

Finally, the efforts of renowned international scholars – most notably in the form of the work of the International Law Commission (ILC) – cannot be underestimated. In 1950, the ILC presented its codification of the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal;²⁷ in 1954, its first draft criminal code, the Draft Code of Offences against the Peace and Security of Mankind;²⁸ in 1991, a revised and updated version of that Code;²⁹ in 1994, the Draft Statute for an International Criminal Court that was eventually considered by the conference of plenipotentiaries in Rome;³⁰ and in 1996, the revised Draft Code of Crimes against the Peace and Security of Mankind.³¹ Each of these documents included invaluable commentaries that explored and explained the relevant principles of the nascent and developing field of international criminal law. Collectively, they have had a remarkable influence on the establishing instruments and the evolving case law of the contemporary international and internationalised criminal courts and tribunals.

1.2 Structure of crimes under international law

The complex variety of sources from which international criminal law derives its substantive content is matched by the complicated structure of the crimes themselves. In certain domestic criminal regimes, for example, each crime is typically a comprehensive description of the conduct justifying the imposition of penal sanctions, bundling together the physical act or omission, the accused's role in the crime, and sometimes any aggravating or mitigating factors.³² In international criminal law, however, those components are disaggregated, and must be independently evaluated and then combined in order to determine whether the accused on trial

'requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all states to specific conventions does not arise'). But see, e.g., [Chapter 3, note 178](#) and accompanying text (noting, for example, that the *Akayesu* Trial Chamber cited almost no authority for its descriptions of the various bases on which a protected group under the Genocide Convention may be defined).

²⁷ 5 UN GAOR Supp. (No. 12) at 11, UN Doc. A/1316 (1950).

²⁸ See Report of the International Law Commission on the Work of Its Sixth Session, UN Doc. A/2963 (1954).

²⁹ See Report of the International Law Commission on the Work of Its Forty-third Session, UN Doc. A/46/10 (1991).

³⁰ See Report of the International Law Commission on the Work of Its Forty-sixth Session, UN Doc. A/49/10 (1994).

³¹ See 1996 ILC Draft Code, *supra* note 3.

³² See, e.g., Carl Erik Herlitz, *Parties to a Crime and the Notion of a Complicity Object* (1992), p. 89 (describing the traditional common-law structure of felonies, which distinguished between the participants in a crime by, *inter alia*, the concepts of first-degree and second-degree principals; for murder, for example, those who physically committed the crime would be guilty of first-degree murder, while those who were merely present and aided its commission would be guilty of second-degree murder); *American Jurisprudence: Criminal Law*, vol. 21 § 187 (2nd edn 2007) (treatise on criminal law in the United States, noting that while '[s]ome jurisdictions today continue the common-law distinction in liability' between the participants in a crime, in most state jurisdictions, no such distinction is recognised, and '[a]ll persons involved in the crime are equally guilty of the completed offense, and all are liable for the conduct of each person').

may be convicted. As will be seen below and throughout this volume, the result is that the various elements of an international crime may, in the circumstances, be fulfilled by different actors involved in the bringing to fruition of a given crime.

Broadly speaking, there are three substantive components to international crimes: (1) the underlying offence; (2) the general requirements of each core category of crimes under international law; and (3) the specific requirements for certain crimes. A fourth component – the form of responsibility, or method through which a given individual participates in the crime – must be supplied before an accused can be subject to criminal penalties. This critical fourth component is the subject of the first volume in this series.³³ Though all the elements of a crime may be satisfied by the accused's conduct, international law does not require that a person physically commit the offence in order to be held responsible for the crime. With limited exceptions for certain requirements where their satisfaction may be determined as a matter of law,³⁴ the prosecution must prove all elements of all four components beyond reasonable doubt before a conviction may be entered.

The **underlying offence** is the conduct that produces the result, or is intended to produce the result, that is prohibited by international law. Such conduct is usually also prohibited by domestic law. Examples include murder; rape; physical assault or beating; and theft or destruction of property. In the contexts in which international crimes are generally committed, such as international or non-international armed conflicts, or actions by military or security services against civilian populations, there are frequently many people at different levels in the political or military hierarchy who are involved in the preparation and execution of the criminal activity. In such circumstances, it is often the lowest-level actor, the foot soldier, who carries out the underlying offence. In order to form the basis of an international crime, such conduct will almost always have to be criminal itself;³⁵ as such, it will have its own physical and mental elements. In order to avoid confusion, we restrict the use of the terms '*actus reus*' and '*mens rea*' to these physical and mental elements of the underlying offences.

