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Can piracy be considered a crime against humanity for purposes of the jurisdiction of the International Criminal Court?

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**THIS MEMORANDUM IS A PRODUCT OF BAKER & MCKENZIE
WORKING IN PARTNERSHIP WITH PILPG AND THE
PILPG HIGH LEVEL WORKING GROUP ON PIRACY**

OBJECT AND PURPOSE: Legal memorandum to provide assistance to the Kenya Piracy Court and other cooperating state courts and to help to lay the groundwork for a Security Council-created Regional Piracy Court.

ISSUE #6: Can piracy be considered a crime against humanity for purposes of the jurisdiction of the International Criminal Court?

**PREPARED BY: BAKER & MCKENZIE
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I. Introduction and Summary of Conclusions

The Public International Law and Policy Group (“PILPG”) is providing assistance to the Kenya Piracy Court to lay the groundwork for a Security Council-created Regional Piracy Court. As part of this mandate, PILPG has requested a legal analysis in answer to several questions to help them advise the judiciary and other entities designing and implementing the Regional Piracy Court.

1. Issue

We have been asked to provide our opinion with respect to the following question:

Can piracy be considered a crimes against humanity for the purposes of the jurisdiction of the International Criminal Court?

2. Summary of Conclusion

The characterization of piracy as a crime against humanity is arguable, and faces significant challenges. Any such prosecution would hinge on whether or not the prosecutors would be able to establish the fundamental elements of the offence; namely, that there was a state or organizational policy, that the attack was widespread and systematic, that the attack was directed against a “civilian population” and that the accused knew of the wider attack and knew that their acts formed part of this attack.

Acts of piracy could potentially satisfy the “organizational policy” requirement; specifically, it is arguable that pirates could be characterised as exercising effective control over a specific territory and that their attacks were “planned, directed or organized” pursuant to internal organizational policy. Of course, if the evidence led could only establish acts that were not part of such a policy or plan, this would be problematic for any attempts to meet the test for a crime against humanity.

The requirement that the attack be ‘widespread’ refers to the magnitude of the acts and the number of victims, while the systematic requirement necessitates the existence of a “plan” pursuant to which the attack is perpetrated. Depending on the nature and scale of the piracy operation, this requirement could also prove to be a high hurdle for the prosecution to prove.

If the overarching act(s) of piracy are broad enough in scope, the victims of piracy could arguably fall within the definition of “civilian population”. The victims of piracy are not participating in the hostilities piracy attacks are usually conducted on a large scale across a particular geographic area. As such the “population” requirement, which dictates that a Crime Against Humanity be directed against a *group* of civilians rather than aimed at a single individual, could potentially be met,

if it was approached flexibly to include all persons travelling through a particular area.

Crimes against humanity have an additional *mens rea* requirement, known as the subjective element. This is common to all of the enumerated crimes. The accused must know that his acts are part of the broader attack against the target population. While it is likely that individually accused pirates would be aware of other individual pirates or groups of pirates, it would be more challenging to establish that different groups of accused pirates were acting as part of a larger organizational operation and knew of each other's existence.

While significant challenges exist, particularly with the ability to characterize a pirate attack as being broad enough to meet the "widespread or systematic" requirement and the ability to prove the subjective element, a review of the jurisprudence from the ICC, the *ad hoc* tribunals and recent domestic jurisprudence suggests that the prosecution of piracy as a crime against humanity remains a possibility. How strong a case could be made would depend on specific evidence that could be brought to bear in a particular case and would depend on evidence that goes beyond the actual acts that took place on the open seas, including regarding the inner-workings of any larger organization behind the front-line actors.

II. Factual Background

The likelihood of any particular act(s) of piracy arguably constituting a crime against humanity will obviously depend on the particular facts of each case. This includes both the actual events that occurred and the organizational context that formed the backdrop for their occurrence. While no particular set of facts is analyzed in detail in the context of this memorandum, the various methodologies of modern-day pirates are discussed in general and used to inform the legal analysis. However, as determinations of whether a crime against humanity has been committed are very fact-specific, ultimately, a more fulsome analysis of these matters could only be made with a detailed factual record of specific alleged crimes.

III. Legal Discussion

1. Definition of Crime Against Humanity Utilized by the ICC

Article 7(1) of the Rome Statute of the ICC provides the definition of a crime against humanity (“Crime Against Humanity”). The provision provides that a 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 (those crimes considered to be arguably applicable to modern-day piracy are bolded and are individually discussed later in this memorandum):

- (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, 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.¹

2. Acts Constituting State or Organizational Policy

To meet the definition of a “crime against humanity” set forth in the Rome Statute, one of the essential elements is that the criminal acts be “pursuant to or in furtherance of a State or organizational policy to commit such attack.”²

While the acts need not constitute a “military attack,” to be considered a crime under the statute, the State or organization must “actively promote or encourage such an attack against a civilian population.”³ In “exceptional circumstances,” such policy may be shown by “a deliberate failure to take action, which is consciously aimed at encouraging such attack.”⁴ Nevertheless, “[t]he existence of such a policy cannot be inferred solely from the absence of governmental or organizational action.”⁵

The ICC Manual for Implementation of the Rome Statute provides the following guidance regarding the necessary elements of a crime against humanity:⁶

To be guilty of a crime against humanity, the perpetrator of an inhumane act must know that his or her act formed part of a broader,

¹ *Rome Statute of the International Criminal Court*, 17 July 1998, 21 UNTS 90, art 7(1) (entered into force 1 July 2002) [Rome Statute].

² *Ibid.*, art 7(2)(a).

³ *Elements of Crimes* (The Hague: International Criminal Court, 2011) at 5 (regarding art 7 of the Rome Statute), online: ICC <<http://www.icc-cpi.int>>.

⁴ *Ibid.*, fn 6.

⁵ *Ibid.*

⁶ The International Criminal Centre for Criminal Law Reform and Criminal Justice Policy, *International Criminal Court: Manual for the Ratification and Implementation of the Rome Statute*, 3d ed (Vancouver: ICCLR, 2008) at 75, online: ICCLR <<http://www.icclr.law.ubc.ca>>.

policy-driven course of conduct involving other inhumane acts. In other words, the perpetrator must be aware that the act is not merely an isolated crime against one or more individuals, but rather forms part of a broader context of widespread or systematic acts of inhumanity against a civilian population.

The required element of a “state or organizational policy” has been criticized by some commentators, as it likely excludes from ICC prosecution acts committed by private individuals, rogue state officials or employees, and non-state actors who do not operate pursuant to an organizational policy.⁷ In any event, the full scope of what constitutes “state or organizational policy” remains to be completely developed.

3. ICC Jurisprudence re: Requirement for “State or Organizational Policy”

ICC jurisprudence suggests that there may be some flexibility within the definition of what will be deemed to be a state or organizational policy.

For example, in *Prosecutor v. Katanga*, the ICC articulated that the policy may be:

made either by groups of persons who govern a specific territory or by any organization with the capability to commit a widespread or systematic attack against a civilian population. The policy need not be explicitly defined by the organizational group. Indeed, an attack

⁷ Jordan J Paust, “The International Criminal Court Does Not Have Complete Jurisdiction Over Customary Crimes Against Humanity and War Crimes” (2010) 43:3 J Marshall L Rev 681 at 693-94.

which is planned, directed or organized – as opposed to spontaneous or isolated acts of violence – will satisfy this criterion.⁸

In *Katanga*, the ICC held that there was sufficient evidence demonstrating a “common policy and an organized common plan,” due to the fact that violence directed against a civilian village by members of a militarized ethnic group (the Forces de Resistance Patriotiques en Ituri) was part of a “larger campaign of reprisals” specifically directed against a different ethnic group, which was intended to fragment ethnic alliances and secure control and access to transit through the area.⁹

Acts of piracy may satisfy the definition of an organizational policy set forth in *Katanga*: while lacking the ethnic component present in *Katanga*, the victims of piracy would, nonetheless, typically satisfy the requirement that they be civilians. Of course, while the specific facts of any particular case will inform the legal analysis of the nature of the alleged crime, it could be argued that Somali pirates “govern (or, at least, exercise effective control over) a specific territory” and that, even if there is no codified policy, their attacks against civilians passing through an ever-expanding area off the coast of eastern Africa are “planned, directed or organized” pursuant to internal organizational policy.

⁸ *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01-04-01/07, Decision on the Confirmation of Charges (30 September 2008) at para 396 (International Criminal Court, Pre-Trial Chamber) [*Katanga*] [references omitted].

⁹ *Ibid* at para 413 [references omitted].

A number of commentators have noted that the language of the Rome Statute should be read broadly to include non-state actors (i.e., criminal groups, terrorist groups and other organized non-state actors), and that the reference to state or organizational plan or policy in Article 7(2) should probably be construed broadly to encompass entities that act like States, even if they are not formally recognized as such.¹⁰

Further, the drafters of the Rome Statute had initially considered including “piracy” and other treaty-based crimes, such as terrorism, hostage-taking, and narcotics trafficking within the purview of the ICC.¹¹ The fact that, ultimately, the drafters did not explicitly include piracy could perhaps be used to argue against any conclusion that it is nonetheless covered. However, so too, it could be argued that the very fact it was considered demonstrates that acts of piracy are of the same nature and kind as other offences that were ultimately included as crimes against humanity.

¹⁰ Jennifer M Smith, “An International Hit Job: Prosecuting Organized Crime Acts as Crimes Against Humanity” (2009) 97:4 Geo L J 1111 at 1126-31 (organized crime groups should be liable for prosecution under provisions of ICC regarding crimes against humanity); Dermot Groome, “The Church Abuse Scandal: Were Crimes Against Humanity Committed?” (2011) 11:2 Chi J Int’l L 439 at 456-57 (noting that sex abuse scandals perpetrated by the Catholic Church should be considered crimes against humanity). See also Paust, *supra* note 7 at 694, fn 37 (arguing that terrorist groups such as Al Qaeda should be considered “organizations” for the purposes of ICC prosecution); Vincent-Joël Proulx, “Rethinking the Jurisdiction of the International Criminal Court in Post-September 11th Era: Should Acts of Terrorism Qualify as Crimes Against Humanity?” (2004) 19:5 Am U Int’l L Rev 1009 (2004); M Cherif Bassiouni, “Legal Control of International Terrorism: A Policy-Oriented Assessment” (2002) 43:1 Harv Int’l LJ 83 at 101.

¹¹ Yvonne Dutton, “Bringing Pirates to Justice: A Case for Including Piracy Within the Jurisdiction of the International Criminal Court” (2010) 11:1 Chi J Int’l L 197 at 236-37, citing *Report of the International Law Commission on the Work of Its Forty-Sixth session*, UNGAOR, 49th Sess, Supp No 10, UN Doc A/49/10 (1994), art 20(a)-(e), Comment 18 and Annex.

4. Jurisprudence from *Ad Hoc* Tribunals re: Requirement for “State or Organizational Policy”

Precedents from other international tribunals suggest that the requirement for a state or organizational plan is not an essential element of a crime against humanity, and in any event, should be interpreted loosely.

