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‘OTHER INHUMANE ACTS’ AS CRIMES AGAINST HUMANITY

Referee-artikkeli
Toukokuu 2011

Julkaistu Edilexissä 15.7.2011
www.edilex.fi/lakikirjasto/7931

Julkaistu aiemmin:
Helsinki Law Review 2011/1
Abstract

Crimes against humanity are one of the core crimes in international criminal law and now often also criminalized by national criminal statutes. The content of this group of offences has differed over time and depending on the context of their application. Crimes against humanity typically include acts such as murder, extermination and enslavement but also the rather enigmatic catch-all clause of ‘other inhumane acts’. This article attempts to examine how this notion is construed and developed as well as the material extent of it – what are the concrete acts that might constitute such an ‘inhumane act’.

The concept of ‘other inhumane acts’ was coined in the Nuremberg Statute, but its extent has changed significantly as has that of international criminal law as a whole. By the Rome Statute and the establishment the International Criminal Court other ‘inhumane acts’ have come to encompass a wide array of acts. All crimes against humanity used to be only applicable to acts committed in an armed conflict and therefore humanitarian law was the standard against which the ‘inhumanity’ of an act was judged. As crimes against humanity have come also to be applicable in times of peace the standards of humanitarian law have been replaced by those of human rights law.

Case law suggests that at least certain types of sexual violence, forcible transfer of people, desecration of corpses, attempted murder, extensive destruction of property and the practise of “forced marriage” could have in various courts been deemed ‘other inhumane acts’.

The vagueness of the category of ‘other inhumane acts’ is problematic especially from the point of view of the principle of legality in criminal law. To ensure its fair application it is essential to create explicit restrictions to its use. Those could be found in the close connection to human rights law.
as well as by making sure that the acts included are of a similar gravity as other crimes against humanity.

Full Article

1. Introduction

International criminal law came about to deal with the most atrocious of acts; acts grave enough to justify the interference into a state’s criminal law system, previously considered very much shielded from outsiders by the principle of state sovereignty. Individuals were first tried for crimes against humanity in the Nuremberg trials and crimes against humanity is one of the four categories of crimes under the material jurisdiction of the International Criminal Court (“the ICC”). The definition of this category varies in international criminal law instruments and has been developed in the practice of international courts, the most significant of which are, in addition to Nuremberg, the ad hoc tribunals for former Yugoslavia (“the ICTY”) and Rwanda (“the ICTR”) and the permanent ICC.

To accommodate for different kinds of acts that can be considered crimes against humanity, the list of different acts mentioned in the statutes of the different courts has grown from “murder, extermination, enslavement, deportation and other inhumane acts” in the Nuremberg Statute to include many other specifically enumerated acts. Common to all definitions of crimes against humanity is that last on the list of acts are ‘other inhumane acts’. This catch-all clause is needed to make sure any crime of sufficient gravity and fulfilling the other conditions of a crime against humanity would not go unpunished for mere lack of imagination of the drafters. The ICTY has repeatedly explained that “[t]he crime of inhumane acts […] functions as a residual category for serious charges which are not otherwise enumerated

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1 The others being war crimes, genocide and the yet undefined crime of aggression. (Rome Statute Art 5.)
2 Nuremberg Statute Art 6(c).
3 List of the Rome Statute cited in chapter 4.3 of this work.
under Article 5 [the article describing crimes against humanity within the jurisdiction of the court].”

The notion of ‘other inhumane act’ says nothing about the act it is designed to encompass, and is therefore difficult to interpret in practice. The obvious conflict is with the principle of *nullum crimen sine lege*: How can anyone be convicted of a crime the factual elements of which are not even written in the law? The openness of the wording also creates the possibility of stretching crimes against humanity – a label reserved only for the most atrocious of acts – beyond recognition.

To examine the notion of ‘other inhumane acts’ further, I plan to present some case law where determinations have been made about acts constituting such an inhumane act that previously have not been considered as such. Also some light is given as to what the conditions of use of the doctrine should be. For this purpose the history and developmental roots of crimes against humanity are examined in Chapter 2 and a brief presentation is made of the *nullum crimen sine lege* principle in Chapter 3. Chapter 4 looks at the sources of determining what are ‘other inhumane acts’ and Chapter 5 goes further into specific acts that have been considered included in the category. Some conclusions are hopefully reached by Chapter 6.

