

International Criminal Law: a Discussion Guide

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I. Introduction to International Criminal Law

International Criminal Law, as that phrase is used in this discussion guide,¹ refers to that body of norms of public international law the breach of which will give rise to individual criminal responsibility.

A. Public International Law

Central to a proper understanding of International Criminal Law is the fact that it is a discrete body of public international law and, as such, operates in the context of the international legal system. At the same time, the character of international criminal norms, as norms capable of engaging the criminal responsibility of individual human beings, is distinct from that of most other norms of public international law.

From the inception of the Westphalian system, the sovereign equality of states and the related principle of non-intervention were paramount. As a horizontal system, where sovereign states were horizontally juxtaposed with no higher authority, its substantive norms consisted of a network of reciprocal obligations that focused almost exclusively on inter-state relations. Norms generated within this system have been traditionally understood to have as their legal subject the state alone, and their breach gave rise only to the responsibility of the state. Individual human beings could only be bound by international law indirectly, if at all, and usually through the modality of domestic legislation.

Another consequence of this horizontal structure is the consent-based nature of international law. As sovereign equals, all states are of equal legal status, and thus may only be bound by obligations that they have created or chosen to accept.² The sources of international law, reflecting this requirement of state consent, are treaties, custom, and general principles of law.³

B. The Evolution of International Criminal Law

The horrors of the Second World War spawned a host of developments in international law. Among the most significant was the crystallization of the principle that violation of certain norms of international law could give rise to individual criminal responsibility. According to this principle, certain serious violations of international law would engage not only the classical form of responsibility in international law, i.e., the responsibility of the state, but also that of the

¹ Generally, the phrase “international criminal law” may refer to a variety of international norms, including those governing such matters as extradition and mutual cooperation in law enforcement and judicial proceedings.

² While this voluntarist model was altered following World War II and the adoption of the Charter of the United Nations, the international legal system still rests on the principle of state sovereignty and any legal analysis must begin with this principle.

³ Statute of the International Court of Justice, art. 38. A treaty binds a state only if a state chooses to become a party to that treaty, thus expressing its consent to be bound. States are deemed to consent to customary law, consisting of the practice of states accepted as law, as well as “the general principles of law recognized by civilized nations.” *Id.* Scholarship and jurisprudence are subsidiary means for the determination of rules of international law. *Id.*

individual human beings perpetrating the violation. Such perpetrators could be criminally prosecuted and punished for these violations of international law.

The emergence of this principle was primarily driven by the need to develop effective means of enforcement. As reasoned by the International Military Tribunal at Nuremberg, “Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”⁴

The principle of individual criminal responsibility for violations of certain international norms has now crystallized in treaty law as well as customary international law. The Rome Statute of the International Criminal Court (ICC), adopted in 1998, provides the most comprehensive codification to date of international criminal law. Included within its subject matter jurisdiction are the crimes of aggression, genocide, war crimes, and crimes against humanity. The treaty has been widely ratified, and its Assembly of States Parties aspires to near universal participation.

Nonetheless, the development of international criminal law is a relatively recent phenomenon, and the principle of *nullem crimen sine lege* takes on particular significance in this context. Further, notwithstanding the fact that these norms directly bind individual human beings, it is essential to bear in mind that these norms were generated in an inter-state legal system. Thus, for example, certain crimes will require an inter-state element in order to engage the criminal responsibility of the individual under international law.

C. The Establishment & Subject Matter Jurisdiction of the Special Panels

The authority of the United Nations Transitional Administration in East Timor (UNTAET) authority to administer and legislate for East Timor was granted by the Security Council in Resolution 1272 (1999). This resolution was adopted under Chapter VII of the Charter of the United Nations. As such, the resolution overrode the non-intervention principle and was clearly binding on all Member States, eliminating the need for consent.

The Special Panels were created by UNTAET in Regulation No. 2000/15⁵ (UNTAET Regulation). Their subject matter jurisdiction encompasses genocide, war crimes, crimes against humanity, torture, murder, and sexual offenses. While the latter two categories are based upon domestic law, the first four are derived from international law.

The subject matter jurisdiction of the panels with respect to the first three categories—genocide, war crimes, and crimes against humanity—is virtually identical to that of the International Criminal Court. Similarly, the definition of torture is modeled closely after that set forth in the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. It is these crimes under international law to which the scope of this discussion guide is limited.

D. Transition to Independence & UNMISSET

⁴ International Military Tribunal (Nuremberg) 41 AJIL 172 (1947) at 221.

⁵ UNTAET Reg. No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, UNTAET/REG/2000/15, § 5 (6 June 2000) [hereinafter UNTAET Regulation No. 2000/15].