Other international tribunals, such as the International Criminal Tribunal for Yugoslavia (“ICTY”), and the International Criminal Tribunal for Rwanda (“ICTR”), do not require the demonstration of a state or organizational policy as a separate element of a crime against humanity. The ICTY defines a crime against humanity as a list of certain crimes, “committed in armed conflict, whether international or internal in character, and directed against any civilian population.”¹² Likewise, the ICTR defines a crime against humanity as a crime “committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.”¹³

¹² *Statute of the International Criminal Tribunal for the Former Yugoslavia*, SC Res 827 (25 May 1993), as amended by SC Res 1877 (7 July 2009), art 5. See also, *Prosecutor v Kunarac et al*, IT-96-23 & IT-96-23/1-A, Appeals Chamber Judgment (12 June 2002) at para 98 (noting that “the existence of a policy or plan may be evidentially relevant, but it is not a legal element of the crime”). (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber) [*Kunarac* Appeal].

¹³ *Statute of the International Criminal Tribunal for Rwanda*, SC Res 955 (8 November 1995), as amended by SC Res 1901 (16 December 2009), art 3. See also *Prosecutor v Akayesu*, ICTR-96-4-T, Trial Judgment (2 September 1998) at para 580 (noting that “common policy involving substantial public or private resources” is part of element of widespread or systemic attack, and that “there is no requirement that this policy must be adopted formally as the policy of a state” but that there must be “some kind of preconceived plan or policy”) (International Criminal Tribunal for Rwanda, Trial Chamber) [*Akayesu*].

The ICTY has treated the existence of a “political objective, a plan pursuant to which the attack is perpetrated or an ideology, in the broad sense of the word, that is, to destroy, persecute or weaken a community,” as a sub-element of the requirement that there be a “widespread or systematic” attack.¹⁴ The objectives of modern day piracy may generally be thought to be more economic than political or ideological and, accordingly, this element of the test may prove to be a poor fit for many acts of piracy. However, the line between economic or monetary objectives and political or ideological objectives is not always as clearly drawn as it might appear. Depending on the evidence that could be brought to bear in a given case, this element could potentially be satisfied, particularly if it could be demonstrated that there was a centralized “plan pursuant to which the attack was perpetrated”. The more entrenched and organized any such “centralized plans” become, the more the acts of piracy become less about spontaneous crimes of opportunity and more a way of life. The more the acts become a way of life with far-reaching structures and systems to sustain that way of life, the more they arguably take on many of the elements of a culture or sub-culture and thereby bear greater resemblance to the “political or ideological”, in much the same way that organized crime syndicates infect political structures and develop their own ideologies.

¹⁴ *Prosecutor v Blaškić*, IT-95-14-T, Judgment (3 March 2000) at paras 203 ff (International Criminal Tribunal for the former Yugoslavia, Trial Chamber) [*Blaškić*] [references omitted].

Further, this requirement has been loosely interpreted, and can be inferred from the circumstances present at the time of the crime. For example, in *Blaškić*, the ICTY noted that such plan “need not necessarily be declared expressly or even stated clearly and precisely. It may be surmised from the occurrence of a series of events,” including: general historical circumstances, the establishment of autonomous political structures . . . etc.¹⁵ The court also noted that the plan need not be developed at “the highest level of the State machinery,” and that “individuals ‘with *de facto* power or organized in criminal gangs’ are just as capable...of implementing a large-scale policy of terror and committing mass acts of violence.”¹⁶

Piracy based in Somalia, for example, could arguably satisfy these criteria for a Crime Against Humanity. Acts of piracy have become characterized by escalating frequency and violence, and are increasingly expansive in their geographic reach. They have also become more organized in ways that do not appear to be fully understood. Assuming that a full prosecution of alleged pirates would expose many of the particulars of the organizational structures in place, this element of the test for a Crime Against Humanity could arguably be met. Pirate attacks off the horn of Africa are planned from the territory of an exceedingly weak or “failed” state, against parties from outside that state who are merely engaged in the lawful traversing of international waters. They have rendered it highly dangerous to engage

¹⁵ *Ibid* at para 204 [references omitted].

¹⁶ *Ibid* at para 205 [references omitted].

in a legal activity in an expanding area of the world's seas that was formerly not subject to such risks. These characteristics are shared by other acts that have been considered Crimes Against Humanity.

5. Requirements for “Widespread and Systematic” Conduct

The Crimes Against Humanity provision under the ICTY statute was the first post-Cold War formulation of the offence. As such, the development of the offence has largely occurred under the ICTY and ICTR jurisprudence.¹⁷ While the terms “widespread” and “systematic” requirements are explicitly referenced in the ICTR and Special Court of Sierra Leone statutes, they are not specifically mentioned in the ICTY statute; nevertheless, the ICTY made them a requirement for establishing Crimes Against Humanity before that tribunal.¹⁸

6. “Widespread and Systematic” under the *Ad Hoc* Tribunals

While in practice, the two requirements often overlap, the requirements are, in fact, disjunctive.¹⁹ The ICTR Trial Chamber in *Akayesu* held that according to customary

¹⁷ I Bantekas & S Nash, *International Criminal Law*, 3d ed (New York: Routledge-Cavendish, 2007) at 127.

¹⁸ See e.g. *Prosecutor v Duško Tadić*, IT-94-1-A, Judgment (15 July 1999) at para 248, fn 311 (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber). The requirement was also specified in the Secretary-General's Report to the Security Council on the establishment of the ICTY (*Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993)*, UN Doc S/25704 (1993)) at para 48.

¹⁹ See e.g. *Prosecutor v Naletilić & Martinović*, IT-98-34-T, Judgment (31 March 2003) at para 236 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber); *Prosecutor v Kayishema et al*, ICTR-95-I-T, Judgment and Sentence (21 May 1999) at paras 122-123, n 28 (International

international law, “[t]he act can be part of [either] a widespread or systematic attack and need not be part of both.”²⁰

a) Widespread

‘Widespread’ refers to the magnitude of the acts and the number of victims. The Tribunal in *Prosecutor v. Kordić et al.* held that ‘widespread’ meant, “the cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude.”²¹

Under the jurisprudence of the *ad hoc* tribunals, while the attack must be widespread, the specific acts of the accused need not be widespread or systematic, only the overall attack.²²

b) Systematic

The ICTY in *Blaškić* referred to four elements when describing the nature of “systematic”:

Criminal Tribunal for Rwanda, Trial Chamber)[*Kayishema*]. Furthermore, it is interesting to note that the French version of the ICTR statute refers to the requirements as “généralisée et systématique” [emphasis added].

²⁰ *Supra* note 13 at para 579.

²¹ IT-95-14/2-T, Judgment (26 February 2001) at para 179 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber) [*Kordić Trial*], citing *Blaškić*, *supra* note 14 at para 206.

²² See e.g. *Prosecutor v Kordić et al*, IT-95-14/2-A, Judgment (17 December 2004) at para 94 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber) [*Kordić Appeal*].

- the existence of a political objective, a plan pursuant to which the attack is perpetrated or an ideology, in the broad sense of the word, that is, to destroy, persecute or weaken a community;
- the perpetration of a criminal act on a very large scale against a group of civilians or the repeated and continuous commission of inhumane acts linked to one another;
- the preparation and use of significant public or private resources, whether military or other;
- the implication of high-level political and/or military authorities in the definition and establishment of the methodical plan.²³

The Tribunal in Blaskic further elaborated upon the fact that the “plan” need not be explicitly mentioned; rather it can be inferred from a series of events. The Tribunal provided the following examples, which included the following:

- the general historical circumstances and the overall political background against which the criminal acts are set;

²³ *Supra* note 14 at para 203.

-the establishment and implementation of autonomous political structures at any level of authority in a given territory;

-the general content of a political programme, as it appears in the writings and speeches of its authors;

-media propaganda;

-the establishment and implementation of autonomous military structures;

-the mobilisation of armed forces;

-temporally and geographically repeated and co-ordinated military offensives;

-links between the military hierarchy and the political structure and its political programme;

-the scale of the acts of violence perpetrated – in particular, murders and other physical acts of violence, rape, arbitrary imprisonment, deportations and expulsions or the destruction of non-military property, in particular, sacred sites.²⁴

²⁴ *Ibid* at para 204.

7. ICC Approach to “Widespread and Systematic”

One commentator, solely citing another, has suggested that the requirements for “widespread or systematic” under Article 7 of the Rome Statute differs from the Crimes Against Humanity provisions found in the ICTY and ICTR, specifically arguing that the test is more difficult to meet.

In order to satisfy the requirements under the Rome Statute, it is suggested that the prosecutor must show that the attack involved multiple crimes, all of which are widespread or systematic, in addition to the overall requirement that the attack be widespread or systematic.²⁵ However, this argument seems dubious, as the original authority cited does not say this. Furthermore, it is not consistent with the clear wording of the Rome Statute. Article 7(2)(a) does state that an attack means “a course of conduct involving the multiple commission of acts pursuant to or in furtherance of a State or organizational policy to commit such attack.”²⁶ However, it does not say that all of the individual acts that are themselves part of that course of conduct are also widespread or systematic. Accordingly, while not every inhumane act was intended to be swept into the definition of Crimes Against Humanity, nor is

²⁵ Bantekas & Nash, *supra* note 17 at 135, citing D Robinson, “Defining Crimes Against Humanity at the Rome Conference” (1999) 93 AJIL 43 at 51.

²⁶ *Ibid.*

there a strong reason to believe that the ICC's approach to "widespread" or "systematic" will materially differ from that taken before the ad hoc tribunals.

8. Definition of "Civilian Population" for Purposes of Article 7 of the Rome Statute?

A Crime Against Humanity requires the victimization of more than a single individual; it requires an act directed against a group of civilians. As set out in the Rome Statute, a threshold criteria for an act to be a Crime Against Humanity requires that there be an attack directed against any "civilian population."

The Elements of the Crimes have been promulgated in accordance with Article 9 of the Rome Statute and are designed to assist the ICC in the interpretation and application of the crimes that are within the jurisdiction of the ICC, including Crimes Against Humanity.²⁷ The Working Group on Elements of the Crimes (the "Working Group"), which constituted delegates from all participating states, discussed the possibility of providing a definition of what constitutes a "civilian population."²⁸ During the discussion, the delegates discussed the fact that all persons are civilian when there is no armed conflict.²⁹ The delegations also agreed that the "civilian population" test was a flexible test.³⁰ Ultimately, the Working Group decided that

²⁷ Rome Statute, *supra* note 1, art 9.

²⁸ RS Lee, ed, *The International Criminal Court: Elements of Crimes and Rules of Evidence* (New York: Transnational Publishers, 2001) at 78.

²⁹ *Ibid.*

³⁰ *Ibid.*

the definition was “too complex a subject and an evolving area in the law, better left for resolution in case law.”³¹

In *Prosecutor v. Duško Tadić* the court examined the meaning of civilian population.³² The court held that crimes against humanity can be committed against civilians of the same nationality as the perpetrator or those who are stateless, as well as those of a different nationality.³³ Moreover, in the *Prosecutor v. Jelisić*, the court stated that the term “civilian population” must be interpreted broadly.³⁴ Thus, in the context of piracy, a civilian population is likely not limited to a group of persons all of the same nationality.

In *Tadić*, the court analyzed the definitions of the terms, “civilian” and “population.” At issue in *Tadić* was whether individuals, who were mobilizing in combative groups without necessarily being under the direct control of the central government, could be considered civilians. As an initial matter the prosecution and defense agreed that the term “civilians” covers all non-combatants.³⁵ Moreover, the court noted that carrying out acts of resistance does not necessarily preclude someone from being a victim of crimes against humanity. The court looked to the

³¹ *Ibid.*

³² IT-94-1-T, Opinion and Judgment (7 May 1997) at para 635 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber) [*Tadić*].