2. Crimes against Humanity

2.1. Nuremberg and the Birth of Crimes against Humanity

The term ‘crimes against humanity’ was first used by the American Civil War veteran and politician George Williams Washington in a letter to the U.S. Secretary of State in describing the Belgian King Leopold’s regime and their treatment of the Congolese people. In the contemporary, legally significant, meaning of the word it was used in 1915 in a declaration by the Allied powers pledging the prosecution of the people responsible for the
Armenian genocide\textsuperscript{6}. Prosecution was however considered contrary to the prohibition on retroactive criminal liability and the first time individuals were prosecuted for crimes against humanity was in The International Military Trials in Nuremberg after the Second World War\textsuperscript{7}.

The Nuremberg trials saw in many ways the emergence of modern international criminal law and paved the way for several other international criminal tribunals as well as eventually the establishment of the permanent International Criminal Court. The question of retroactivity was readdressed but overcoming it was much easier in the post Second World War political climate, when public opinion was strongly in favour of making the people who committed the atrocities of the holocaust responsible for their actions. Legally it was not a long stretch either, as international law already prohibited the persecution of civilians within occupied territories.

There was however no international consensus on whether German officials could be held responsible for acts committed within the borders of Germany. These acts had no international aspect as such and it was questionable whether an international court could have jurisdiction. The remedy was to call these acts ‘crimes against humanity’ and in that establish jurisdiction beyond state lines. The logic behind this resembles the one now given for universal jurisdiction, a principle currently used and debated in international criminal law. Universal jurisdiction is solely dependent on the nature of the act committed, whether they are offences recognized by the community of nations as of universal concern\textsuperscript{8}. Similarly some of the jurisdictional questions in Nuremberg were diverted by claiming the crimes to be so horrendous in nature that they were of concern to humanity as a whole.

\textsuperscript{6} Originally said crimes were referred to as ‘crimes against Christianity’ but changed by the French Foreign Minister for fear of offending Muslims under French and English colonial rule. (Cassese 2008 at 102.)

\textsuperscript{7} Schabas 2004 at 41–42.

2.2. Independence of Crimes against Humanity from Other International Crimes

The Allied powers did not wish, by making international prosecution possible, to open doors for all kinds of actions against states by for example oppressed minorities in their own countries. Therefore, they insisted that crimes against humanity would have to be committed in connection with other crimes in the tribunal’s jurisdiction, i.e., war crimes or crimes against peace. This would mean that crimes against humanity could only be committed in connection to an armed conflict. The United States representative to the International Conference on Military Trials in 1947 said that

“the way Germany treats its inhabitants [...] is not our affair any more than it is the affair of some other government to interpose itself in our problems. The reason that this program of extermination of Jews and destruction of the right of minorities becomes an international concern is this: it was part of a plan for making an illegal war.”

The requirement of this *nexus* between crimes against humanity and an armed conflict became a topic of debate when establishing further international tribunals and in their practise. It is by now, however, considered unnecessary.

Under the Nuremberg Statute crimes against humanity are to be committed “against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal”. Under the ICTY Statute crimes against humanity have to be “committed in armed conflict, whether international or internal in character, and directed against any civilian population”. The ICTY Statute still clearly expresses the requirement of a connection between a crime against humanity and a conflict, but the significance of it has been explained away already in a pre-trial decision in

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10 Nuremberg Statute Art 6(c).
11 ICTY Statute Art 5.
12 The ICTY Statute Art 5: “The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict”.

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the first case before the court, Tadić. The ICTY saw that “there is no logical or legal basis for this requirement and it has been abandoned in subsequent State practice.”

“It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed, [...] customary international law may not require a connection between crimes against humanity and any conflict at all. [...]There is no question, however, that the definition of crimes against humanity adopted by the Security Council in Article 5 [of the ICTY Statute] comports with the principle of nullum crimen sine lege.”

The lack of the requirement of nexus is one of the relatively few differences between the ICTY and the ICTR Statute and it is absent from the ICC Statute as well and has therefore not been applied under any of the mentioned statutes.

3. The Principle of Legality in International Law

Nullum crimen sine lege, also known as the Principle of Legality or the doctrine of strict legality is a part of customary law. It is enshrined in the criminal codes of most democratic countries as well as in international criminal law instruments. Basically it means that a person may not be convicted for conduct that was not criminalized at the time of the commission. Nationally nullum crimen sine lege is seen to encompass four basic notions. First of all criminal offences must be provided for in written law, not only in custom (nullum crimen sine lege scripta). Secondly, conduct regarded criminal must be described as specifically as possible in law so as to guide the behaviour of citizens (nullum crimen sine lege stricta). Thirdly, criminal rules cannot have effect retroactively (nullum crimen sine proevia lege). Lastly, resort to analogy is prohibited in criminal law.