East Timor's transition to independence, in tandem with UNTAET's transformation into UNMISSET, may have brought about a shift in the legal basis of the Panels. The fact that UNMISSET was not established under Chapter VII of the Charter may indicate that the consent of East Timor may be necessary for the continuing operation of the Panels. It should be noted, however, that the same resolution establishing UNMISSET authorizes it under Chapter VII to take the action necessary to fulfill its mandate. In any event, the entrenchment of consent by the East Timorese government in Article 163 of the East Timorese Constitution would seem to assure the continuing jurisdiction and independence of the Panels.

II. War Crimes

A. The Regulation of Armed Conflict Under International Law

The traditional function of public international law is to regulate relations between and among states. This function continues even when these relations degenerate into armed conflict, for during such conflicts “[t]he right of belligerents to adopt means of injuring the enemy is not unlimited.”⁶

The law of armed conflict, known also as the law of war, the *jus in bello*, or international humanitarian law (IHL), is one of the oldest subject areas of international law. It refers to the corpus of international norms that regulates the conduct of hostilities and that provides protection for persons not taking part, or no longer taking part, in hostilities.

While it shares with international human rights law the purpose of protecting individuals, the two bodies of international law may be distinguished on several grounds. Most significantly, human rights law is primarily concerned with the way a state treats those under its jurisdiction, while “[h]umanitarian law aims at placing restraints on the conduct of warfare so as to diminish its effects on the victims of the hostilities.”⁷ Humanitarian law must also be distinguished from the *jus ad bellum*, which regulates the lawfulness of a state’s initial recourse to the use of armed force. Once an armed conflict has begun, the *jus ad bellum* gives way to the *jus in bello*.

International humanitarian law applies only in times of armed conflict or occupation. One of the strengths of IHL is that it applies on the facts, and is unconcerned with political labels. Thus, a formal declaration of war is not necessary to trigger the application of IHL so long as an armed conflict or occupation in fact exists.

B. The Evolution of IHL

The corpus of IHL rests on a set of fundamental principles, which at the same time constitute the earliest antecedents of modern humanitarian law.⁸ These include the complementary principles of necessity and humanity, and of distinction and proportionality.

While the principle of humanity was aimed at reducing human suffering, it is tempered by the principle of military necessity, which reflects the interests of the warring parties in avoiding conferral of a military advantage on the opposing party to the conflict. Thus, traditional weapons were prohibited only if they caused *unnecessary* suffering.

⁶ Art. 22, Fourth Hague Convention of 1907.

⁷ Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, IT- 96-23/1, Judgment, ¶ 470(i) (Trial Chamber II, February 22, 2001). Other distinctions between human rights and humanitarian law include the subjects of obligations, the institutions competent to determine violations, the period of application, the range of rights protected, and the sources of obligations.

⁸ These principles are historically rooted in moral philosophy. The doctrine of collateral damage, for example, follows from the Thomist doctrine of ‘double-effect.’

A balance is similarly struck between the principle of distinction and the permissibility of civilian casualties in the form of proportionate collateral damage. The principle of distinction requires that “the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”⁹ Civilian casualties may result, however, in the course of an attack against a military objective. The lawfulness of such an attack will be preserved so long as the expected loss of civilian life is not “excessive in relation to the concrete and direct military advantage anticipated.”¹⁰

As may be gleaned from these principles, many provisions of IHL are premised on a bargaining of sorts. For example, certain protected objects retain their protected status only so long as they are not used for purposes related to the hostilities. Thus, when fighters take shelter in a church, the church becomes a lawful military objective, losing the protection otherwise afforded to it under humanitarian law.¹¹

The Combatants’ Privilege

One of the fundamental rules of IHL is embodied in the “combatants’ privilege.” While the above-mentioned principles imposed restraints on the conduct of hostilities, the combatants’ privilege affords lawful combatants the right to kill enemy combatants. Thus, while IHL regulates the means by which such killing is effected, lawful combatants are immunized from prosecution for the act of killing itself, so long as the principle of distinction was not violated.

Hague law and Geneva law

The Nineteenth Century saw the conclusion of the first multilateral treaties codifying the law of armed conflict. The most comprehensive codifications were the Hague Conventions of 1899 and 1907 and the Geneva Conventions of 1949, supplemented by the Additional Protocols of 1977. In general, these treaties track two different strands of humanitarian law, known simply as the Hague law and the Geneva law.

The Hague law consists primarily of restraints on the conduct of hostilities, including the outright prohibition of certain methods and means of warfare. The rules of the Hague law prohibit, for example, attacks against particular targets, such as undefended towns or religious institutions, and the employment of certain types of weapons, in particular those calculated to cause unnecessary suffering.

⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, (Protocol I) art. 48, 8 June 1977, 1125 UNTS 3 [hereinafter Additional Protocol I].

¹⁰ *Id.* art. 57.

¹¹ Note, however, that if there were civilians in the church as well, the principle of proportionality would still apply. If the number of civilians present in the church vastly outnumbered the number of combatants, it is likely that the principle of proportionality would bar attacking the church in a manner that would result in the deaths of those civilians.