³³ *Ibid.*

³⁴ IT-95-10-T, Judgment (14 December 1999) at para 54 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber) [*Jelisić*].

³⁵ *Tadić*, *supra* note 32 at para 637.

Vukovar Hospital Decision,³⁶ which held that although crimes against humanity must target a civilian population, individuals who at one time performed acts of resistance may, in certain circumstances, be victims of crimes against humanity. In the *Vukovar Hospital Decision*, patients in a hospital, either civilians or resistance fighters who had laid down their arms were considered victims of crimes against humanity. Based on the foregoing, an individual who does not participate in hostilities should constitute a civilian.

The term population does not require that an entire population of a state or territory be victimized.³⁷ The term's usage is intended to impose a requirement that there be more than a single or isolated act. In *Tadić*, the court articulated this requirement as follows: "the 'population' element is intended to imply crimes of a collective nature and thus exclude single or isolated acts which, although possibly constituting war crimes or crimes against national penal legislation, do not rise to the level of crimes against humanity."³⁸ The court in *Tadić* went on to cite the United Nations War Crimes Commission to explain the purpose behind the aforementioned requirement:

Isolated offences did not fall within the notion of crimes against humanity. As a rule systematic mass action, particularly if it was

³⁶ *Ibid* at para 643, citing *Prosecutor v Mrkšić et al*, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, IT -95-13-R61 (3 April 1996) (International Criminal Tribunal for the former Yugoslavia, Trial Chamber) [*Vukovar Hospital Decision*].

³⁷ *Ibid* at para 644.

³⁸ *Ibid* at para 644, citing Egon Schwelb, "Crimes Against Humanity" (1946) 23 Brit YB Int'l L 178 and *Memorandum of the Secretary-General, The Charter and Judgement of the Nuremberg Tribunal: History and Analysis*, UN Doc A/CN.4/5 (UN Publication, Sales No: 1949.V.7) at 67.

authoritative, was necessary to transform a common crime, punishable only under municipal law, into a crime against humanity, which thus became also the concern of international law. Only crimes which either by their magnitude and savagery or by their large number or by the fact that a similar pattern was applied at different times and places, endangered the international community or shocked the conscience of mankind, warranted intervention by States other than that on whose territory the crimes had been committed, or whose subjects had become their victims.³⁹

In the present case, the typical victims of piracy are the captains and crews of international shipping liners. The victims are not all one nationality, but encompass individuals from a large number of nations. These individuals are not combative; they are simply conducting their job, which is to operate shipping liners. Thus, these individuals should be considered “civilians.” Furthermore, piracy is a crime that is of a collective or systematic nature in that the attacks are continuous and conducted on a large organized scale. Thus, the attacks are targeted at a “population.” Based on the foregoing, the victims of piracy should constitute a civilian population under Article 7 of the Rome Statute.

9. The Subjective Element

Crimes Against Humanity have an additional *mens rea* requirement, also known as the subjective element. This subjective element is common to all of the enumerated

³⁹ *Ibid* at para 644, citing Robert Alderson Wright, United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of Laws of War* (London: HMSO, 1948) at 179.

crimes. The ICTY jurisprudence has articulated the additional subjective requirement as follows:

It is...irrelevant whether the accused intended his acts to be directed against the targeted population or merely against his victim. It is the attack, not the acts of the accused, which must be directed against the target population and the accused need only know that his acts are part thereof.⁴⁰

Similarly, before the ICC, the perpetrator must also act with knowledge that their underlying offence was part of the widespread or systematic attack against a civilian population.⁴¹

While each decision would turn on the particular facts of the case and the specific evidence adduced, it is arguable and potentially likely that some individual accused pirates who commit murder during the course of a piracy operation would be aware of the existence of other similarly-situated individuals or groups committing similar crimes. Accordingly, a significant challenge would be to establish that different groups of accused pirates were acting as part of a larger organizational operation.

Contemporary piracy had been divided into two categories, which can be summarized as follows:

I) Small scale operations that are interested in the possession of the crew or equipment on board the vessel;

⁴⁰ *Kunarac Appeal*, *supra* note 12 at para 103.

⁴¹ See *Bantekas & Nash*, *supra* note 17 at 135.

II) Well-organized groups that extend beyond “random attacks at seas.” The purpose of these attacks are generally to seize the cargo or the vessel itself and then to subsequently re-register the ship. Once this is done, the pirates would contact shipping agents who hold expired letters of credit and offer them the services of the ship. Once the ship is loaded with the shipper’s cargo, the pirates would sail to a different destination than specified in the bill of lading and make arrangements with an accomplice or an unsuspecting buyer.⁴²

While the latter of the two categories lends itself well to proving the additional *mens rea* requirement, the former might prove to be more of a high hurdle in terms of proving that the accused was aware of the larger attack.

10. Select Enumerated Crimes Constituting Crimes Against Humanity

a) Murder

The ICTY jurisprudence as outlined the elements of murder as follows:

- a) the victim must have died;
- b) his/her death must be caused by an act or omission of the accused, or of a person or persons for whose acts or omissions the accused bears criminal responsibility; and

⁴² *Ibid* at 175.

- c) the act was done, or the omission was made, with an intention: (i) to kill, or (ii) to inflict serious injury, in reckless disregard of human life.⁴³

The jurisprudence under the ICTY and ICTR with respect to the premeditation requirement is divided; specifically, the ICTY in *Blaškić* and *Kupreskić* take opposing views with respect to whether premeditation is a requirement to constitute a Crime Against Humanity, the latter indicating that it is a requirement.⁴⁴ Specifically, the court in *Blaškić* stated: “the Trial Chamber is of the view that it is murder (“meurtre”) and not premeditated murder (“assassinat”) which must be the underlying offence of a crime against humanity” while in *Kupreskić* the court made the following pronouncement:

In *Kayishema* it was noted that the standard of mens rea required is intentional and premeditated killing. The result is premeditated when the actor formulated his intent to kill after a cool moment of reflection. The result is intended when it is the actor’s purpose, or the actor is aware that it will occur in the ordinary course of events.⁴⁵

In contrast to some of the other enumerated crimes listed under Article 7 of the Rome Statute, murder was listed without any further clarification; the drafters considered the concept of murder to be sufficiently well understood by the

⁴³ *Ibid* at 129, citing *Prosecutor v Mucić et al (Čelebići Camp Case)*, IT-96-21-T, Trial Judgment (16 November 1998) at para 439 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber).

⁴⁴ William A Schabas, *The UN International Criminal Tribunals:- The former Yugoslavia, Rwanda and Sierra Leone* (Cambridge: Cambridge University Press, 2006) at 199, citing *Blaškić*, *supra* note 14 at para 216 and *Prosecutor v Kupreškić et al*, IT-95-16-T, Judgment (14 January 2000) at para 561 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber) [*Kupreškić*].

⁴⁵ *Kupreškić*, *ibid* at para 561, citing *Kayishema*, *supra* note 19 at para 139.

international legal community.⁴⁶ Under the ICC Elements of Crimes, the requirements for murder as a crime against humanity are as follows: 1) the perpetrator killed one or more persons; 2) the conduct was committed as part of a widespread or systematic attack directed against a civilian population; 3) the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.

Piracy is defined under Article 15 of the *Convention on the High Seas* (“CHS”) as follows:

Piracy consists of any of the following acts:

(1) ***Any illegal acts of violence***, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed [*emphasis added*]:

- a. On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
- b. Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

⁴⁶ Lee, *supra* note 28 at 80.

- (2) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- (3) Any act of inciting or of intentionally facilitating an act described in subparagraph 1 or subparagraph 2 of this article.

By any measure, murder should fall within the definition of “any illegal acts of violence” under the definition of piracy contained in the *CHS*. As such, if during the course of committing piracy, a murder was committed by a pirate with the knowledge that their conduct was intended to be part of a widespread or systematic attack against a civilian population, the crime would arguably fall within the ambit of murder in the context of crimes against humanity.

a) Deportation or Forcible Transfer of Population

Article 7(2)(d) provides that “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.

The Elements of Crimes requires the following: 1) the perpetrator deported or forcibly transferred, without grounds permitted under international law, one or more persons to another State or location, by expulsion or other coercive acts; 2) such

person or persons were lawfully present in the area from which they were so deported or transferred; 3) the perpetrator was aware of the factual circumstances that established the lawfulness of such presence; 4) the conduct was committed as part of a widespread or systematic attack directed against a civilian population; and 5) the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

The term “forcibly” is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment. “Deported or forcibly transferred” is interchangeable with “forcibly displaced.”

According to *Black’s Law Dictionary*, “deportation” is “the act or an instance of removing a person to another country; esp., the expulsion or transfer of an alien from a country.”⁴⁷ Moreover, the term “forcible transfer of population” was included to make expressly clear that transfers of populations within a state’s borders were covered.⁴⁸ The Elements of Crimes confirms that the deportation or forcible transfer of an individual to another location, including within a state, is covered by Article 7(1)(d) of the Rome Statute.

⁴⁷ *Black’s Law Dictionary*, 8th ed by Bryan A Garner (St Paul, MN: Thomson/West, 2004).

⁴⁸ Lee, *supra* note 28 at 86.

Based on the foregoing, an argument could be made that Article 7(1)(d) requires a transfer of an individual from his place of residence to another place of residence. Piracy does not result in the transfer of the victims' residence. If this were the case, acts of piracy would likely not constitute Deportation or Forcible Transfer of Population under Article 7(1)(d).

On the other hand, acts of piracy often involve the forcible transfer of persons to another location by coercive acts. The victims are lawfully present in the area from which they are being transferred and the pirates are aware that the victims are lawfully in the area. Thus, there is an argument that acts of piracy could be characterized as Deportation or Forcible Transfer of Population.

**b) Imprisonment or Other Severe Deprivation of Physical Liberty in
Violation of Fundamental Rules of International Law**

Perhaps the best "fit" for acts of piracy from among the enumerated crimes against humanity contained in the Rome Statute is the crime of imprisonment, set out in Article 5(e). This crime includes an act or omission that results in arbitrary deprivation of physical liberty, or that is reasonably likely to effect that result. Given the *modus operandi* of modern-day pirates of holding passengers and crew prisoner, seeking the payment of ransom, these acts and the circumstances in which they are carried out dovetail with the primary elements of the offence.

“Arbitrary deprivation of liberty” requires that there be no legal justification for the detention⁴⁹, which seems self-evident in circumstances where the impugned acts include taking hostages for ransom. The ingredient that appears to present the largest challenge, as discussed elsewhere in this memorandum, is the requirement for the acts to be part of a “widespread or systematic attack directed against a civilian population”. The ICTY Appeals Chamber has confirmed that the crime against humanity of imprisonment “...should be understood as contemplating arbitrary imprisonment, that is to say, the deprivation of liberty of the individual without due process of law, as part of a widespread or systematic attack directed against a civilian population’.⁵⁰ To date, there is little jurisprudence on this particular issue before the various UN *ad hoc* war crimes tribunals, all of them being before the ICTY.⁵¹

c) Torture

The Rome Statute defines “torture” as “the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the

⁴⁹ *Prosecutor v Krnojelac*, IT-97-25-T, Judgment (15 March 2002) at para 115 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber) [*Krnojelac*]; *Kordić Trial*, *supra* note 21 at paras 302-303.

⁵⁰ *Kordić Trial*, *ibid* at para 302; *Kordić Appeal*, *supra* note 22 at para 116; *Kunarac Appeal*, *supra* note 12 at para 142. See also *Krnojelac*, *supra* note 49 at para 179; *Prosecutor v Furundžija*, IT-95-17/1-A, Judgment (21 July 2000) (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber).