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13 Tadić (Decision on Defence Motion) § 140.
14 Tadić (Decision on Defence Motion) § 141. Square brackets by Author.
15 Werle 2009 at 37.
However, in international law the principle is upheld only in a limited way.\textsuperscript{17} Lapses of the nationally held standard are somewhat common especially with regard to the first notion. A rule of customary law is sometimes enough to fulfil the criteria if it was foreseeable for the violator of such a rule that the violation could result in individual criminal responsibility.\textsuperscript{18} For example, a serious breach of international humanitarian law can be considered to constitute a war crime even if the conduct was not especially mentioned as prohibited under the applicable definition of war crimes.\textsuperscript{19}

The importance of \textit{nullum crimen sine lege} has increased throughout the short history of application of international criminal law. With regard to Nuremberg it is highly questionable whether the proceedings fulfil the requirement of non-retroactivity of international criminal law. In contrast the Rome Statute is more specific than any previous international court’s statute when it comes to defining crimes. This serves the purpose of enforcing the requirement of \textit{nullum crimen sine lege stricta}. Also the \textit{nullum crimen sine lege} principle has its very explicit expression in Art 22 of the Rome Statute (as opposed to the ICTY and ICTR Statutes where the principle in expressed only implicitly).\textsuperscript{20}

4. Defining “Other Inhumane Acts”

4.1. From External Sources to Power of Precedent

The definition of ‘other inhumane acts’ is obscure at best. As said earlier ‘other inhumane acts’ exist already in the Nuremberg Statute as well as the statutes of the ICTY and the ICTR but it is more specifically defined for the first time in the Rome Statute as “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.” The clause still gives great discretion to the court to define the actual conduct amounting to an ‘inhumane act’. In the early days

\textsuperscript{17} Cassese 2008 at 87. Even more liberties are taken in International Criminal Law with regards to the related principle of nulla poena sine lege, no punishment without law. Neither the Statutes for the ICTY and ICTR nor the Rome Statute provide for tariffs relating to sentencing each crime. (Cassese 2008 at 51–52.)

\textsuperscript{18} Werle 2009 at 38.

\textsuperscript{19} Cassese 2008 at 84–88.

\textsuperscript{20} Cassese 2008 at 41.
of the ICTY and the ICTR they made more references to external sources in interpreting definitions of crime, but later as the body of case law has grown significantly, international criminal courts refer more to their own and each other’s case law.21

The external sources are visible among others in the ICTY’s first case, Tadić. Here significant weight is given to the International Law Commission Draft Code of Crimes against the Peace and Security of Mankind, where the residual category in crimes against humanity is “other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm.”22 From the acts enumerated as crimes against humanity in the ICTY Statute (Art 5) the Court draws that ‘other inhumane acts’ as a residual category in the crimes against humanity “must consist of acts inflicted upon a human being and must be of a serious nature.”23 Even this rather rudimentary attempt at a more descriptive definition on an ‘inhumane act’ has not held in practise as discussed further below.

4.2. From Humanitarian to Human Rights Law

As crimes against humanity could originally only be committed in an armed conflict, the standard for determining what constitutes such an act was strongly tied to the principles and rules designed to regulate warfare, i.e., international humanitarian law. War crimes are often also crimes against humanity and vice versa, the main difference being that crimes against humanity can be committed against civilians without regard to their nationality; acts against a state’s own citizens are not punishable as war crimes.

Another element differentiating crimes against humanity from war crimes was the requirement of a certain severity or large scale of the acts committed. As war crimes concern the immediate victims, crimes against humanity address the perpetrator’s conduct towards “the whole of humankind”

21 For an interesting challenge to the power of ICTY and ICTR precedents in the ICC see Judge Hans Kaul’s dissenting opinion in the ICC Pre-Trial Chamber II Decision on the Authorization of an Investigation into the Situation in Kenya of 31 March 2010.
22 ILC Draft Code Art 18.
23 Tadić § 728.
as well.\textsuperscript{24} The creation of the concept of crimes against humanity to supplement the war crimes doctrine (established earlier as breaches of the Geneva law) created a strong link to humanitarian law. That link was severed when the requirement of a connection to an armed conflict was discarded and crimes against humanity came to apply also to acts committed during times of peace. This is another difference from war crimes.