The Geneva law focuses on the protection of individuals who are not or are no longer taking part in hostilities. Each of the four Geneva Conventions protects a different category of such individuals. The First and Second Geneva Conventions protect sick and wounded soldiers in the field and at sea, respectively. The Third Convention regulates the treatment of prisoners of war. The protection of civilians is the exclusive province of the Fourth Convention. The Additional Protocols to the Geneva Conventions simultaneously update and merge the Hague and Geneva law.

Among the most basic rules of IHL, in addition to the principles noted above, are the following: Persons *hors de combat* (i.e. an individual who has been removed from combat through sickness or detention) and those not taking direct part in hostilities must be protected and treated humanely without adverse discrimination. It is forbidden to kill or injure an enemy who surrenders or is *hors de combat*. The wounded and sick must be collected and cared for by the party that has them in its power. The Red Cross emblem, which is used to protect humanitarian or medical establishments and personnel, must be respected. Captured combatants and civilians under the authority of an adverse party are entitled to have their basic rights respected; in particular they must be protected against violence. All persons are entitled to basic judicial guarantees. Parties to the conflict cannot use weapons or methods of warfare causing unnecessary suffering. In addition, certain acts are specifically prohibited. These include torture, the taking of hostages, the use of human shields, rape, the imposition of collective penalties, pillage,¹² and reprisals¹³ against protected¹⁴ persons.

The Grave Breaches

The Geneva Conventions also establish a special penal regime for certain violations — the so-called “grave breaches.” When a grave breach is committed, all States Parties are obliged to criminalize such conduct under their domestic law, to seek out the perpetrators, and to bring them to justice through prosecution or extradition.¹⁵

The continuing relevance of customary law

¹² Pillage is essentially theft of civilian property. It must be distinguished from the lawful act of requisitioning supplies needed by an occupying army.

¹³ A reprisal is an otherwise unlawful act committed in response to an unlawful act by the opposing party. Reprisals are employed to induce compliance by the opposing party.

¹⁴ As noted above, the scope of protection afforded by the Geneva Conventions is limited to certain groups of individuals. The bulk of the protection afforded under the Fourth Convention is limited to a particular group of civilians – “those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.” See Geneva Convention relative to the Protection of Civilian Persons in Time of War (4th Geneva Convention), 75 U.N.T.S. 287, art. 4 (1949).

¹⁵ See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1st Geneva Convention), 75 U.N.T.S. 31, art. 50 (1949) (“Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.”).

Notwithstanding the codification of humanitarian law, the general principles and customary law of war as developed through the centuries continue to apply in a residual manner, filling any gaps between the express provisions of treaty law. As set forth in the famous Martens clause:¹⁶

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.¹⁷

In addition to this gap-filling function of customary law, a number of states, including the United States, have failed to ratify the Additional Protocols to the 1949 Geneva Conventions. These states would be bound by the rules contained in those instruments only to the extent that each particular rule had evolved into customary law.

The law of non-international armed conflict

A more critical distinction than that between the Hague law and the Geneva law is the distinction between the law of international armed conflict and the law of non-international armed conflict.

Embedded in the classical system of international law, a system resting on the sovereign equality of states¹⁸ and the related principle of non-intervention,¹⁹ IHL is predominantly concerned with international (i.e., interstate) armed conflict. Among the four Geneva Conventions, only ‘Common Article 3’ expressly applies to non-international armed conflict. Common Article 3 provides protection from only the most serious abuses.²⁰ While Protocol II also applies to non-international armed conflict, it provides significantly less protection to individuals than does Protocol I, which is

¹⁶ The ‘Martens clause’, as it has come to be known, was included in the preamble of the Hague Conventions at the behest of F. F. de Martens, prominent jurist and Russian delegate to the 1899 Hague Peace Conference. The clause essentially invoked natural law to provide residual protection to victims of inhumane acts that were not expressly prohibited by the Convention. This clause also provided the foundation for the evolution of Crimes Against Humanity as they are understood today. See Theodor Meron, *The Martens Clause, Principles of Humanity, and Dictates of Public Conscience*, 94 AM. J. INT’L L. 78, 79 (2000). The International Court of Justice has found the Clause itself to constitute a rule of customary international law. *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, 257 (July 8).

¹⁷ Hague Conventions of 1907, preamble.

¹⁸ UN CHARTER, art. 2(1).

¹⁹ UN CHARTER, art. 2(7).