⁵¹ See Schabas, *supra* note 44.

control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.”⁵²

The elements of the crime of torture are the following: (1) that the perpetrator inflicted severe physical or mental pain or suffering on a person; (2) such person was in the custody or under the control of the perpetrator; and (3) such pain and suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions.⁵³

According to commentators, this definition does not require instigation by a public official, and therefore allows commission of the crime by “not only State actors but also by non-State actors.”⁵⁴ In fact, the drafters of the statute had reached consensus that the court should not limit prosecution of non-state actors.⁵⁵

Based on this definition, the acts of pirates who detain and inflict “severe physical or mental pain and suffering” on an individual would amount to torture under the Rome Statute.

d) Forced Disappearance

The Rome Statute defines “forced disappearance” as “the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a

⁵² Rome Statute, *supra* note 1, art 7(2)(e).

⁵³ Lee, *supra* note 28 at 90.

⁵⁴ *Ibid.*

⁵⁵ *Ibid* at 92.

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.”⁵⁶

The basic elements of the crime of forced disappearance are the following: (1) that the perpetrator arrested, detained or abducted a person; (2) that such deprivation of liberty was followed by a refusal to acknowledge that deprivation of liberty or give information about the whereabouts of such person; (3) that the perpetrator was aware that such deprivation of liberty would be followed by a refusal to acknowledge that deprivation of liberty or give information about the whereabouts of such person; (4) such deprivation of liberty was “carried out by, or with the authorization, support, or acquiescence of a State or political organization”; (5) that the refusal to acknowledge that deprivation of liberty or give information about the whereabouts of such person was carried out by, or with the authorization, support, or acquiescence of a State or political organization; and (6) the perpetrator intended to remove such person from the protection of the law for a prolonged period of time.⁵⁷

⁵⁶ Rome Statute, *supra* note 1, art 7(2)(i).

⁵⁷ Lee, *supra* note 28 at 92.

Based on this definition, provided that it can be argued that pirates are a qualifying “State or political organization,” the acts committed by pirates would likely be available for prosecution under the Rome Statute.

e) Other Inhumane Acts

Article 7(1)(k) provides that “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health” fall within the category of Crimes Against Humanity.

The Elements of Crimes requires the following: 1) the perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act; 2) such act was of a character similar to any other act referred to in article 7, paragraph 1, of the Statute; 3) the perpetrator was aware of the factual circumstances that established the character of the act; 4) the conduct was committed as part of a widespread or systematic attack directed against a civilian population; and 5) the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Article 7(1)(k) was included as a catch-all clause for acts that do not squarely fall within Article 7(1)(a)-(j). The drafters recognized that it is impossible to

exhaustively enumerate every kind of inhumane act which could constitute a crime against humanity.⁵⁸

The ICTY examined this enumerated crime and noted that “[t]here is a concern that this category lacks precision and is too general to provide a safe yardstick for the work of the Tribunal and hence, that it is contrary to the principle of the “specificity” of criminal law.”⁵⁹ The Tribunal cited to an International Committee of the Red Cross comment on what would constitute a violation of the obligation to provide “humane treatment” contained in common Article 3 of the *Geneva Conventions*:

It is always dangerous to try to go into too much detail – especially in this domain. However great the care taken in drawing up a list of all the various forms of infliction, it would never be possible to catch up with the imagination of future torturers who wished to satisfy their bestial instincts; and the more specific and complete a list tries to be, the more restrictive it becomes. The form of wording adopted is flexible and, at the same time, precise.⁶⁰

Moreover, the Tribunal looked to the usage of the term “other inhumane acts” in other international human rights instruments, such as the *Universal Declaration on Human Rights* the two United Nations Covenants on Human Rights of 1966:

Drawing upon the various provisions of these texts, it is possible to identify a set of basic rights appertaining to human beings, the

⁵⁸ *Ibid* at 106.

⁵⁹ *Kupreškić*, *supra* note 44 at para 563.

⁶⁰ *Ibid*, citing the 1958 ICRC Commentary on *Convention (IV) relative to the Protection of Civilian Persons in Time of War*. Geneva, 12 August 1949, online: ICRC <<http://www.icrc.org>>.

infringement of which may amount, depending on the accompanying circumstances, to a crime against humanity. Thus, for example, serious forms of cruel or degrading treatment of persons belonging to a particular ethnic, religious, political or racial group, or serious widespread or systematic manifestations of cruel or humiliating or degrading treatment with a discriminatory or persecutory intent no doubt amount to crimes against humanity: inhuman or degrading treatment is prohibited by the United Nations Covenant on Civil and Political Rights (Article 7), the European Convention on Human Rights, of 1950 (Article 3), the Inter-American Convention on Human Rights of 9 June 1994 (Article 5) and the 1984 Convention against Torture (Article 1).⁶¹

As discussed, Article 7(1)(k) was included in the Rome Statute as a catch-all provision, intended to encompass future acts that have not been currently contemplated but are of the same caliber as the other enumerated crimes.

Arguably, piracy does not fall within this category because it is a crime that has been in existence for thousands of years. Thus, if the drafters felt that piracy amounted to the same level as the other enumerated crimes against humanity, they could have listed it as a specific crime against humanity. On the other hand, piracy results in murder, kidnapping, theft, and other similar atrocities on a widespread basis. Therefore, it is arguable that piracy could fall within the catch-all provision of Article 7(1)(k) of the Rome Statute.

⁶¹ *Kupreškić, ibid* at para 564.

11. State conduct, including domestic legislation and jurisprudence re: Crimes Against Humanity

The following countries have incorporated the definition of Crimes Against Humanity found in the Rome Statute by reference to Article 7 of the Rome Statute: Argentina,⁶² Ireland,⁶³ Kenya,⁶⁴ New Zealand,⁶⁵ South Africa,⁶⁶ and the United Kingdom.⁶⁷

Additionally, numerous other countries have enacted crimes against humanity statutes. The majority of the statutes require a widespread or systematic attack that is directed against a civilian population. Also, the majority of countries include most or all of the acts that are considered crimes against humanity under the Rome Statute (Murder; Extermination; Enslavement; Deportation or forcible transfer of population; Imprisonment; Torture; Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence; Persecution; Enforced disappearance of persons; The crime of apartheid; and Other inhumane acts of a similar character).

See **Exhibit A** for the crimes against humanity statutes of Armenia, Australia, Bosnia-Herzegovina, Bulgaria, Canada, Croatia, Estonia, France, Germany, South

⁶² *Law 26200 of December 13, 2006* (Argentina, BOLETIN OFICIAL, 9 January 2007).

⁶³ *International Criminal Court Act 2006* (Ireland), 2006/30, art 7.

⁶⁴ *International Crimes Act* (Kenya), 2008/16.

⁶⁵ *International Crimes and International Criminal Court Act* (NZ), 2000/26.

⁶⁶ *The Implementation of the Rome Statute of the International Criminal Court* (S Afr), 2002/27.

⁶⁷ *International Criminal Court Act 2001* (UK), c 17.

Korea, Norway, and Slovenia. This memorandum includes the statutes that are in English or translated into English. The Statutes of Argentina, Ireland, Kenya, New Zealand, South Africa and the UK incorporate the Rome Statute by reference. Accordingly we did not include those statutes in Exhibit A.

The United States does not have legislation relating to crimes against humanity. Proposed legislation, the Crimes Against Humanity Act of 2010, was introduced in 2010 before the Senate but failed to become law.

12. Select state conduct, including treaties, domestic legislation and jurisprudence re: piracy

As an initial matter, there is not a general international consensus as to the definition of piracy.⁶⁸ In the United States, the seminal case on the issue was *US v. Smith*, which was decided in 1820 by the US Supreme Court and defined piracy as “robbery or forcible depredation upon the sea.”⁶⁹ Thus, under US law, the act of piracy requires that an actual robbery take place. Other countries such as the UK and Australia, use the definition of piracy found in the *United Nations Convention on the Law of the Seas* (“UNCLOS”). Piracy under UNCLOS consists of: (i) any act of violence; (ii) committed for private ends; (iii) on the high seas or in a place beyond

⁶⁸ See George D Gabel, “Smoother Seas Ahead: The Draft Guidelines as an International Solution to Modern-Day Piracy” (2007) 81:5-6 Tul L R 1433; Helmut Tuerk, “The Resurgence of Piracy: A Phenomenon of Modern Times” (2009) 17 U Miami Int’l & Comp L Rev 1.

⁶⁹ See *United States v Said et al* (ED Va 2010); *United States v Smith*, 18 US 153, 5 Wheat 153 (1820).

the relevant jurisdiction of any State; and (iv) which is committed by one vessel against another. The UNCLOS definition of piracy does not require robbery.

Below are the relevant statutes from the United States, the United Kingdom and Australia:

a) UNCLOS

UNCLOS:

Article 101

Definition of piracy

Piracy consists of any of the following acts:

- (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
 - (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
 - (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

- (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).⁷⁰

Article 102

Piracy by a warship, government ship or government aircraft whose crew has mutinied

The acts of piracy, as defined in article 101, committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private ship or aircraft.⁷¹

Article 103

Definition of a pirate ship or aircraft

A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred

⁷⁰ *UN Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 397 (entered into force 16 November 1994) [UNCLOS].

⁷¹ *Ibid.*, art 102.

to in article 101. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act.⁷²

Article 104

Retention or loss of the nationality of a pirate ship or aircraft

A ship or aircraft may retain its nationality although it has become a pirate ship or aircraft. The retention or loss of nationality is determined by the law of the State from which such nationality was derived.⁷³

Article 105

Seizure of a pirate ship or aircraft

On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.⁷⁴

Article 106

⁷² *Ibid*, art 103.

⁷³ *Ibid*, art 104.

⁷⁴ *Ibid*, art 105.

Liability for seizure without adequate grounds

Where the seizure of a ship or aircraft on suspicion of piracy has been effected without adequate grounds, the State making the seizure shall be liable to the State the nationality of which is possessed by the ship or aircraft for any loss or damage caused by the seizure.⁷⁵

*Article 107**Ships and aircraft which are entitled to seize on account of piracy*

A seizure on account of piracy may be carried out only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.⁷⁶

b) US

18 USC § 1651: Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.

⁷⁵ *Ibid*, art 106.

⁷⁶ *Ibid*, art 107.

c) UK

s. 26(1), Merchant Shipping and Maritime Security Act 1997 (c. 28): For the avoidance of doubt it is hereby declared that for the purposes of any proceedings before a court in the United Kingdom in respect of piracy, the provisions of the United Nations Convention on the Law of the Sea 1982 that are set out in Schedule 5 shall be treated as constituting part of the law of nations.⁷⁷

d) Australia

Crimes Act 1914, section 51:

In this Part:

"act of piracy" means an act of violence, detention or depredation committed for private ends by the crew or passengers of a private ship or aircraft and directed:

(a) if the act is done on the high seas or in the coastal sea of Australia-- against another ship or aircraft or against persons or property on board another ship or aircraft; or

(b) if the act is done in a place beyond the jurisdiction of any country-- against a ship, aircraft, persons or property.

"Australia" includes the External Territories.

"coastal sea of Australia" means:

(a) the territorial sea of Australia; and

(b) the sea on the landward side of the territorial sea of Australia and not within the limits of a State or Territory;

and includes airspace over those seas.

"high seas" means seas that are beyond the territorial sea of Australia and of any foreign country and includes the airspace over those seas.