To the place of humanitarian law as the standard for treatment of civilians comes human rights law. This creates tension not yet conclusively resolved by the courts. The minimum standards provided by human rights law on one hand and humanitarian law on the other, overlap for the most part but due possibly to the different origins of these systems, not entirely. The non-derogable core of humanitarian law in Article 3 of the Geneva Conventions\textsuperscript{25} and of human rights law in Article 4 of the ICCPR\textsuperscript{26} each provide among other things for the right to life, prohibition of torture and the principle of \textit{nullum crimen sine lege}.\textsuperscript{27}

The position of human rights law as guidelines for the minimum standards of treatment - the breach of which could be seen as inhumane - has been repeatedly recognized by the international tribunals.

"Less broad parameters for the interpretation of "other inhumane acts" [than the one's set out the Rome Statute] can instead be identified in international standards on human rights such as those laid down in the Universal Declaration on Human Rights of 1948 and the two United Nations Convenants on Human Rights of 1966. Drawing upon the various provisions

\textsuperscript{24} Erdemović (separate opinion) § 21.
\textsuperscript{25} \"...Persons taking no active part in the hostilities...shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples...\".
\textsuperscript{26} \"...No derogation from articles 6 (right to life), 7 (prohibition of torture or cruel, inhumane or degrading treatment or punishment), 8 (paragraphs I and 2) (prohibition of slavery), 11, 15 (nullum crimen sine lege), 16 and 18 (freedom of thought, conscience and religion) may be made under this provision." Square brackets by Author.
\textsuperscript{27} Akhavan 2008 at 27.
of these texts, it is possible to identify a set of basic rights appertaining to human beings, the infringement of which may amount, depending on the accompanying circumstances, to a crime against humanity.\textsuperscript{28}

The 1991 version of the ILC Draft Code included to a large extent the crimes that appeared in the 1996 ILC Draft Code under crimes against humanity but in 1991 they were titled as "systematic or mass violations of human rights." This correspondence between systematic or mass violations of human rights and crimes against humanity has been affirmed by the courts on several occasions\textsuperscript{29} and the two can today be seen as synonymous.

\textbf{4.3. Case Law}

‘Other inhumane acts’ are a residual category where ‘other’ refers to acts besides the ones enumerated in the list preceding it. It logically follows that the scope of ‘other inhumane acts’ varies depending on what is on the list preceding it. This has in several occasions meant that acts specifically mentioned in the Article 7 of the Rome Statute have as judged under prior Statutes (with shorter lists of enumerated crimes against humanity) been prosecuted as ‘other inhumane acts’.

This practice could be seen to cause the broadening of the crimes against humanity doctrine in further statutes. As it concerns acts that are comparable in gravity to the ones already mentioned this is a positive development. However there is also the danger that as more acts previously categorised as ‘other inhumane acts’ get specifically included in the list of crimes against humanity, other – less grave – crimes can move in to fill the ‘other inhumane acts’ category. With time this development could lead to the inclusion of more acts of lesser gravity under crimes against humanity, possibly diluting the original notion of crimes against humanity as a category preserved only for the most notorious acts imaginable.

The Rome Statute differs from previous Statutes in that it is a Treaty by form and has as such been signed and ratified by states whereas the Statutes of the ICTY and the ICTR were adopted as UN Security Council resolutions. The

\textsuperscript{28} Kupreškić § 566. Square brackets by Author.

\textsuperscript{29} Stakić § 25; Kunarač § 537.
content of the Rome Statute is therefore much more directly connected to the political wills of member states and has more weight as a source of international law. Because of its wide ratification it is also an important source in determining what can be considered the customary international law with regard to this particular crime. According to Article 7 of the Rome Statute:

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.

The list is significantly longer than in, e.g., the Nuremberg Statute and expresses the constantly growing group of acts prosecutable under crimes against humanity. This is due to the previously discussed growing influence of human rights law. All crimes are here also defined much more closely (even further in paragraph 2 of the article) partly no doubt due to the case
law that has accumulated in the decades between these treaties and given shape to what these crimes are in real life.

‘Other inhumane acts’ have in the ICTR and ICTY provided a category fit for acts that in the Rome Statute have their own wording. The Akayesu case in the ICTR and Kupreškić in ICTY provide clear examples of this.

4.3.1. Sexual Violence

In the case against Jean Paul Akayesu the ICTR found the defendant guilty of ‘other inhumane acts’ as crimes against humanity for acts constituting sexual violence other than the especially criminalized act of rape. The ICTR Statute criminalizes rape as a crime against humanity but no other forms of sexual violence are explicitly mentioned. Those have in the courts’ practise sometimes fallen into the category of ‘other inhumane acts’. In Akayesu the court had to define rape in order to be able to punish the accused for other acts of a sexual nature as ‘other inhumane acts’ (as well as several other crimes against humanity).