²⁰ Common Article 3 prohibits the following acts against persons taking no active part in the hostilities: “[v]iolence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; [the] [t]aking of hostages; [o]utrages upon personal dignity, in particular, humiliating and degrading treatment; [and] [t]he 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.”

applicable only in international armed conflict or occupation. Application of the Hague Conventions is similarly limited to situations of international armed conflict.²¹

While neither the Hague Conventions nor the Geneva Conventions define the phrase “armed conflict,” definitions for both international and non-international armed conflict have been set forth in international jurisprudence. According to the jurisprudence of one international criminal tribunal, an armed conflict exists “whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”²²

A peculiar feature of the law of non-international armed conflict is its application to non-state groups. As noted above, the traditional subject of international law is the state. However, over the course of the past century, the principle that only states could be the subjects of international legal obligations yielded to the changing values and nature of the international community. By its terms, Common Article 3 of the Geneva Conventions binds both states and non-state parties to non-international conflicts. In addition, certain norms of IHL have evolved into norms of international criminal law, which directly binds individuals.

The law of occupation

As noted above, IHL applied in times of occupation as well as armed conflict. Indeed, the Geneva Conventions make clear that they apply to all cases of partial or total occupation, “even if the said occupation meets with no armed resistance.”

According to the Fourth Hague Convention of 1907, “Territory is considered occupied when it is actually placed under the authority of the hostile army.” However, jurisprudence suggests that the term “occupation,” as used in the Fourth Geneva Convention (Civilians), has a broader meaning. According to the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Naletilic* case, “the application of the law of occupation as it effects ‘individuals’ as civilians protected under Geneva Convention IV does not require that the occupying power have actual authority. For the purposes of those individuals’ rights, a state of occupation exists upon their falling into ‘the hands of the occupying power.’”

C. War Crimes as Crimes under International Law

As noted in the Introduction, it was the establishment of the International Military Tribunals²³ in the aftermath of World War II that spurred the development of international criminal law.²⁴ Thus,

²¹ Note, however, that the International Criminal Tribunal for the former Yugoslavia has greatly expanded the scope of norms applicable in non-international armed conflict. In the *Tadic* case, the Appeals Chamber found that certain norms of international armed conflict have evolved through customary law and now apply during non-international armed conflict as well. Prosecutor v. Dusko Tadic, IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 69 (October 2, 1995).

²² *Id.* ¶ 70.

²³ At the close of World War II, the Allies established the International Military Tribunal at Nuremberg as well as the International Military Tribunal for the Far East. While the former was established on the basis

the overwhelming majority of international crimes that were recognized by the international community at that time were those relating to war; i.e. violations of humanitarian law. In addition, the commission of international crimes, by their very nature and scale, will often coincide with times of massive upheaval, such during periods of armed conflict.

“War crimes” are essentially criminal violations of IHL (i.e. violations of those norms of IHL which are deemed to give rise to individual criminal responsibility). Genocide and crimes against humanity are distinct from war crimes in that they need not be committed in times of armed conflict. It must be noted, however, that not all violations of IHL will constitute war crimes. The breach of some norms will give rise only to state responsibility (the traditional form of responsibility in international law), and not the responsibility of the individual perpetrator. When the drafters of the ICTY Statute began to develop the subject matter jurisdiction of the Tribunal, they were faced with the challenge of determining which violations of IHL gave rise to individual criminal responsibility. The first category of war crimes they included in the Statute was the category of “grave breaches” as set forth in the 1949 Geneva Conventions. Because such breaches were the subject of a mandatory penal regime in the Conventions, the drafters of those Conventions had clearly intended that the breach of such norms should give rise to criminal responsibility. The other category of war crimes included in the ICTY Statute referred simply to the ‘laws and customs of war,’ essentially leaving to the judges the questions of which violations of IHL would constitute war crimes.

Thus, in the *Tadic* decision, the ICTY Appeals Chamber developed a framework for analyzing which norms of IHL gave rise to individual criminal responsibility, and could thus be prosecuted before the Tribunal. The primary criteria set forth were the character of the norm itself, the severity of the violation, and the interest of the international community in its repression.²⁵

Furthermore, for an act to constitute a war crime, a nexus must be established between the alleged offence and the armed conflict which gives rise to the applicability of international humanitarian law. The *ad hoc* International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR) have determined that such a nexus exists where an act is closely related to an armed conflict; i.e., if the act was committed in furtherance of an armed conflict, or under the guise of an armed conflict. They have cited as factors in this determination: the fact that the perpetrator is a combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator’s official duties.

The enumeration of war crimes in the Rome Statute is the most extensive to date, and is widely regarded as a progressive development of the law, as opposed to a codification of customary law existing at the time of its adoption. This poses no problem for the ICC since its jurisdiction is

of a multilateral treaty, the latter was created on the basis of a unilateral order by the Supreme Commander of the Allied Powers.

²⁴ As noted above, although international criminal law can refer to various distinct bodies of international law, ranging from extradition treaties to mutual assistance agreements, in this discussion guide it is used to refer to that body of international norms the breach of which gives rise to the criminal responsibility of the individual under international law.

²⁵ *Tadic* Appeal Decision, ¶ 128.

prospective. The fact that ICC State Parties have agreed to criminalize future instances of this conduct is sufficient to render it prosecutable by the ICC. However, this is not true of the Special Panels, since the Panels are tasked with adjudicating crimes that occurred before the entry into force of the UNTAET Regulation.