The **general requirements** are the elements that must be satisfied before an underlying offence constitutes a crime of international significance. These elements vary according to which core category of crimes is alleged, and generally correspond to the context in which the underlying offence was committed or the intent that accompanies the offence: for example, war crimes must occur in an armed

³³ See generally Boas, Bischoff, and Reid, *supra* note 11.

³⁴ For example, the equal gravity requirement for persecution as a crime against humanity, and the gravity requirement for violations of the laws or customs of war. See Chapter 2, text accompanying note 399; Chapter 4, section 4.2.1.5.2.

³⁵ The sole exception being certain forms of persecution as a crime against humanity. See Chapter 2, note 397 and accompanying text.

conflict,³⁶ crimes against humanity must be committed in the context of a widespread or systematic attack on a civilian population;³⁷ and the defining element of genocide is the specific intent to partially or completely destroy a national, ethnic, racial, or religious group (a ‘protected group’).³⁸ The general requirements are the elements that distinguish each category of crimes; that is, any underlying offence must satisfy one set of general requirements if it is to constitute a war crime, a different set of general requirements before it becomes a crime against humanity, and yet another set of general requirements if it is to qualify as genocide.³⁹ Using one example from the paragraph above, the underlying offence of murder is a crime against humanity if the victim is a civilian, the murder is committed in the context of a widespread or systematic attack directed against a civilian population, and either the physical perpetrator⁴⁰ or another relevant actor knows that the murder is part of that attack.⁴¹ That same underlying offence becomes the war crime of wilful killing, a grave breach of the Geneva Conventions, if it is committed in territory controlled by one of the parties to an international conflict, is closely related to that conflict, and the victim is a person protected by the Geneva Conventions.⁴² Finally, this underlying offence constitutes genocide by killing if the physical perpetrator or other relevant actor intends by that murder (and presumably, others) to contribute to the partial or complete destruction of a protected group.⁴³

The **specific requirements** are elements that must also be fulfilled if an underlying offence is to constitute one of a small subset of international crimes that are characterised by unique physical and mental elements, such as discriminatory intent and discrimination in fact for persecution, or the three cumulative criteria for ‘other

³⁶ See generally Chapter 4, section 4.2.1.1. There are also subcategories of war crimes, each defined by its own additional general requirements. See *ibid.*, sections 4.2.1.3–4.2.1.5.

³⁷ See generally Chapter 2, sections 2.2.2.2, 2.2.2.4. ³⁸ See generally Chapter 3, section 3.2.1.2.

³⁹ Under the Statutes of the *ad hoc* Tribunals, the elements that characterise each category of crimes include certain jurisdictional requirements that do not exist in customary international law. See Chapter 2, section 2.2.1. In addition, the ICTY Statute has two separate provisions on war crimes; Article 2 grants jurisdiction over grave breaches of the Geneva Conventions, and Article 3 over violations of the laws or customs of war. There are therefore several references in *ad hoc* judgements to the fact that these articles share certain general or *chapeau* requirements – referring to the *chapeau* paragraph of each article. See, e.g., *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Judgement, 1 September 2004, paras. 139–143 (making ‘findings in respect of the general requirements common to Articles 2, 3 and 5’). Under customary international law, however, each core category of crimes is characterised by a distinct set of general requirements.

⁴⁰ As in Volume I of this series, the term physical perpetrator is used throughout this volume to refer to the person who physically carries out the *actus reus* of the underlying offence. See Boas, Bischoff, and Reid, *supra* note 11, p. 5 (citing judgements alternatively deeming this person the ‘principal perpetrator’, the ‘principal offender’, the ‘immediate perpetrator’, and the ‘physical perpetrator’). Recently, the ICTY Appeals Chamber expressed its preference for the term ‘principal perpetrator’. See *Prosecutor v. Brđanin*, Case No. IT-99-36-A, Judgement, 3 April 2007, para. 362. We choose to retain our terminology, as the word ‘principal’ may erroneously imply that this person must be one of the more important persons involved in a criminal transaction, when in fact he may occupy a very low place in the hierarchy.

⁴¹ See generally Chapter 2, section 2.2.2; see also Annex, section 2.2.

⁴² See generally Chapter 4, sections 4.2.1.1–4.2.1.3, 4.2.2.4; see also Annex, section 4.13.