"offence against this Part" includes:

(a) an offence against section 6 that relates to an offence against a provision of this Part; and

(b) an offence against a provision of this Part that is taken to have been committed because of section 11.2 or 11.2A of the *Criminal Code* ; and

(c) an offence against section 11.1, 11.4 or 11.5 of the *Criminal Code* that relates to an offence against a provision of this Part.

"pirate-controlled ship or aircraft" means a private ship or aircraft which is under the control of persons that:

(a) have used, are using or intend to use the ship or aircraft in the commission of acts of piracy; or

(b) have seized control of the ship or aircraft by an act of piracy.

"place beyond the jurisdiction of any country" means a place, other than the high seas, that is not within the territorial jurisdiction of Australia or of any foreign country.

"private ship or aircraft" means a ship or aircraft that is not being operated for naval, military, customs or law enforcement purposes by Australia or by a foreign country, and includes a ship or aircraft that has been taken over by its crew or passengers.

"ship" means a vessel of any type not permanently attached to the sea-bed, and includes any dynamically supported craft, submersible, or any other floating craft, other than a vessel that has been withdrawn from navigation or is laid up.

13. Select Piracy Jurisprudence From Domestic Courts

In recent years, domestic courts in several countries have been able to successfully prosecute Somali pirates based on violations of their domestic laws. These prosecutions are useful to consider as guidance, as they may provide some insight in how other jurisdictions have characterized (and successfully prosecuted) the underlying criminal acts constituting a piracy attack.

This is by no means an exhaustive list of piracy prosecutions that have occurred recently, it merely represents a sampling of recent piracy prosecutions and the types of charges that have been brought against pirates.

United States – Prosecution arising out of M/V CEC Future and U.S.S. Ashland Incidents

The M/V CEC Future was attacked on November 7, 2008 by Somali pirates, as it was transiting through the Gulf of Aden, on the high seas, and outside of the territorial waters of any country.⁷⁸ Jama Idle Ibrahim was one of the pirates who attached the vessel – Ibrahim and others captured the vessel using armed force, and held the vessel for 71 days until ransom was paid for the crew and vessel's release.⁷⁹

⁷⁸ *United States of America v Jama Idle Ibrahim, United States of America v Jama Idle Ibrahim*, (District of Columbia District Court 2010, No 10-231), Statement of Facts (8 September 2010) [*Ibrahim*]. See also “Lengthy Term Handed Down for Pirate” (7 April 2011) (blog), online: LegalTimes < <http://legaltimes.typepad.com>>.

⁷⁹ *Ibrahim, ibid.*

During this time, the pirates threatened the crew and controlled their movements with weapons, stole money, food and supplies.⁸⁰ Ibrahim was captured while attempting to attack a U.S. naval vessel, the U.S.S. Ashland.⁸¹

For crimes committed in connection with the U.S.S. Ashland incident, Ibrahim was charged with, inter alia, attacking to plunder a vessel (18 U.S.C. §1659, §2), acts of violence against persons of a vessel (18 U.S.C. §2291(a)(6)), using a firearm during a crime of violence (18 U.S.C. §924(c)(1)(A)(iii)). For crimes committed in connection with the CEC Future incident, Jama Idle Ibrahim was charged under U.S. statutes on the following grounds – conspiracy to commit piracy under the law of nations (18 U.S.C. §371, §1651) and conspiracy to use a firearm during a crime of violence (18 U.S.C. §924(o)).⁸² Ibrahim pleaded guilty to the charges arising out of both incidents.⁸³ Ibrahim was sentenced to a total of 55 years imprisonment, and 6 years of supervised in release, in connection with his role in both incidents.⁸⁴

United States – Prosecution arising out of Maersk Alabama Incident

⁸⁰ *Ibid.*

⁸¹ *Ibid.*, Sentencing Memorandum (22 November 2010).

⁸² *Ibid.*, Information (27 August 2010).

⁸³ *Ibid.*, Sentencing Memorandum (22 November 2010).

⁸⁴ *Ibid.*, Judgment (30 November 2010).

A U.S. commercial vessel, the Maersk Alabama was seized by Somali pirates, including Adiwali Abdiqadir Muse on around April 7, 2009.⁸⁵ The pirates left the vessel, taking the captain as hostage – on April 12, 2009, after a stand-off between the pirates and US naval forces, US forces mounted a rescue operation, which resulted in the capture of Muse and the killing of the three other pirates involved.⁸⁶

Muse was indicted on various counts under U.S. criminal statutes. Muse pled guilty to six counts, and was held guilty for: the hijacking of a vessel, conspiracy to hijack three ships, hostage taking, conspiracy to engage in hostage taking, kidnapping and conspiracy to engage in kidnapping.⁸⁷ Muse was sentenced to a total of 53.75 years, as well as 8 years of supervised release.⁸⁸

Spain – Prosecution arising out of MS Alakrana Incident

The Criminal Chamber of the National Court of Spain recently found Cabidweli Cabdullahi and Raageggesey Hassan Aji guilty on 36 counts of illegal detention and robbery with violence for their role in the hijacking of the MS Alakrana, a Spanish

⁸⁵ *United States of America v Abduwali Abdukhadir Muse* (SD NY 2010, No 9-512), Sentencing Submission of Abduwali Abdukhadir Muse (2 February 2011) [*Muse*]; Robert D McFadden & Scott Shane, “In Rescue of Captain, Navy Kills 3 Pirates” *The New York Times* (12 April 2009), online: The New York Times <<http://www.nytimes.com>>.

⁸⁶ *Muse, ibid.*

⁸⁷ *Ibid*, Sentencing Submission of Abduwali Abdukhadir Muse (2 February 2011).

⁸⁸ *Ibid*, Judgment in a Criminal Case (25 February 2011).

fishing vessel in 2009.⁸⁹ Charges of terrorism, membership in an organized crime group and torture were dropped.⁹⁰

After being captured by Spanish forces while fleeing the site of the hijacking, the pirates were charged with various crimes under different articles of the Spanish Penal Code, such as illegal association, illegal detention, robbery with violence, membership in an armed gang, terrorism, crimes against “integridad moral” (moral integrity).⁹¹ The court’s opinion addressed the question of jurisdiction, and affirmed that the court had jurisdiction of the matter, as the crimes were committed in Spanish territory, or on board a Spanish vessel, and moreover, Spain possessed jurisdiction over piracy crimes pursuant to international treaties/instruments to which it is a party (i.e., *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*; *Convention of the Law of the Sea*, Art. 105; U.N. Security Council resolutions 1814, 1816 and 1838 of 2008).⁹²

⁸⁹ “Spain Sentences Somali Pirates to 439 Years’ Jail Each” *BBC News* (3 May 2011), online: BBC News <<http://www.bbc.co.uk>>.

⁹⁰ *Ibid.*

⁹¹ Audiencia Nacional Sala de lo Penal Sección Cuarta, Sentencia No 10/2011 (3 May 2011), online: <http://estaticos.elmundo.es/documentos/2011/05/03/sentencia_alakrana.pdf>.

⁹² *Ibid* at 21-22.

Netherlands – Prosecution arising out of Samanyolu Incident

Five pirates were convicted in Dutch court in June 2010, based on their role in the 2009 attack of a Dutch Antilles ship, the Samanyolu.⁹³ Defense lawyers had attempted to raise the Dutch court’s lack of jurisdiction as a bar to prosecution, but the court determined that Dutch criminal code had vested universal jurisdiction for cases of piracy on the open seas, and that such laws were not contrary to international conventions.⁹⁴ They were sentenced to five years imprisonment, and the judge presiding over the case had noted that in imposing the sentence, he had taken into account “the difficult conditions in Somalia that led the men to piracy.”⁹⁵

⁹³ “Five Somali Men Jailed for Piracy by Dutch Court” *BBC News* (17 June 2010), online: BBC News <<http://www.bbc.co.uk>> [“Five Somali Men Jailed for Piracy”].

⁹⁴ “Netherlands court convicts Somali pirates” *MarineLog* (17 June 2010), online: MarineLog <<http://www.marinelog.com>>.

⁹⁵ “Five Somali Men Jailed for Piracy”, *supra* note 93.

EXHIBIT 'A'

Armenia

Criminal Code for Armenia (adopted on April 18, 2003)

Article 390. Serious breach of international humanitarian law during armed conflicts.

1. The following serious violations of international humanitarian norms during armed conflict against persons not immediately engaged in military actions or defenseless persons, the injured, ill, medical personnel or clergy, sanitary units or sanitary means of transportation, POWs, civilians, civil population, refugees, protected persons or other protected persons during military actions:

- 1) murder,
- 2) torture and inhuman treatment, including biological experiments;
- 3) willfully inflicted serious sufferance or other actions threatening man's physical or mental state,

is punished with imprisonment for 8-15 years, or for life.

2. The committal of the following acts seriously violating international norms with respect to persons and facilities mentioned in part 1 of this Article:

- 1) inflicting damage to health,
- 2) forcing a protected person or POW to serve in the opponent army,
- 3) deprivation of a protected person or POW from impartial court trial,
- 4) illegal deportation, removal and arrest of a protected person, or deprivation of freedom otherwise,
- 5) taking hostages,
- 6) illegal, willful destruction or realization of property not caused by military necessity,

is punished with imprisonment for 5-12 years.

3. The following acts seriously breaching international humanitarian norms, causing grave damage to human physical or mental state during armed conflicts:

- 1) assault on civilian population or individual civilians;
- 2) not selective assault which inflicts damage to the civilian population or civilian facilities, if it is obvious that such assault will cause large losses amongst civilians or extremely large losses to civilian facilities, if such damages are redundant for the achievement of specific and immediate military supremacy;
- 3) assault on facilities and equipment containing hazardous forces, if it is obvious that the assault will cause extremely large damage to civilian facilities, if such damages are redundant for the achievement of specific and immediate military supremacy;
- 4) targeting unprotected areas and demilitarized zones,
- 5) assault on a person who, obviously for the perpetrator, ceased immediate participation in military actions,

is punished with imprisonment for 10-15 years, or for life.

4. The following acts seriously breaching the norms of international humanitarian law during armed conflicts:

- 1) re-population by the aggressor state of part of one's own population in the occupied territories, or depopulation of the whole population or part thereof in the occupied territory, or movement within the occupied territory or beyond its boundaries,
- 2) unjustified delay in the repatriation of POWs or civilians,
- 3) humiliation of a person's self-esteem, based on apartheid or racial discrimination, application of inhuman and other humiliating practices,
- 4) targeting specially protected, clearly marked, cultural, spiritual and historical monuments, works of art, ceremonial places, and inflicting large damage to the latter as a result of assault, if these facilities are not in near proximity from military objectives and if there is no information attesting to the use of these historical monuments, works of art, ceremonial places by the enemy for military purposes,

is punished with imprisonment for 8-12 years,

5. During armed conflicts, medical intervention not necessitated by the health condition of the persons under jurisdiction of the enemy, arrested or otherwise detained, and detrimental for the physical or mental condition of the latter violating universally recognized medical norms, particularly, even with consent of these persons, inflicting physical injuries to people, subjecting them to medical or scientific experiments, harvesting parts of body or tissues for transplantation,

is punished with imprisonment for 8-12 years.

6. Other violations of the norms of international humanitarian law, agreements envisaged by international agreements during armed conflicts:

is punished with imprisonment for up to 5 years.