[Rape is] a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. The Tribunal considers sexual violence, which includes rape, as any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact. The incident described by Witness KK in which the Accused ordered the Interahamwe to undress a student and force her to do gymnastics naked in the public courtyard of the bureau communal, in front of a crowd, constitutes sexual violence. […] Sexual violence falls within the scope of “other inhumane acts”, set forth in Article 3(i) of the Tribunal’s Statute, “outrages upon personal dignity,” set forth in Article 4(e) of the Statute, and “serious bodily or mental harm,” set forth in Article 2(2)(b) of the Statute.30

30 Akayesu § 688. One should not be distracted by the fact that the defendant didn’t physically commit the acts himself; this alternative method of establishing individual responsibility through presence and an authoritative position with regard to the actual committers has been established in case law. See, e.g., Furundžija § 209.
This distinction seems less important under the Rome Statute where other forms of sexual violence are included in the same subparagraph as rape and the court does not need to distinguish between them. The above-described acts would under the Rome Statute probably constitute a “form of sexual violence of comparable gravity”. To include these acts within the scope of crimes against humanity, either through court practice such as Akayesu, or by inclusion in the Rome Statute, is necessary, as sexually violent acts, even when not amounting to rape, can be just as devastating to the victim and their commission show as much contempt for the dignity of the individual. To make them into specifically described forms of crimes against humanity in the Rome Statute enforces the predictability and credibility of international criminal justice.

4.3.2. Forcible Transfer

The Nuremberg Statute recognizes “deportation” but in the Rome Statute are mentioned “deportation or forcible transfer of population”. In Kupreškić the court remained confined to the ICTY Statute with regard to deportation (only listed as “deportation” similarly to the Nuremberg list) but looked to the Rome Statute for help in interpreting the clause of ‘other inhumane acts’. They noted in the Rome Statute the lack of standard according to which to judge possible ‘inhumane acts’ and decided to derive one from the most essential human rights and humanitarian law norms concluding that as a violation of the Geneva conventions forcible transfer of people could constitute an ‘inhumane act’ as a crime against humanity. A similar finding was made in Krstić.

Similarly to the parallel between Akayesu and the Rome Statute definition of sexual violence, the acts in Kupreškić and Krstić would also have later been likely to be punished as ‘forcible transfer’ - specifically listed under crimes against humanity - instead of as ‘other inhumane acts’. The dynamic nature

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31 IVth Convention of 1949 Art 49 and Additional Protocol II of 1977 Art 17(1).
32 Kupreškić § 565–566.
33 Krstić § 523: “In this regard, the Trial Chamber notes that any forced displacement is by definition a traumatic experience which involves abandoning one's home, losing property and being displaced under duress to another location. As previously stated by the Trial Chamber in the Kupreškić case, forcible displacement within or between national borders is included as an inhumane act under Article 5(i) defining crimes against humanity.”
of the category of ‘other inhumane acts’ is apparent when looking at the conclusions of cases like these. ‘Other inhumane acts’ is not an independent category of crime and its dependency on other crimes considered crimes against humanity is essential for its legitimacy.

5. Acts Considered ‘Other Inhumane Acts’

5.1. ‘Other Inhumane Acts’ as Crimes against Humanity

‘Other inhumane acts’ are crimes against humanity, so an act needs to fulfill the general criteria for that class of crimes. For an act to be considered a crime against humanity three main requirements must be fulfilled. A crime against humanity consists of (i) an underlying offence (such as murder, extermination or ‘other inhumane act’), committed as part of (ii) a broader attack (a widespread or systematic attack on a civilian population), with (iii) a mental element of intent to commit the underlying offence and knowledge of the offence’s role as part of the broader attack.34

The underlying offence is one of the ones listed in the crimes against humanity article of the statute applicable, the most obscure of which is ‘other inhumane acts’ as it gives no description of the offence it is supposed to apply to. In the ILC Draft Code “mutilation and severe bodily harm” are mentioned as examples of what is meant by ‘inhumane acts. In the courts this has been interpreted to mean that at least these can be ‘inhumane acts’, without excluding acts that do not fall into either category. The Rome Statute follows this in its formulation of “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental health” (Art 7(1)(k).

As shown in cases already mentioned sexual violence and forcible transfer have constituted inhumane acts. The following are examples of other acts that have not made it into statutory materials, at least not yet.

