragraph (1), first sentence, number 1, of the Act Amending the Introductory Act to the Courts Constitution Act of 30 September 1977 (Federal Law Gazette I page 1877), as amended by Article 4 of the Act of 28 March 1980 (Federal Law Gazette I page 373), the words "murder, manslaughter or genocide (sections 211, 212, 220a)" shall be replaced by the words "murder or manslaughter (sections 211, 212) or genocide (section 6 of the Code of Crimes against International Law)".

Article 6
Amendment to the Act on State Security Files
of the Former German Democratic Republic

Section 23 subsection (1), first sentence, number 1 (b) of the Act on State Security Files of the Former German Democratic Republic of 20 December 1991 (Federal Law Gazette I page 2272), as last amended by Article 3, number 3, of the Act of 20 December 2001 (Federal Law Gazette I page 3926), shall be amended as follows:

1. The words "or 220a" shall be deleted.
2. The following dash shall precede the first dash:
"-section 6 of the Code of Crimes against International Law,".

Article 7
Repeal of a continuing provision
of the Criminal Code of the German Democratic Republic

Section 84 of the Criminal Code of the German Democratic Republic—CC—of 12 January 1986 in the new version of 14 December 1988 (Law Gazette I 1989 Number 3 page 33), as amended by the Sixth Criminal Law Amendment Act of 29 June 1990 (Law Gazette I Number 39 page 526), which, pursuant to Annex II Title III Subject Area C Chapter I Number 1 of the Unification Treaty of 31 August 1990 in conjunction with Article 1 of the Act of 23 September 1990 (Federal Law Gazette 1990 II page 885, 1168) continues in force, shall be hereby repealed.

Article 8
Entry into force

This Act shall enter into force on the day after its promulgation.

The constitutional rights of the Federal Council have been heeded.
The above Act is hereby executed. It is to be promulgated in the Federal Law Gazette.

Berlin, 26 June 2002

For the Federal President
The President of the Federal Council
Klaus Wowereit

The Federal Chancellor
Gerhard Schröder

The Federal Minister of Justice
Däubler-Gmelin

FICJC Publication No. 1 (2007)

Importing Core International Crimes into National Criminal Law

Morten Bergsmo, Mads Harlem and Nobuo Hayashi (editors)

States are obliged under treaties such as the Genocide Convention, the Geneva Conventions and the Torture Convention to enact legislation that gives effect in national criminal law to prohibitions in the treaties. The law and practice of international criminal jurisdictions provide that it is significant whether national prosecutions for conduct amounting to genocide, crimes against humanity and war crimes can use the characterization of international crimes and not just ordinary crimes (such as murder). Several states have already imported these international crimes into national criminal law – for example, Canada and Germany. This publication is based on presentations made at a seminar organized by the Forum for International Criminal Justice and Conflict (FICJC) on 27 October 2006 that focused on particular challenges in the process to import such crimes into national law.

Forum for International
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