Australia

Subdivision C—Crimes against humanity

268.8 Crime against humanity—murder

A person (the *perpetrator*) commits an offence if:

- (a) the perpetrator causes the death of one or more persons; and
- (b) the perpetrator's conduct is committed intentionally or knowingly as part of a widespread or systematic attack directed against a civilian population.

Penalty: Imprisonment for life.

268.9 Crime against humanity—extermination

(1) A person (the *perpetrator*) commits an offence if:

- (a) the perpetrator causes the death of one or more persons; and
- (b) the perpetrator's conduct constitutes, or takes place as part of, a mass killing of members of a civilian population; and
- (c) the perpetrator's conduct is committed intentionally or knowingly as part of a widespread or systematic attack directed against a civilian population.

Penalty: Imprisonment for life.

(2) In subsection (1):

causes the death of includes causes death by intentionally inflicting conditions of life (such as the deprivation of access to food or medicine) intended to bring about the destruction of part of a population.

268.10 Crime against humanity—enslavement

(1) A person (the *perpetrator*) commits an offence if:

- (a) the perpetrator exercises any or all of the powers attaching to the right of ownership over one or more persons (including the exercise of a power in the course of trafficking in persons, in particular women and children); and
- (b) the perpetrator's conduct is committed intentionally or knowingly as part of a widespread or systematic attack directed against a civilian population.

Penalty: Imprisonment for 25 years.

(2) In subsection (1):

exercises any or all of the powers attaching to the right of ownership over a person includes purchases, sells, lends or barter a person or imposes on a person a similar deprivation of liberty and also includes exercise a power arising from a debt incurred or contract made by a person.

268.11 Crime against humanity—deportation or forcible transfer of population

(1) A person (the *perpetrator*) commits an offence if:

- (a) the perpetrator forcibly displaces one or more persons, by expulsion or other coercive acts, from an area in which the person or persons are lawfully present to another country or location; and
- (b) the forcible displacement is contrary to paragraph 4 of article 12 or article 13 of the Covenant; and
- (c) the perpetrator knows of, or is reckless as to, the factual circumstances that establish the lawfulness of the presence of the person or persons in the area; and
- (d) the perpetrator's conduct is committed intentionally or knowingly as part of a widespread or systematic attack directed against a civilian population.

Penalty: Imprisonment for 17 years.

(2) Strict liability applies to paragraph (1)(b).

(3) In subsection (1):

forcibly displaces one or more persons includes displaces one or more persons:

- (a) by threat of force or coercion (such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power) against the person or persons or against another person; or
- (b) by taking advantage of a coercive environment.

268.12 Crime against humanity—imprisonment or other severe deprivation of physical liberty

(1) A person (the *perpetrator*) commits an offence if:

- (a) the perpetrator imprisons one or more persons or otherwise severely deprives one or more persons of physical liberty; and
- (b) the perpetrator's conduct violates article 9, 14 or 15 of the Covenant; and
- (c) the perpetrator's conduct is committed intentionally or knowingly as part of a widespread or systematic attack directed against a civilian population.

Penalty: Imprisonment for 17 years.

(2) Strict liability applies to paragraph (1)(b).

268.13 Crime against humanity—torture

A person (the *perpetrator*) commits an offence if:

- (a) the perpetrator inflicts severe physical or mental pain or suffering upon one or more persons who are in the custody or under the control of the perpetrator; and
- (b) the pain or suffering does not arise only from, and is not inherent in or incidental to, lawful sanctions; and
- (c) the perpetrator's conduct is committed intentionally or knowingly as part of a widespread or systematic attack directed against a civilian population.

Penalty: Imprisonment for 25 years.

268.14 Crime against humanity—rape

(1) A person (the *perpetrator*) commits an offence if:

- (a) the perpetrator sexually penetrates another person without the consent of that person; and
- (b) the perpetrator knows of, or is reckless as to, the lack of consent; and
- (c) the perpetrator's conduct is committed intentionally or knowingly as part of a widespread or systematic attack directed against a civilian population.

Penalty: Imprisonment for 25 years.

(2) A person (the *perpetrator*) commits an offence if:

- (a) the perpetrator causes another person to sexually penetrate the perpetrator without the consent of the other person; and
- (b) the perpetrator knows of, or is reckless as to, the lack of consent; and
- (c) the perpetrator's conduct is committed intentionally or knowingly as part of a widespread or systematic attack directed against a civilian population.

Penalty: Imprisonment for 25 years.

(3) In this section:

consent means free and voluntary agreement.

The following are examples of circumstances in which a person does not consent to an act:

- (a) the person submits to the act because of force or the fear of force to the person or to someone else;
- (b) the person submits to the act because the person is unlawfully detained;
- (c) the person is asleep or unconscious, or is so affected by alcohol or another drug as to be incapable of consenting;
- (d) the person is incapable of understanding the essential nature of the act;
- (e) the person is mistaken about the essential nature of the act (for example, the person mistakenly believes that the act is for medical or hygienic purposes);
- (f) the person submits to the act because of psychological oppression or abuse of power;
- (g) the person submits to the act because of the perpetrator taking advantage of a coercive environment.

(4) In this section:

sexually penetrate means:

- (a) penetrate (to any extent) the genitalia or anus of a person by any part of the body of another person or by any object manipulated by that other person; or
- (b) penetrate (to any extent) the mouth of a person by the penis of another person; or
- (c) continue to sexually penetrate as defined in paragraph (a) or (b).

(5) In this section, being *reckless* as to a lack of consent to sexual penetration includes not giving any thought to whether or not the person is consenting to sexual penetration.

(6) In this section, the genitalia or other parts of the body of a person include surgically constructed genitalia or other parts of the body of the person.

268.15 Crime against humanity—sexual slavery

(1) A person (the *perpetrator*) commits an offence if:

(a) the perpetrator causes another person to enter into or remain in sexual slavery; and

(b) the perpetrator intends to cause, or is reckless as to causing, that sexual slavery; and

(c) the perpetrator's conduct is committed intentionally or knowingly as part of a widespread or systematic attack directed against a civilian population.

Penalty: Imprisonment for 25 years.

(2) For the purposes of this section, sexual slavery is the condition of a person who provides sexual services and who, because of the use of force or threats:

(a) is not free to cease providing sexual services; or

(b) is not free to leave the place or area where the person provides sexual services.

(3) In this section:

sexual service means the use or display of the body of the person providing the service for the sexual gratification of others.

Threat means:

(a) a threat of force; or

(b) a threat to cause a person's deportation; or

(c) a threat of any other detrimental action unless there are reasonable grounds for the threat of that action in connection with the provision of sexual services by a person.

268.16 Crime against humanity—enforced prostitution

(1) A person (the perpetrator) commits an offence if:

(a) the perpetrator causes one or more persons to engage in one or more acts of a sexual nature without the consent of the person or persons, including by being reckless as to whether there is consent; and

(b) the perpetrator intends that he or she, or another person, will obtain pecuniary or other advantage in exchange for, or in connection with, the acts of a sexual nature; and

(c) the perpetrator's conduct is committed intentionally or knowingly as part of a widespread or systematic attack directed against a civilian population.

Penalty: Imprisonment for 25 years.

(2) In subsection (1):

consent means free and voluntary agreement.

The following are examples of circumstances in which a person does not consent to an act:

- (a) the person submits to the act because of force or the fear of force to the person or to someone else;
- (b) the person submits to the act because the person is unlawfully detained;
- (c) the person is asleep or unconscious, or is so affected by alcohol or another drug as to be incapable of consenting;
- (d) the person is incapable of understanding the essential nature of the act;
- (e) the person is mistaken about the essential nature of the act (for example, the person mistakenly believes that the act is for medical or hygienic purposes);
- (f) the person submits to the act because of psychological oppression or abuse of power;
- (g) the person submits to the act because of the perpetrator taking advantage of a coercive environment.

Threat of force or coercion includes:

- (a) a threat of force or coercion such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power; or
- (b) taking advantage of a coercive environment.
- (3) In subsection (1), being reckless as to whether there is consent to one or more acts of a sexual nature includes not giving any thought to whether or not the person or persons are consenting to engaging in the act or acts of a sexual nature.

268.17 Crime against humanity—forced pregnancy

(1) A person (the *perpetrator*) commits an offence if:

- (a) the perpetrator unlawfully confines one or more women forcibly made pregnant; and
- (b) the perpetrator intends to affect the ethnic composition of any population or to destroy, wholly or partly, a national, ethnical, racial or religious group, as such; and
- (c) the perpetrator's conduct is committed intentionally or knowingly as part of a widespread or systematic attack directed against a civilian population.

Penalty: Imprisonment for 25 years.

(2) In subsection (1):

forcibly made pregnant includes made pregnant by a consent that was affected by deception or by natural, induced or age-related incapacity.

(3) To avoid doubt, this section does not affect any other law of the Commonwealth or any law of a State or Territory.

268.18 Crime against humanity—enforced sterilisation

(1) A person (the *perpetrator*) commits an offence if:

- (a) the perpetrator deprives one or more persons of biological reproductive capacity; and
- (b) the deprivation is not effected by a birth-control measure that has a non-permanent effect in practice; and
- (c) the perpetrator's conduct is neither justified by the medical or hospital treatment of the person or persons nor carried out with the consent of the person or persons; and
- (d) the perpetrator's conduct is committed intentionally or knowingly as part of a widespread or systematic attack directed against a civilian population.

Penalty: Imprisonment for 25 years.

(2) In subsection (1):

consent does not include consent effected by deception or by natural, induced or age-related incapacity.

268.19 Crime against humanity—sexual violence

(1) A person (the *perpetrator*) commits an offence if:

(a) the perpetrator does either of the following:

- (i) commits an act or acts of a sexual nature against one or more persons;
- (ii) causes one or more persons to engage in an act or acts of a sexual nature; without the consent of the person or persons, including by being reckless as to whether there is consent; and

(b) the perpetrator's conduct is of a gravity comparable to the offences referred to in sections 268.14 to 268.18; and

(c) the perpetrator's conduct is committed intentionally or knowingly as part of a widespread or systematic attack directed against a civilian population.

Penalty: Imprisonment for 25 years.

(2) Strict liability applies to paragraph (1)(b).

(3) In subsection (1):

consent means free and voluntary agreement.

The following are examples of circumstances in which a person does not consent to an act:

- (a) the person submits to the act because of force or the fear of force to the person or to someone else;
- (b) the person submits to the act because the person is unlawfully detained;
- (c) the person is asleep or unconscious, or is so affected by alcohol or another drug as to be incapable of consenting;
- (d) the person is incapable of understanding the essential nature of the act;
- (e) the person is mistaken about the essential nature of the act (for example, the person mistakenly believes that the act is for medical or hygienic purposes);
- (f) the person submits to the act because of psychological oppression or abuse of power;

(g) the person submits to the act because of the perpetrator taking advantage of a coercive environment.

Threat of force or coercion includes:

(a) a threat of force or coercion such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power; or

(b) taking advantage of a coercive environment.

(4) In subsection (1), being reckless as to whether there is consent to one or more acts of a sexual nature includes not giving any thought to whether or not the person is consenting to the act or acts of a sexual nature.