Nonetheless, many of the crimes included in the Statute were already recognized under customary law, with the clearest example being the grave breaches. Such crimes could thus be prosecuted by the Panels.

III. Crimes Against Humanity

The UNTAET Regulation follows the jurisdictional requirements for crimes against humanity set forth in the Rome Statute for the International Criminal Court.²⁶ With two exceptions,²⁷ the language appearing in the Regulation repeats verbatim the language of Article 7 of the Rome Statute. This section will discuss the contours of crimes against humanity under the Regulation by examining the Rome Statute as well as the jurisprudence of the ICTY and ICTR. Broadly speaking, the definition can be divided into the *chapeau*, or contextual elements of crimes against humanity, and the enumerated acts.

A. Contextual Elements of Crimes of Against Humanity

Section 5.1 of the UNTAET Regulation reads:

For the purposes of the present regulation, “crimes against humanity” means any of the following acts when committed as part of a widespread or systematic attack and directed against any civilian population, with knowledge of the attack.²⁸

Thus, crimes against humanity require that there be an act, committed as part of an overarching attack, of which the actor is aware. The *chapeau* requires neither discriminatory grounds nor a nexus to armed conflict.

1. Widespread or Systematic Attack

Definition of attack

The definition of an attack is fairly nebulous, but may be generally defined as an unlawful act, event, or series of events. An “attack” does not necessarily require the use of armed force; it could involve other forms of inhumane mistreatment of the civilian population.²⁹

Widespread or systematic

The Rome Statute formalized the scale and organization criteria of an attack as disjunctive, allowing jurisdiction over attacks of either massive scale *or* based upon some degree of planning

²⁶ Rome Statute of the International Criminal Court, art. 7 (1998), *available at* <http://www.un.org/law/icc/statute/romefra.htm> [hereinafter Rome Statute].

²⁷ Both exceptions will be discussed in context *infra*.

²⁸ UNTAET Reg. No. 2000/15, § 5.1.

²⁹ *See* Prosecutor v. Laurent Semanza, ICTR-97-20, Judgment and Sentence, ¶ 327 (Trial Chamber III, May 15, 2003). *See also* Prosecutor v. Milomir Stakic, IT-97-24, Judgment, ¶ 623 (Trial Chamber II, July 31, 2003) (clarifying the difference between an attack and armed conflict: “an attack can precede, outlast, or continue during the armed conflict, but it need not be part of it and is not limited to the use of armed force; it encompasses any mistreatment of the civilian population”).

or organization. The Regulation follows this disjunctive formula. A disjunctive test is also reflected in the ICTR Statute³⁰ and ICTY jurisprudence.³¹

While the Rome Statute defines neither “widespread” nor “systematic,” ICC negotiators understood “widespread” to mean a “multiplicity of persons” or a “massive attack,” and “systematic” to encompass a developed policy or a high degree of organization and planning of the acts. Under ICTY and ICTR jurisprudence, “widespread” has been interpreted to include both a large number of acts spread across time or geography, as well as a single or limited number of acts committed on a large scale.³² For the ICTR, “systematic” generally refers to the organized or planned nature of the attack.³³ However, this planning can be done by any organization or group, rather than being limited to the State or military bodies.³⁴ The ICTY has similarly defined systematicity, and identified relevant factors in determining this element.³⁵

No policy requirement

Evidence of a policy or plan may be useful in proving the “widespread” or “systematic” nature of the attack; however, the jurisprudence of both ad hoc tribunals has made clear that proof of a specific policy is not required to meet either criterion.³⁶

Under the Rome Statute, attacks must meet two sets of threshold requirements: a high threshold that establishes the attacks as either “widespread or systematic,” and a lower threshold that requires “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.”³⁷ Thus, in contrast to ICTY and ICTR jurisprudence, the Rome Statute includes a State or organizational policy element.³⁸ However, this second threshold requirement

³⁰ See Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., Annex, U.N. Doc. S/RES/955, art. 3 (1994) (“committed as part of a *widespread or systematic* attack”) [hereinafter ICTR Statute].

³¹ Prosecutor v. Dusko Tadic a/k/a/ "Dule," IT-94-1-T, Opinion and Judgment, ¶ 626 (Trial Chamber I, May 7, 1997).

³² See Prosecutor v. Jean-Paul Akayesu, ICTR-96-4, Opinion and Judgment, ¶ 580 (Trial Chamber I, September 2, 1998); *Tadic* Trial Judgment, ¶ 648; Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, IT- 96-23/1, Judgment, ¶ 94 (Appeals Chamber, June 12, 2002).

³³ See *Akayesu* Trial Judgment, ¶ 173.