34 Cassese 2008 at 98–99 et al. Also defined by ICTR, e.g., in Bagilishema § 28.
5.2. Acts Committed on Corpses and the Ejusdem Generis Principle

5.2.1. Ejusdem Generis

In Tadić the ICTY established that ‘inhumane acts’ must be committed on human beings but also contemplated whether this could include acts on dead bodies. The prosecutor proposed that an act of discharging a fire extinguisher in a corpse’s mouth could constitute an ‘inhumane act’. The court refused the idea in this case and took

the view, having regard to the inhumane acts specifically listed under Article 5(a) to (h) of the Statute, that the inhumane act contemplated in Article 5(i) must be one which has to be inflicted on a living individual if it is not to offend the ejusdem generis rule.35

Ejusdem generis (Latin for “of the same kind”) is the principle of extending the meaning of a general word preceded by enumerations to things of the same kind as the enumerated.36 Here it would mean that ‘other inhumane acts’ under crimes against humanity must be similar to the acts mentioned in the list before. As all of the crimes against humanity in the ICTY statute can only be committed on living persons, so have to be acts under ‘other inhumane acts’. To date none of the criminal law statutes include mention of acts committed on corpses so under the reasoning in Tadić and the principle of ejusdem generis ‘other inhumane acts’ would also have to be committed on the living.

Ejusdem generis should be seen as a principle limiting the extent of ‘other inhumane acts’. This was quite elegantly explained long before Tadić, in a case before the District Court of Tel Aviv in 1951, Ternek.37 In it the court states that:

35  Tadić § 748.
36  In Black's Law Dictionary (8th edition 2004): “A canon of construction that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same type as those listed. For example, in the phrase horses, cattle, sheep, pigs, goats, or any other farm animal, the general language or any other farm animal - despite its seeming breadth - would probably be held to include only four-legged, hoofed mammals typically found on farms, and thus would exclude chickens.”
37  All references to this case from Cassese 2008 (at 42, 49, 89 and 114) as the Author is regrettably completely illiterate in Hebrew.
The defence counsel argue [...] that the words “other inhumane acts” [...] should be interpreted subject to the principle of ejusdem generis. That is, that an “other inhumane act” should be the type of the specific action mentioned before it, in the same definition, which are “murder, extermination, enslavement, starvation and deportation”. [...] We believe that there is truth in the defence counsel’s [...] claim. The punishment determined [...] for “crimes against humanity” is death [...], and it can be assumed that the legislator intended to inflict the most extreme punishment known to the penal code only for those inhumane actions which resemble in their type “murder, extermination, enslavement, starvation and deportation of a civilian population”.

As such ejusdem generis is scarcely used in case law or literature but a similar logic is apparent in the Rome Statute definition of crimes against humanity where “other inhumane acts of a similar character” are criminalized.38

5.2.2. Acts Committed on Corpses

In Niyitegeka, the accused was present39 as Assiel Kabanda, a prominent and well-liked Tutsi was captured, killed, decapitated and castrated, his skull pierced with a spike and his severed genitalia paraded around pinned on a spike. The court found that “the jubilation of the Accused, particularly in light of his leadership role in the attack, at the decapitation and castration of Kabanda, and the piercing of Kabanda’s skull, supported and encouraged the attackers, and thereby aided and abetted the commission of these crimes.”40

In another incident six days later the accused instructed a soldier to sharpen a piece of wood and insert it into the genitalia of a Tutsi woman who had just been killed.41

38 Rome Statute Art 7(1)(k). Emphasis by Author. See also Cassese 2008 at 49.
39 It should be noted, albeit briefly, that in International Criminal law guilt can be attributed to a person sometimes on their presence alone. A condition for this is that the onlooker is a superior to the person actually committing the act. See, e.g., Akayesu. (Cassese 2008 at 217–218 et al.)
40 Niyitegeka § 462.
41 Niyitegeka § 463.
The Chamber finds that the acts committed [...] are acts of seriousness comparable to other acts enumerated in the Article, and would cause mental suffering to civilians, in particular, Tutsi civilians, and constitute a serious attack on the human dignity of the Tutsi community as a whole.42

Here required is “seriousness comparable” to the listed acts. This implies a similar notion to *ejusdem generis*, but is more vague. This reasoning of the court seems not to fulfil the requirements set in *Tadić* of the crimes having to be committed on living people. The two views could be reconciled only through interpreting that the acts committed in Niyitegeka were offensive to the (living) members of the Tutsi community - and not to the individuals who, or whose dead bodies, were the immediate objects of the acts. The court makes no such interpretation in the text of the judgement so it is unclear if this is the logic they followed. They made no reference here to *Tadić* either.