268.20 Crime against humanity—persecution

(1) A person (the *perpetrator*) commits an offence if:

(a) the perpetrator severely deprives one or more persons of any of the rights referred to in paragraph (b); and

(b) the rights are those guaranteed in articles 6, 7, 8 and 9, paragraph 2 of article 14, article 18, paragraph 2 of article 20, paragraph 2 of article 23 and article 27 of the Covenant; and

(c) the perpetrator targets the person or persons by reason of the identity of a group or collectivity or targets the group or collectivity as such; and

(d) the grounds on which the targeting is based are political, racial, national, ethnic, cultural, religious, gender or other grounds that are recognised in paragraph 1 of article 2 of the Covenant; and

(e) the perpetrator's conduct is committed in connection with another act that is:

(i) a proscribed inhumane act; or

(ii) genocide; or

(iii) a war crime; and

(f) the perpetrator's conduct is committed intentionally or knowingly as part of a widespread or systematic attack directed against a civilian population.

Penalty: Imprisonment for 17 years.

(2) Strict liability applies to:

(a) the physical element of the offence referred to in paragraph (1)(a) that the rights are those referred to in paragraph (1)(b); and (b) paragraphs (1)(b) and (d).

268.21 Crime against humanity—enforced disappearance of persons

(1) A person (the *perpetrator*) commits an offence if:

(a) the perpetrator arrests, detains or abducts one or more persons; and

(b) the arrest, detention or abduction is carried out by, or with the authorisation, support or acquiescence of, the government of a country or a political organisation; and (c) the perpetrator intends to remove the person or persons from the protection of

the law for a prolonged period of time; and

(d) the perpetrator's conduct is committed intentionally or knowingly as part of a widespread or systematic attack directed against a civilian population; and

(e) after the arrest, detention or abduction, the government or organisation refuses to acknowledge the deprivation of freedom of, or to give information on the fate or whereabouts

of, the person or persons.

Penalty: Imprisonment for 17 years.

(2) A person (the *perpetrator*) commits an offence if:

(a) one or more persons have been arrested, detained or abducted; and

(b) the arrest, detention or abduction was carried out by, or with the authorisation, support or acquiescence of, the government of a country or a political organisation; and

(c) the perpetrator refuses to acknowledge the deprivation of freedom, or to give information on the fate or whereabouts, of the person or persons; and

(d) the refusal occurs with the authorisation, support or acquiescence of the government of the country or the political organisation; and

(e) the perpetrator knows that, or is reckless as to whether, the refusal was preceded or accompanied by the deprivation of freedom; and

(f) the perpetrator intends that the person or persons be removed from the protection of the law for a prolonged period of time; and

(g) the arrest, detention or abduction occurred, and the refusal occurs, as part of a widespread or systematic attack directed against a civilian population; and

(h) the perpetrator knows that the refusal is part of, or intends the refusal to be part of, such an attack.

Penalty: Imprisonment for 17 years.

268.22 Crime against humanity—apartheid

A person (the *perpetrator*) commits an offence if:

(a) the perpetrator commits against one or more persons an act that is a proscribed inhumane act (as defined by the Dictionary) or an act that is of a nature and gravity similar to any such proscribed inhumane act; and

(b) the perpetrator's conduct is committed in the context of an institutionalised regime of systematic oppression and domination by one racial group over any other racial group or groups; and

(c) the perpetrator knows of, or is reckless as to, the factual circumstances that establish the character of the act; and

(d) the perpetrator intends to maintain the regime by the conduct; and

(e) the perpetrator's conduct is committed intentionally or knowingly as part of a widespread or systematic attack directed against a civilian population.

Penalty: Imprisonment for 17 years.

268.23 Crime against humanity—other inhumane act

A person (the *perpetrator*) commits an offence if:

- (a) the perpetrator causes great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act; and
- (b) the act is of a character similar to another proscribed inhumane act as defined by the Dictionary; and
- (c) the perpetrator's conduct is committed intentionally or knowingly as part of a widespread or systematic attack directed against a civilian population.

Penalty: Imprisonment for 25 years.

Bosnia-Herzegovina

Crimes against Humanity

Article 172

(1) Whoever, as part of a widespread or systematic attack directed against any civilian population, with knowledge of such an attack perpetrates any of the following acts:

- a) Depriving another person of his life (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) Coercing another by force or by threat of immediate attack upon his life or limb, or the life or limb of a person close to him, to sexual intercourse or an equivalent sexual act (rape), sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation or any other form of sexual violence of comparable gravity;
- h) Persecutions against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious or sexual gender or other grounds that are universally recognised as impermissible under international law, in connection with any offence listed in this paragraph of this Code, any offence listed in this Code or any offence falling under the competence of the Court of Bosnia and Herzegovina;
- 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 physical or mental health,

shall be punished by imprisonment for a term not less than ten years or long-term imprisonment.

(2) For the purpose of paragraph 1 of this Article the following terms shall have the following meanings:

- a) *Attack directed against any civilian population* means a course of conduct involving the multiple perpetrations of acts referred to in paragraph 1 of this Article against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack.

- b) *Extermination* includes the intentional infliction of conditions of life, especially deprivation of access to food and medicines, 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 control of the accused; except that torture shall not include pain or suffering arising only from, or being 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.
- g) *Persecution* means the intentional and severe deprivation of fundamental rights, contrary to international law, by reason of the identity of a group or collectivity.
- h) *Enforced disappearance of persons* means the arrest, detention or abduction of persons by, or with the authorisation, support or acquiescence of, a State or a political organisation, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with an aim of removing them from the protection of the law for a prolonged period of time.
- i) *The crime of apartheid* means inhumane acts of a character similar to those referred to in paragraph 1 of this Article, perpetrated in the context of an institutionalised regime of systematic oppression and domination by one racial group over any other racial group or groups and perpetrated with an aim of maintaining that regime.

Bulgaria

Criminal Code of the Republic of Bulgaria (adopted in April 1968, amended as of May 2005)

Chapter Fourteen
CRIMES AGAINST PEACE AND HUMANITY

Section I -Crimes Against Peace

Article 407

A person who in any way makes propaganda for war, shall be punished by deprivation of liberty for up to eight years.

Article 408

A person who, directly or indirectly, through the press, by speech, over the radio or in any other way, strives to provoke an armed attack by one state on another, shall be punished for abetment to war by deprivation of liberty for three to ten years.

Article 409

(Amended, SG No. 153/1998)

A person who plans, prepares or wages an aggressive war, shall be punished by deprivation of liberty for a term of fifteen to twenty years, or by life imprisonment without substitution.

Section II - Crimes Against the Laws and Customs of Waging War

Article 410

A person who in violation of the rules of international law for waging war:

- a) perpetrates or orders the perpetration of, on wounded, sick, shipwrecked persons or sanitary personnel, acts of murder, tortures, or inhuman treatment, including biological experiments, inflicts or orders grave sufferings, mutilation or other impairments of health to be inflicted to such persons;
- b) perpetrates, or orders to be perpetrated, major destruction or appropriations of sanitary materials or installations,

(Amended, SG No. 153/1998) shall be punished by deprivation of liberty for a term of from five up to twenty years, or by life imprisonment without substitution.

Article 411

A person who in violation of the rules of international law for waging war:

- a) perpetrates or orders to be perpetrated with regard to prisoners of war murder, tortures or inhuman treatment, including biological experiments or causes or orders grave sufferings, mutilation or other impairments of health to be inflicted on such persons;
- b) compels a prisoner of war to serve in the armed forces of the enemy state, or

c) deprives a prisoner of war of the right to be tried by a regular court and under a regular procedure,
(Amended, SG No. 153/1998) shall be punished by deprivation of liberty for a term of from five up to twenty years or by life imprisonment without substitution.

Article 412

(Amended, SG No. 153/1998)

A person who in violation of the rules of international law for waging war:

- a) perpetrates or orders with regard to the civil population murders, tortures, inhuman treatment, including biological experiments to be perpetrated, causes or orders grave sufferings, mutilation or other serious impairments of health to be inflicted;
 - b) takes or orders hostages to be taken;
 - c) carries out or orders unlawful deportations, persecutions or detentions to be effected;
 - d) compels a civilian to serve in the armed forces of an enemy state;
 - e) deprives a civilian of his right to be tried by a regular court and under a regular procedure;
 - f) unlawfully and arbitrarily perpetrates or orders the perpetration of destruction or appropriations of property on a large scale,
- (Amended, SG No. 153/1998) shall be punished by deprivation of liberty for a term of from five up to twenty years or by life imprisonment without substitution.

Article 413

A person who, without having such right, bears the insignia of the Red Cross or of the Red Crescent or who abuses a flag or the insignia of the Red Cross or the Red Crescent or the colour determined for transport vehicles for sanitary evacuation, shall be punished by deprivation of liberty for up to two years.

Article 414

(1) A person who, in violation of the rules of international law for waging war destroys, damages or makes unfit cultural or historical monuments and objects, works of art, buildings and equipment intended for cultural, scientific or other humanitarian purposes, shall be punished by deprivation of liberty for one to ten years.

(2) The same punishment shall also be imposed on a person who steals, unlawfully appropriates or conceals objects indicated in the preceding paragraph or imposes contribution or confiscation with respect to such objects.

Article 415

(1) (Supplemented, SG. No. 62/1997, amended and supplemented, SG No. 92/2002)

A person who, in violation of the rules of international law for waging war uses or orders nuclear, chemical, bacteriological, biological or toxic weapons or impermissible ways or means for waging war to be used, shall be punished by deprivation of liberty for three to ten years.

(2) (Amended, SG No. 153/1998) If particularly grave consequences have set in therefrom, the punishment shall be deprivation of liberty for a term of from ten up to twenty years or life imprisonment without substitution.

Article 415a

(New, SG No. 92/2002)

Anyone who undertakes military preparation for the use of nuclear, chemical, bacteriological, biological or toxic weaponry as means of war, shall be punished by deprivation of liberty from one to six years.

Section III - (Heading supplemented, SG No. 95/1975)

Liquidation of Groups of the Population (Genocide) and Apartheid

Article 416

(1) A person who, for the purpose of liquidating, completely or in part, a certain national, ethnic, racial or religious group:

- a) causes death, severe bodily injury or permanent derangement of the consciousness of a person belonging to such a group;
- b) places the group under living conditions such that lead to its full or partial physical liquidation;
- c) takes measures aimed at checking the birth rate amid such a group;
- d) forcefully transfers children from one group to another,

(Amended, SG No. 153/1998) shall be punished for genocide by deprivation of liberty for a term of from ten up to twenty years or by life imprisonment without substitution.

(2) (Previous Article 417,- SG, No. 95/1975) A person who commits preparation for genocide shall be punished by deprivation of liberty for two to eight years.

(3) (Previous Article 418, SG No. 95/1975) A person who openly and directly incites genocide, shall be punished by deprivation of liberty for one to eight years.

Article 417

(New, SG No. 95/1975, amended, SG No. 153/1998)

A person who with the aim of establishing or maintaining domination or systematic oppression of one racial group of people over another racial group of people:

- a) causes death or severe bodily injury to one or more persons of such a group of people, or
- b) imposes living conditions of such a nature as to cause complete or partial physical

liquidation of a racial group of people,
(Amended, SG No. 153/1998) shall be punished for apartheid by deprivation of liberty for a term of from ten up to twenty years or by life imprisonment without substitution.

Article 418

(New, SG No. 95/1975)

A person who for the purpose under the preceding article:

- a) unlawfully deprives of liberty members of a racial group of people or subjects them to compulsory labour;
 - b) puts into operation measures for hindering the participation of a racial group of people in the political, social, economic and cultural life of the country, and for intentional creation of conditions hampering the full development of such a group of people, in particular by depriving its members of the basic freedoms and rights of citizens;
 - c) puts into operation measures for dividing the population by racial features through setting up of reservations and ghettos, through the ban of mixed marriages between members of different racial groups or through expropriation of real property belonging thereto;
 - d) deprives of basic rights and freedoms organisations and persons, because they are opposed to apartheid,
- shall be punished by deprivation of liberty for five to fifteen years.

