

### §3.2.e Rome Statute of the International Criminal Court (ICC)

#### *Rome Statute of the ICC: R2P*

Including the statutes of the *International Criminal Tribunal for Rwanda* (ICTR) and the *International Criminal Tribunal for the former Yugoslavia* (ICTY)

Along with War Crimes, the Rome Statute of the ICC determines the legal scope and substance of the atrocity crimes of Genocide (Art. 6) and Crimes against humanity (Art.7) in international law.<sup>78</sup> Importantly, neither of these crimes require a link to armed conflict, with Crimes against Humanity explicitly requiring only its being “committed as part of a widespread or systematic attack directed against any civilian population” (Art. 7). Ethnic Cleansing is not a separately listed crime in the Statute. Rather, acts of ethnic cleansing will be Crimes against Humanity under Art. 7(d) concerning forced displacement and/or Art. 7(g) concerning persecution. The Rome Statute thus determines the scope of all four of R2P’s atrocity crimes, and provides an international legal framework criminalizing the violation of State’s R2P Pillar One duties.<sup>79</sup> The Rome Statute, however, does not itself provide any authority whatsoever for R2P Pillar Three action, at least in terms of military intervention for protective purposes. As its Preamble declares: “nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State.” Rather, the ICC contributes to long-term (Pillar Two) structural prevention through stopping impunity for atrocity crimes.

The *ICTY Statute* similarly gives

78 ICC, “Rome Statute of the International Criminal Court” (Rome: 1st July 2002).

79 Fleck, “International Accountability,” pp. 191–93; Stahn, “Political Rhetoric or Emerging Legal Norm?” p. 118.

**The three international criminal statutes provide for the crimes of genocide, crimes against humanity and war crimes.**

**R2P’s fourth atrocity crime – ethnic cleansing – is not expressed as a crime distinct from these. When it does not amount to genocide, ethnic cleansing in the statutes falls under specific elements of *Crimes against Humanity*, in particular, a) forced displacement, b) deportation, and/or, c) persecution.**

determinacy to the crimes of Genocide (Art. 4) and Crimes against humanity (Art. 5). Crimes against Humanity include, relevant to ethnic cleansing, the crimes of deportation (Art 5(d)) and persecution (Art. 5(h)). The Statute dealt with war crimes under the rubrics of *Grave breaches of the Geneva Conventions of 1949* (Art. 2) and *Violations of the laws or customs of war* (Art. 3). Again, there is clear application here with regard to R2P Pillar One. For example, Art. 7(3) describes the responsibility of authorities that have failed to prevent violations being performed by their subordinate actors. Additionally, paving the way for the Rome Statute, the ICTY court supported the possibility that crimes against humanity do not need to be linked to armed conflict.<sup>80</sup>

Likewise, the ICTR Statute provides for the crimes of Genocide (Art. 2) and Crimes against Humanity (Art. 3, including deportation and persecution), and deals with war crimes under the specific rubric of *Violations of Article 3 common to the*

80 Louis G. Maresca, “Case Analysis: The Prosecutor V. Tadic the Appellate Decision of the ICTY and Internal Violations of Humanitarian Law as International Crimes,” *Leiden Journal of International Law* 9 (1996): 219-31 p. 229.

*Geneva Conventions and of Additional Protocol II* (Art. 4).

#### *Rome Statute of the International Criminal Court (ICC): POC*

The Rome Statute’s Art. 8 provides for war crimes and so for the application of IHL – *Narrow POC*. With the crimes of genocide and crimes against humanity applying outside armed conflict, war crimes are expressly limited by the Statute to occurring in armed conflict and are thus distinguished from “social tensions” (Art. 8(d)). Importantly, the Rome Statute has a substantiality requirement, responding only to “grave breaches” of IHL, so its scope is more restrained than the overall class of POC situations.

Similarly, the statute of the ICTY provides in Art. 2 and Art. 3 for grave breaches of the Geneva Conventions, while the ICTR Statute’s Art. 4 refers to violations of Com. Art. 3 and Add. Protocol II.