³⁴ Prosecutor v. Ignace Bagilishema, ICTR-95-1A-T, Judgment, ¶ 78 (Trial Chamber I, June 7, 2001)

³⁵ Prosecutor v. Tihomir Blaskic, IT-95-14, Judgment, ¶ 203 (Trial Chamber I, March 2, 2000). The relevant factors include:

- The existence of a policy, plan, or ideology on which the attack is perpetrated, that supports destruction, persecution, or a weakening of the targeted community;
- The perpetration of the attack on a very large scale against a group of civilians or the repeated and continuous commission of inhumane acts linked to one another;
- The use of significant public or private resources, whether military or other; and
- The involvement of high-level political and/or military authorities in the establishment and perpetration of the plan.

³⁶ See *Semanza* Trial Judgment, ¶¶ 326, 329; *Kunarac* Appeal Judgment, ¶¶ 89, 98.

³⁷ Rome Statute, arts. 7(1) and 7(2)(a).

³⁸ Rome Statute, art. 7(2)(a).

was not transferred in explicit terms to the UNTAET Regulation. Thus, it is unlikely that the existence of a policy would have to be established in order to meet the definition of a “widespread or systematic attack” under the UNTAET Regulation.

2. Directed Against Any Civilian Population

Unlike the Rome Statute, the *chapeau* in the Regulation adds the word “and” between the phrases “when committed as part of a widespread or systematic attack” and “directed against any civilian population.”³⁹ While this addition allows for an interpretation that the latter phrase could modify the underlying acts rather than or as well as the overall attack,⁴⁰ the jurisprudence of the Special Panels suggests that the Regulation does not create jurisdiction different from that described by the Rome Statute. Thus, the *Same Panel* read the *chapeau* as if the conjunctive “and” were absent from the Regulation,⁴¹ while the *Los Palos Panel* retained the conjunctive but interpreted the concept of “any civilian population” as related, rather than additional, to the widespread or systematic attack, maintaining the meaning presented in the Rome Statute.⁴²

Definition of Civilian Population

The ICTY and ICTR Statutes as well as jurisprudence state that the attack must be committed against *any* civilian population. This qualification has been interpreted to mean that the inclusion of non-civilians (military forces or those who have previously borne arms in a conflict) does not necessarily deprive the population of its civilian character.⁴³ However, the targeted population must remain predominantly civilian in nature.⁴⁴ Further, according to ICTR and ICTY jurisprudence, it is the situation of the victim at the time of the attack, and not the victim’s status, that should be the focus of the inquiry.⁴⁵ Thus, in the context of crimes against humanity, a non-civilian may nevertheless be considered part of the civilian population if at the time of the attack he or she was not participating in the hostilities.

³⁹ Compare UNTAET Regulation 2000/15, § 5.1 with Rome Statute, art. 7(1).

⁴⁰ Meaning either “a widespread or systematic *attack* that is directed against any civilian population,” or “any of the following *acts* that are both part of a widespread or systematic attack and directed against any civilian population.”

⁴¹ Prosecutor v. Benjamin Sarmiento et al. (*Same Panel*), Case No. 18/2001, Decision Relating to Guilty Plea, at 2 (Special Panel for Serious Crimes, June 30, 2003) (“[A]s a part of a widespread or systematic attack against a civilian population with knowledge of the attack.”).

⁴² Prosecutor v. Joni Marques et al. (*Los Palos Panel*), Case No. 9/2000, Judgment, ¶¶ 634, 638 (Special Panel for Serious Crimes, December 11, 2001) (“The concept of ‘any population’ as the victims implies a multiplicity of civilians attacked in a widespread or systematic approach.”).

⁴³ See *Tadic* Trial Judgment, ¶ 638; *Blaskic* Trial Judgment, ¶ 209; Prosecutor v. Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipovic, Dragan Papic, Vladimir Santic, a/k/a “Vlado,” IT-95-16, Judgment, ¶ 568 (Trial Chamber II, January 14, 2000); *Akayesu* Trial Judgment, at n. 146.

⁴⁴ See *Akayesu* Trial Judgment, ¶ 575 (citing Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, IT-95-13-R61, Rule 61 Decision of 3 April 1996 (Trial Chamber II, April 3, 1996)).

⁴⁵ See *Bagilishema* Trial Judgment, ¶ 79 (citing *Blaskic* Trial Judgment, ¶ 214 [“[t]he specific situation of the victim at the moment of the crimes committed, rather than his status, must be taken into account in determining his standing as a civilian”]).

The population requirement refers to the idea that enough people must be targeted to show that the attack was directed against “a population” as opposed to limited and randomly selected individuals.⁴⁶ However, the ICTY has held that “population” need not be the entire population of a state, city, or town.⁴⁷

3. *Mens Rea*

The *mens rea* element under the Regulation requires that the prosecution prove the actor’s knowledge of, but not necessarily responsibility for, the overarching attack. It is the association with a widespread or systematic overarching attack that elevates these offenses to the status of violations against “humanity.” Thus, to satisfy the *mens rea* element of crimes against humanity, the defendant must be aware of the attack that makes his or her act a crime against humanity.