Canada

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.

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.

Croatia**Article 157A of the Criminal Code of Croatia:**

Whoever violates the rules of international law within an extensive or systematic attack against the civilian population and, with knowledge of such an attack, orders the killing of another person, orders the infliction of conditions of life so as to bring about the physical destruction in whole or in part of some civilian population which could lead to its complete extermination, orders trafficking in human beings, in particular of women and children, or the enslavement of a person in any other way so that some or all of the powers originating in property rights are exercised over such person, orders the forceful displacement of persons from areas where they lawfully reside and through expulsion or other measures of coercion, orders that a person deprived of liberty or under supervision be tortured by intentionally inflicting severe bodily or mental harm or suffering, orders that a person be raped or subjected to some other violent sexual act or that a woman who has been impregnated as a result of such violent act be intentionally kept in detention so as to change the ethnic composition of some population, orders the persecution of a person by depriving him or her of the fundamental rights because this person belongs to a particular group or community, orders the arrest, detention or kidnapping of some persons in the name of and with the permission, support or approval of a state or political organization and subsequently does not admit that these persons have been deprived of their liberty or withholds information about the fate of such persons or the place where they are kept, or orders within an institutionalized regime of systematic oppression and domination of one racial group over another racial group or groups that an inhumane act described in this Article be committed or an act similar to any of these offenses so as to maintain such a regime (the crime of apartheid), or whoever commits any of the foregoing offenses shall be punished by imprisonment for not less than five years or by a life sentence.

Estonia

Criminal Code of Estonia (entered into force on Sept. 1, 2003, amended as of March 15, 2007)

(Chapter 18. Div. 2, § **89. Crimes against humanity**)

Systematic or large-scale deprivation or restriction of human rights and freedoms, instigated or directed by a state, organisation or group, or killing, torture, rape, causing health damage, forced displacement, expulsion, subjection to prostitution, unfounded deprivation of liberty, or other abuse of civilians, is punishable by 8 to 20 years' imprisonment or life imprisonment.

France**Book II, Title I, of the Penal Code, entitled “Crimes against Humanity and the Human Species.”****ARTICLE 211-1**

Genocide occurs where, in the enforcement of a concerted plan aimed at the partial or total destruction of a national, ethnic, racial or religious group, or of a group determined by any other arbitrary criterion, one of the following actions are committed or caused to be committed against members of that group:

- wilful attack on life;
- serious attack on psychological or physical integrity;
- subjection to living conditions likely to entail the partial or total destruction of that group;
- measures aimed at preventing births;
- enforced child transfers.

Genocide is punished by criminal imprisonment for life.

The first two paragraphs of article 132-23 governing the safety period apply to the felony provided for by the present article.

ARTICLE 212-1

Deportation, enslavement or the massive and systematic practice of summary executions, abduction of persons followed by their disappearance, of torture or inhuman acts, inspired by political, philosophical, racial or religious motives, and organised in pursuit of a concerted plan against a section of a civil population are punished by criminal imprisonment for life.

The first two paragraphs of article 132-23 governing the safety period are applicable to felonies provided for by the present article.

ARTICLE 212-2

Where they are committed during war time in execution of a concerted plan against persons fighting the ideological system in the name of which are perpetrated crimes against humanity, the actions referred to under article 212-1 are punished by criminal imprisonment for life.

The first two paragraphs of article 132-23 governing the safety period are applicable to felonies set out under the present article.

ARTICLE 212-3

Participation in a group formed or in an agreement established with a view to the preparation, as demonstrated by one or more material actions, of any of the felonies defined by articles 211-1, 212-1 and 212-2 is punished by criminal imprisonment for life.

The first two paragraphs of article 132-23 governing the safety period are applicable to the felony set out under the present article.

Germany

The Act to Introduce the Code of Crimes Against International Law (of June 26, 2002)

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 or life on that population or on parts thereof, being conditions calculated to bring about its physical destruction in whole or in part,
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 organization, 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 organization 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 collectively 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 recognized as impermissible under the general rules of international law

(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 like or for 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 institutionalized regime or 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).

South Korea

The Act on the Punishment, Etc. of Crimes Under the Jurisdiction of the International Criminal Court, Act No. 8719 (Dec. 21, 2007)

Article 9 (Crimes against humanity)

(1) Whoever, as part of a widespread or systematic attack directed against any civilian population pursuant to or in furtherance of a State or organizational policy to commit such attack, kills a person shall be punished by death or life imprisonment, or imprisonment for not less than seven years.

(2) Whoever, as part of a widespread or systematic attack directed against any civilian population pursuant to or in furtherance of a State or organizational policy to commit such attack, commits any one of the following acts shall be punished by life imprisonment or imprisonment for not less than five years.

1. 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;
2. Enslavement;
3. Deportation or forcible transfer of a person lawfully present in an area to another State or location in violation of international law;
4. Imprisonment or other severe deprivation of physical liberty in violation of international law;
5. Torture of a person in the custody or under the control of the perpetrator by inflicting upon that person severe physical or mental pain or suffering;
6. Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violation of comparable gravity;
7. Persecution against any 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, religious, gender, or other grounds that are recognized as impermissible under international law;
8. Enforced disappearance of a person, by any of the following acts with the authorization, support or acquiescence of, a State or a political organization, with the intent of removing him or her from the protection of the law for a prolonged period of time.
 - A. Arresting, detaining, abducting (within this Subparagraph hereinafter referred to as “arrest, etc.”) that person, followed by a refusal to give information on that

person's arrest, etc., identity, fate, and whereabouts or by giving false information thereon;

B. Refusing to give information or giving false information referred to in Subparagraph A in violation of a legal duty.

9. Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to physical or mental health.

(3) Whoever commits any of the crimes under Paragraph (1) or (2) with the intent of maintaining an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups shall be punished pursuant to Paragraph (1) or (2).

(4) Where the perpetrator causes the death of a person through an offence pursuant to Paragraph (2) or through an offence pursuant to Paragraph (3) (of committing crimes under Paragraph (2)), the punishment shall be the same as specified in Paragraph (1).

(5) Whoever attempts to commit any of the crimes under Paragraphs (1) or (2) shall be also punished.

Norway

Law No. 4 of March 7, 2008, Act Amending the Penal Code 20 May 2005 No. 28, etc. (Aggravating and mitigating circumstances, genocide, national independence, terrorism, peace, order and security, and public authorities).

Chapter 16, Genocide, crimes against humanity and war crimes

Section 102. *Crimes against humanity*

Any person is liable to punishment for a crime against humanity who, as part of a widespread or systematic

attack directed against any civilian population,

(a) kills a person,

(b) exterminates a population in whole or in part, including by inflicting on it or parts of it conditions of life calculated to bring about the destruction of the population in whole or in part,

(c) enslaves a person,

(d) deports or forcibly transfers a population in violation of international law/*without grounds permitted under international law*,

(e) imprisons or otherwise severely deprives a person of physical liberty in violation of fundamental rules of international law,

(f) tortures a person in his custody or under his control by inflicting on the person severe mental or physical pain *or suffering*,

(g) subjects a person to rape, sexual slavery or enforced prostitution, forced pregnancy, enforced sterilisation or any other form of sexual violence of comparable gravity,

(h) subjects an identifiable group to persecution by depriving one or more members of the group of fundamental human rights on political, racial, national, ethnic, cultural, religious, gender-related or other grounds contrary to international law,

(i) on behalf of, or with the consent, support or authorisation/*authorisation, support or acquiescence** of a State or a political organisation contributes to the enforced disappearance of a person, with the intention of removing that person from the protection of the law for a prolonged period of time,

(j) in the context of an institutionalised regime of systematic oppression and domination by one racial group over one or more other racial groups/*any other racial group or groups** commits a crime of apartheid by carrying out inhumane acts of a character like or similar to that of acts falling within the scope of this section with the intention of maintaining that regime, or

(k) commits another inhumane act of a similar character that causes great suffering or severe injury to body or health.

The penalty for a crime against humanity is imprisonment for a term not exceeding 30 years.

Slovenia

Slovenia's Criminal Code (adopted in March 1994, amended as of June 15, 2005)
Chapter Thirty-Five

CRIMINAL OFFENCES AGAINST HUMANITY AND INTERNATIONAL LAW

Genocide

Article 373

(1) Whoever, with the intention of destroying, in whole or in part, a national, ethnic, racial or religious group, gives orders to kill members of the group, to inflict severe bodily injuries upon them, to seriously undermine their bodily or mental health, to forcibly displace the population, to inflict on the group conditions of life calculated to bring about its physical destruction in whole or in part, to impose measures to prevent births within the group, or to forcibly transfer children of the group to some other group, or whoever, with the same intention, commits any of the above acts, shall be punished by imprisonment of at least ten years or by imprisonment of thirty years.

(2) Whoever commits any of the acts under the previous paragraph against any social or political group,

shall be punished the same.

(3) The same punishment shall be imposed on whoever incites or calls for the direct commission of criminal offences from this Article.

Crimes Against the Civilian Population

Article 374

(1) Whoever in contravention of the rules of international law during wartime, armed conflict or occupation, or when carrying out or supporting the policy of a state or organisation as part of a larger systematic attack, orders or commits the following acts against the civilian population: an attack on the civilian population, a built-up

area, individual civilians or persons unable to fight which causes death, grievous bodily harm or serious harm to health; use of the presence of civilian or other protected persons to avert military operations; a random attack that causes injury to civilians; slaughter, torture, inhumane treatment, biological, medical or other scientific experiments, the removal of tissue or organs for transplant, the infliction of great suffering or the violation of physical integrity or health; deportation, displacement, forced removal of citizenship or forced religious conversion; rape, forced prostitution, forced pregnancy, forced sterilisation and other forms of sexual violence that constitute a serious violation of international law; measures of intimidation or terrorism, hostage-taking, collective punishment, unlawful removal to a concentration camp and other unlawful incarceration, and removal of the right to a fair trial; forced service in the armed forces of the aggressor or in the aggressor's intelligence service or administration; forced labour; starvation of the population; the confiscation of property, pillage of property of the population, unlawful and arbitrary destruction or large-scale appropriation of property not justified by military needs, and the imposition of unlawful and disproportionately high contributions and requisitions; devaluation of the value of the domestic currency or the unlawful issuing of currency, shall be punished by imprisonment of at least ten years or by imprisonment of thirty years.

(2) Whoever in contravention of the rules of international law during wartime, armed conflict or occupation or when carrying out or supporting the policy of a state or organisation as part of a larger systematic attack, orders: an attack on buildings given special protection under international law and on buildings and facilities an attack on which would be particularly dangerous, such as dams, levees and nuclear power plants; a random attack on buildings given special protection under international law, or on defenceless or demilitarised areas; an attack deliberately targeted at staff, buildings, materials, units and vehicles participating in the provision of humanitarian aid or peacekeeping missions in accordance with the Founding Charter of the United Nations, as long as these are, in accordance with international law, entitled to the same protection as civilians or civilian buildings; the infliction of long-term and large-scale damage to the environment which may endanger the health or survival of the population, shall be punished the same.

(3) Whoever, as an occupier, violates the rules of international law during wartime, armed conflict or occupation by ordering or carrying out the deportation of sections of his civilian population to an occupied area, shall be punished by imprisonment of at least five years.

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.