5.3. “Forced Marriage”

The practise of systematically abducting girls and women and forcing them to perform sexual services, domestic labour, undergo pregnancies and have children to the rebel soldier they were assigned to as well as face punishment for not complying with these circumstances was known to be a part of the genocide in Rwanda and conflicts elsewhere in Africa. However ‘forced marriage’ as practised by the Armed Forces Revolutionary Council (AFRC)43 was charged as a separate crime first in the Special Court for Sierra Leone (“the SCSL”). The Appeals Chamber found the practice to constitute an ‘inhumane act’ as a crime against humanity.

With regard to sexual violence, where the ICTR and ICTY Statutes merely mention rape, the SCSL Statute also lists “sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence”44. The prosecution in the *AFRC* case indicted in the Trial chamber for “forced mar-

42  Niyitegeka § 465.
43  A group of soldiers associated with the rebel army Revolutionary United Front fighting (but failing) to overturn the government in the 1991–2002 Civil War of Sierra Leone, assisted by the then-president of Liberia, Charles Taylor.
44  SCSL Statute Art 2(g).
riage” but didn’t specify whether it was charged as a sexual crime or under ‘inhumane acts’. The Trial Chamber found the acts of forced marriage to be subsumed by the count of “sexual slavery”.

The prosecution appealed the original judgment stating that the crime of sexual slavery did not include the non-sexual aspects of the act of forced marriage. The Appeals chamber indeed saw

“no reason why the so-called “exhaustive” listing of sexual crimes under Article 2.g of the Statute should foreclose the possibility of charging as “Other Inhumane Acts” crimes which may among others have a sexual or gender component.”

“Based on the evidence on record, the Appeals Chamber finds that no tribunal could reasonably have found that forced marriage was subsumed in the crime against humanity of sexual slavery. While forced marriage shares certain elements with sexual slavery such as non-consensual sex and deprivation of liberty, there are also distinguishing factors. [...] These distinctions imply that forced marriage is not predominantly a sexual crime. The Trial Chamber, therefore, erred in holding that the evidence of forced marriage is subsumed in the elements of sexual slavery.”

The Appeals Chamber essentially divided the act of forced marriage into a sexual and a non-sexual component. The former was categorised and punished as ‘sexual violence’, the latter as ‘other inhumane acts’. No definitions were made of the factual aspects of these two parts or indeed of ‘forced marriage’ as such. The circumstances of ‘forced marriage’ in the Sierra Leone conflict were discussed in detail but no definition of the act with a more general applicability was given, which might prove a problem when prosecuting similar acts in very different circumstances.

45  AFRC case § 186.
46  Ibid. § 195.
47  Rose 2009 at 371.
5.4. Attempted Murder

Article 7 of the ICTY Statute provides for individual responsibility for the crimes set out in the Statute. Specifically in Article 7(1):

A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

Attempt is not mentioned in the entire Statute. This lead the court in the Vasiljević case to prosecute attempted murder as an ‘inhumane act’ as a crime against humanity. The accused, a Bosnian Serb, had shot at seven Bosnian Muslim civilians made to stand in line at a riverbank. Five of the men died and for those acts the defendant was appropriately charged (for extermination, persecution and murder as crimes against humanity and murder as a war crime). Two of the men were not hit and survived by jumping in the river and playing dead. For the acts of their attempted murders the defendant was charged for ‘other inhumane acts’ and not, as might seem logical, for the attempted crime of murder.

Prosecuting an attempted crime as a completed one is peculiar and seems only to be explained by the very literal following of the wording of the Statute; as attempt is not explicitly mentioned in the Statute, so the acts must be considered as completed ones. The Trial Chamber seemed to accept this structuring by the prosecution and only addressed the acts from this point of view, never considering whether the acts committed would have been better addressed as attempts at the crime of murder (as either a crime against humanity, a war crime or both) than as the completed crimes of inhumane acts as crimes against humanity.

The Trial Chamber is further satisfied that the attempted murder of VG-32 and VG-14 constitutes a serious attack on their human dignity, and that it caused VG-32 and VG-14 immeasurable mental

48 ICTY Statute Art 5(i).
49 About the concurrence of crimes in international criminal law see, e.g., Cassese 2008 at 178–183.
50 Cassese 2004 at 267.
suffering, and that the Accused, by his acts, intended to seriously attack the human dignity of VG-32 and VG-14 and to inflict serious physical and mental suffering upon them. The Trial Chamber is thus satisfied that the Accused incurred individual criminal responsibility for the attempted murder of these two Muslim men as inhumane acts pursuant to his participation in a joint criminal enterprise to murder them.\textsuperscript{51}