In practice, this means that the perpetrator must have knowledge of the attack and some understanding of the relationship between his or her acts and the attack.⁴⁸ Under ICTY jurisprudence, knowingly running the risk that an act may be part of a greater attack is sufficient to establish the knowledge requirement.⁴⁹ Moreover, the Appeals Chamber in *Kunarac* made clear that the perpetrator need not know the details of the attack.⁵⁰ Similarly, the ICC Elements of Crimes⁵¹ affirms that knowledge of the attack does not necessitate complete knowledge of the detailed character of the attack or the plan or policy behind it.⁵²

Both ad hoc tribunals note that motive is entirely separate.⁵³ Further, the perpetrator need not share a purpose or policy goal behind the attack with any other entity.⁵⁴ Similarly, it is irrelevant whether the accused intended the acts to be directed against the targeted population or just the particular victim.⁵⁵

The ICC Elements of Crimes expands upon the statutes of the ad hoc tribunals by including a provision that specifically provides for “first actors.” “First actors” — initiators of the attack or

⁴⁶ See *Stakic* Trial Judgment, ¶ 624.

⁴⁷ See *Tadic* Trial Judgment, ¶ 644.

⁴⁸ Prosecutor v. Clement Kayishema and Obed Ruzindana, ICTR-95-1-T, Judgment, ¶¶ 131-32 (Trial Chamber II, May 21, 1999) (“The perpetrator must knowingly commit crimes against humanity in the sense that he must understand the overall context of his act.”).

⁴⁹ See *Kunarac*, Appeal Judgment, ¶ 102.

⁵⁰ See *id.*

⁵¹ ICC-ASP/1/3 (2002) (containing an enumeration of the elements that must be demonstrated to establish guilt for each of the crimes in the Rome Statute), available at http://www.icc-cpi.int/library/officialjournal/Elements_of_Crimes_120704EN.pdf.

⁵² Preparatory Commission for the International Criminal Court, Report of the Preparatory Commission for the International Criminal Court, Part II, Finalized draft text of the Elements of Crimes, Addendum, at 9, U.N. Doc. PCNICC/2000/1/Add.2 (2000) [hereinafter PrepCom Elements of Crimes].

⁵³ See *Kunarac* Appeal Judgment, ¶ 103; *Kupreskic* Trial Judgment, ¶ 558. At most, evidence that the perpetrator committed the acts for purely personal reasons would be indicative of a rebuttable assumption that the perpetrator was not aware that his or her acts were part of that attack. See *Kunarac* Appeal Judgment, ¶ 103.

⁵⁴ See *Kunarac* Appeal Judgment, ¶ 103.

⁵⁵ See *id.*

offenders whose acts take place at the cusp of the attack — attain the requisite *mens rea* if an intent to further the emerging attack is proved.⁵⁶

4. No Discrimination Requirement

Although discriminatory grounds were necessary to establish all crimes against humanity under the ICTR Statute,⁵⁷ an overwhelming majority at the Rome Conference⁵⁸ opposed the inclusion of a discrimination requirement for all crimes against humanity. Many delegations were concerned that the inclusion of discrimination as an element could have led to a limiting construction of the provision that would have excluded jurisdiction over otherwise severe atrocities.⁵⁹ Accordingly, the *chapeau* in the Rome Statute does not contain a discrimination requirement. This interpretation is consistent with ICTY jurisprudence, which has affirmed that discrimination is not an element of crimes against humanity, except for the specific crime of persecution.⁶⁰ The UNTAET Regulation similarly omits such a requirement.

5. Nexus between the Act and the Attack

Both the ICTR and ICTY have interpreted their own Statutes to require a nexus between the act and an attack.⁶¹ Thus, crimes against humanity consist of individual “acts” that will fall under, be connected with, or exist during a larger “attack.”⁶² ICTR jurisprudence has determined that the act does not need to be committed at the same time or place as the attack, or share the same features, but it must, on some essential level, form part of the attack.⁶³ For example, it must share some relation, temporal or geographical, with the attack. To meet this requirement, the act does not

⁵⁶ ICC Elements of Crimes, at 9.

⁵⁷ It should be noted that the ICTR has recognized that this discriminatory element is a jurisdictional requirement specific to the ICTR and not a reflection of customary international law. *See Akayesu Trial Judgment*, ¶ 175.

⁵⁸ United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 15 June – 17 July 1998 (adopting the Rome Statute).

⁵⁹ For instance, because discriminatory grounds are limited to enumerated discriminations (political, racial, etc.), an executed policy of extermination directed at victims not within those specifically prohibited classes would not have been justiciable.