⁴³ See generally Chapter 3, section 3.2.1; see also Annex, section 3.2.

inhumane acts'.⁴⁴ Both these examples are crimes against humanity, and an underlying offence must satisfy both the general requirements for crimes against humanity and these additional specific requirements before it may constitute either of these crimes. Again using the example of the underlying offence of murder, in order to qualify as murder as a form of persecution as a crime against humanity, the following general and specific requirements must be satisfied: it must be committed in the context of a widespread or systematic attack directed against a civilian population; either the physical perpetrator or another relevant actor must know that the murder is part of that attack; the victim must be a civilian; and he or she must be targeted on the basis of political, racial, or religious identity.⁴⁵ These crimes, and the specific requirements that distinguish them, are among the most difficult aspects of international criminal law to understand and apply correctly. This difficulty is compounded by the inconsistent and confusing manner in which the chambers of the *ad hoc* Tribunals have treated these crimes, in particular persecution as a crime against humanity.⁴⁶ In our view, persecution as a crime against humanity is not a single undifferentiated crime, but rather a convenient label that is applied to a cluster of underlying offences that share those distinguishing characteristics. In order to determine whether an accused charged with responsibility for 'rape as a form of persecution as a crime against humanity' may be convicted, a trial chamber must first determine whether the crime occurred; in order to do that, it must evaluate the elements of each component of the crime, that is, the elements of the underlying offence (in this example, rape), the specific requirements for persecution, and the general requirements for crimes against humanity. It is a daunting and time-consuming task, but it is one that must be executed assiduously, or an accused could be unfairly punished, or a fundamental breach of international law go unrecognised.

As mentioned above, the fourth component to an international crime is the form of responsibility, which describes the manner and extent of an individual's participation in the realisation of the crime. Before they may convict an accused of a crime under international law, the courts and tribunals discussed in this series must combine the elements of the underlying offence, the general requirements for the charged category of crimes, any specific requirements for particular crimes, and the elements of the charged form or forms of responsibility. For example, in order to conclude that an accused aided and abetted the commission of murder as a form of

⁴⁴ See Chapter 2, sections 2.2.3.8.1, 2.2.3.9.1.

⁴⁵ See Chapter 2, sections 2.2.2, 2.2.3.8.1; see also Annex, section 2.9.b. As explained in Chapter 2, the jurisprudence is not very clear on whether the victim must actually be a member of a group defined by one of these characteristics, or whether the subjective belief of the physical perpetrator or other relevant actor is sufficient. See Chapter 2, text accompanying notes 408–415.

⁴⁶ See Chapter 5, section 5.2.4.1.

persecution as a crime against humanity,⁴⁷ a trial chamber must find that (1) murder was committed, that is, that the death of an individual (the ‘victim’) was caused by the conduct of another person (the ‘physical perpetrator’ or ‘killer’), who acted with intent to kill or intent to harm with acceptance of the reasonable likelihood of death; (2) the murder was part of a widespread or systematic attack directed at a predominantly civilian population, and either the killer or another relevant actor knew that it was a part of that attack; (3) the victim was targeted on the basis of his or her of political, racial, or religious identity; and (4) the accused was aware of the essential elements of the crime, including the persecutory elements, and intentionally lent practical assistance, encouragement, or moral support to the killer, with knowledge or awareness that it would have a substantial effect on the commission of the murder.⁴⁸ As increasingly higher-ranking accused are charged and tried in international criminal proceedings, international courts and tribunals will have to grapple directly with the question of which elements of crimes must be fulfilled by the accused in front of them, and which may be satisfied by the conduct of the physical perpetrator, an intermediate civilian superior or military commander, or another relevant actor.⁴⁹ The annex to this volume, which combines the elements of the forms of responsibility and the elements of the crimes, will specify which elements must be satisfied by an accused in order to hold him responsible for a particular crime under a particular form of responsibility.

Notwithstanding – or perhaps because of – the completion strategies at the two *ad hoc* Tribunals,⁵⁰ their chambers remain extremely active, releasing interlocutory decisions and judgements relevant to the core crimes at least once a month. In addition, the newer courts and tribunals have begun to, or will soon, produce relevant jurisprudence and judgements. As a consequence, readers should note that this analysis is current as of 1 December 2007.

⁴⁷ The elements of the various components of the crime listed in this sentence generally follow the jurisprudence of the *ad hoc* Tribunals. See Chapter 2, sections 2.2.2, 2.2.3.1, 2.2.3.8.1; see also Annex, section 5.2.5. There are minor variations in the definitions, both within the Tribunals and in the instruments and case law of the other courts and tribunals discussed in this series.

⁴⁸ See generally Boas, Bischoff, and Reid, *supra* note 11, pp. 303–327.

⁴⁹ See Chapter 2, section 2.2.2.1; Chapter 3, section 3.2.1.1.

⁵⁰ See Security Council Resolution 1534, UN Doc. S/RES/1534 (2004), 26 March 2004, p. 2, para. 5; Security Council Resolution 1503 UN Doc. S/RES/1503 (2003), 28 August 2003, pp. 1–2.