In national courts attempted murders have been found to constitute war crimes as such, just as attempted murder constitutes a crime in practically any national legal system. Attempt is explicitly included in the Rome Statute. The case has been criticised for stretching the notion of ‘other inhumane acts’ too far.\textsuperscript{52}

5.5. Destruction of Property

An example of truly stretching the notion of ‘other inhumane acts’ too far is in the Trial of Saddam Hussein\textsuperscript{53}. The nationally created Iraqi High Tribunal (“the IHT”)\textsuperscript{54} charged Saddam Hussein for acts committed in the attack on the city of Ad-Dujayl. Multiple crimes falling under the IHT Statute’s jurisdiction were committed in the attack but the destruction of the city’s infrastructure, orchards and date palms was charged as ‘inhumane acts’ (set out in Article 12(I)(J), the entire Article on crimes against humanity being almost identical to the one set out in the Rome Statute). This extensive destruction of property was not argued to have caused direct physical injury to the people of the town (as starvation, exposure to elements or the like) but more weight was given to the malicious intent behind it.\textsuperscript{55}

Destruction of important infrastructure might be a significant act and express great contempt for the people of Ad-Dujayl, but the special nature of crimes against humanity as the most atrocious acts imaginable cannot accommodate a stretch this far from the level of severity expressed in the

\textsuperscript{51} Vasiljević § 239.
\textsuperscript{52} Cassese 2004 at 274.
\textsuperscript{53} Regrettably no reference can be made to the original court documents as they are not available in English and the Author’s knowledge of Arabic is regrettably lacking.
\textsuperscript{54} Also known as The Supreme Criminal Tribunal or Iraqi Special Tribunal.
\textsuperscript{55} Blinderman 2009 at 1260–1261.
crimes of murder, enslavement, extermination, rape and others that are at the core of crimes against humanity. Even the minimum requirement set already in Tadić, of ‘inhumane acts’ having to be inflicted on human beings, is not met. However condemnable acts such as the ones considered in Hussein are, they have to be tried in a manner that does not threaten the system as a whole. The Hussein judgment, however, is generally considered very questionable on various other grounds as well and the value of this case as a precedent to further international criminal law is nonexistent.

6. Conclusions

A comparison between Akayesu and the AFRC case illuminates the differences in the scope of what ‘other inhumane acts’ are as dependent on the list of crimes against humanity preceding it in each statute. In Akayesu sexual violence fell within the scope of ‘other inhumane acts’ whereas in the AFRC case ‘the offence of ‘other inhumane acts’, even though residual, must logi-cally be restrictively interpreted as applying to acts of a non-sexual nature amounting to an affront to human dignity’.

These seemingly contradictory positions taken by the courts are so only at first glance. In Akayesu the only sex crime available as explicitly listed in the statute is rape and others must be judged as ‘inhumane acts’ whereas the SCSL had in the AFRC case a list of a number of sexual crimes to choose from – including the residual category of ‘any other form of sexual violence’ – and so no sexual violence could be tried under ‘other inhumane acts’.

‘Other inhumane acts’ are a constant in the international criminal law statutes, but the scope of it is strictly dependent on the respective articles on crimes against humanity as a whole, which has differed considerably over the years and from court to court.

‘Inhumane acts’ are intentionally an open catch-all clause. The necessity of this openness was quite elegantly defended by the ICTY, who in contemplating it referred to the International Committee of the Red Cross’s comments on Article 3 of the Geneva conventions, describing “humane treatment”.

56 AFRC case § 679.
57 Kupreškić § 563, Blaškić § 273.
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.\footnote{ICRC Commentary at 39.}

The openness of the concept arouses a conflict with the \textit{nullum crimen sine lege}-principle upheld in international criminal law. This contradiction could be resolved in the courts first by keeping in mind the principle of \textit{ejusdem generis} and maintaining that ‘inhumane acts’ are of a severity similar to the specifically listed crimes against humanity. Secondly the standard by which the “inhumanity” of an act is judged has to be a customarily accepted one and tied to the appropriate human rights standards.

A very important purpose of criminal law is to provide a deterrent for prospective offenders by stating what is prohibited and implementing the threat of punishment. International criminal law has the important objective of ending impunity and it cannot do so without the deterrent effect, discouraging from committing atrocities also those whose moral compass does not do so. The eagerness of a court to make punishable all possible atrocities must be restricted by the fact that crimes against humanity will lose their status as the most condemnable of crimes if they are diluted by including more and more acts. This is a concern for all application of international criminal law but in many ways most critical in notions such as ‘other inhumane acts’ as they are in their openness the most vulnerable.
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