⁶⁰ *Prosecutor v. Dusko Tadic a/k/a “Dule,” IT-94-1-A, Judgment*, ¶ 249 (Appeals Chamber, July 15, 1999). *See also Prosecutor v. Dario Kordic and Mario Cerkez, IT-95-14/2, Judgment*, ¶ 211 (Trial Chamber III, February 26, 2001).

⁶¹ *See Semanza Trial Judgment*, ¶ 330; *Tadic Appeal Judgment*, ¶ 251.

⁶² Each act within Article 3(a)-(i) has its own requirements, but each must be part of the greater attack required by the *chapeau*. The enumerated acts which may rise to the level of crimes against humanity are the same in the ICTR and ICTY statutes. Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, U.N. SCOR, 3217th mtg., art. 5, U.N. Doc. S/RES/827 (1993); ICTR Statute, art. 3.

⁶³ *Semanza Trial Judgment*, ¶ 329 (“Although the act need not be committed at the same time and place as the attack or share all of the features of the attack, it must, by its characteristics, aims, nature, or consequence objectively form part of the discriminatory attack.”). *Cf Tadic Appeal Judgment*, ¶ 251.

necessarily have to be committed against the same population as the broader attack of which it is a part.⁶⁴

6. No Armed Conflict Requirement

The nexus between an act and an attack must be distinguished from the question of whether the act must be “committed in armed conflict.” While the Statute of the ICTY included this requirement as a jurisdictional element, no such element is required under customary international law.⁶⁵ Accordingly, neither the UNTAET Regulation nor the Rome Statute contain an armed conflict requirement, allowing prosecution of acts perpetrated during peacetime as well as during either internal and international armed conflicts.

B. Enumerated Acts

Following precedent set by the Rome Statute, the Regulation describes eleven enumerated acts amounting to crimes against humanity if the contextual evidence satisfies the *chapeau* elements. These acts are generally: murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecution; enforced disappearance; apartheid; and other inhumane acts of a similar character as the previous acts. Although many of these acts have been recognized as crimes under customary international law, the principle of legality, examined *infra* in Chapter VII, requires that each enumerated act be examined to determine whether it gave rise to international criminal responsibility at the time it was committed.

⁶⁴ See *Semanza* Trial Judgment, ¶ 330. Although the act does not have to be committed against the same population, if it is committed against the same population, that characteristic may be used to demonstrate the nexus between the act and the attack.

⁶⁵ See *Tadic* Appeal Judgment, ¶ 249. Although the ICTY Statute retains an armed conflict requirement for crimes against humanity, the *Tadic* Appeals Chamber explicitly recognized that this requirement is a jurisdictional element only and does not reflect customary international law. *Id.*

IV. Genocide⁶⁶

A. Introduction to Genocide

The term “genocide” was coined by the Polish-American jurist Raphael Lemkin in the early 1940s to describe the intentional destruction of certain groups. Writing in the midst of the Holocaust, Lemkin’s work was informed in large part by the events of World War II.⁶⁷

Although the term “genocide” did not appear in the Nuremberg Charter or in the judgment of the International Military Tribunal at Nuremberg, its definition was set forth in the 1948 Genocide Convention, which states:

“genocide” means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

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

This definition is used verbatim in all relevant international legal instruments, including UNTAET Regulation No. 2000/15.⁶⁸ Broadly speaking, the definition can be divided into a mental element (the necessary intent to destroy the group as such) and a physical element (the commission of at least one of the enumerated acts).

B. Distinctive features of the definition

A few preliminary observations about the definition are important. First, genocide is a specific intent crime. This special intent requirement (or *dolus specialis*) is an element of the crime. The perpetrator must have the intent to destroy, in whole or in part, a group as such.

Second, killing is not expressly required. The perpetrator need only commit one of the enumerated acts with the required intent. However, the *travaux préparatoires* make clear that the definition of genocide set forth in the Convention was not intended to encompass “cultural genocide;” nor was it intended to provide protection for political groups.⁶⁹

Third, unlike war crimes, the crime of genocide need not occur in the context of an armed conflict. Additionally, although both genocide and crimes against humanity can be committed in times of peace, these two crimes should also be distinguished from one another. As the ICTY Trial

⁶⁶ This section is based largely upon J. Cerone, “Recent Developments in the Law of Genocide” in S. Vardy & T. Tooley, *Ethnic Cleansing in 20th-Century Europe*, Columbia University Press, New York (2003).

⁶⁷ See Raphael Lemkin, *Genocide as a Crime under International Law*, 41 AMER. J. INT’L L. 145 (1947).

⁶⁸ See UNTAET Reg. No.2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, UNTAET/REG/2000/15, § 4 (June 6, 2000).

⁶⁹ See Josef L. Kunz, *The UN Convention on Genocide*, 43 Amer. J. Int’l L. 4 (1949).

Chamber noted in the case of *Prosecutor v. Kupreskic*, genocide is an extreme and most inhumane form of the crime against humanity of persecution; its *mens rea* requires proof of the intent not only to discriminate, but also to destroy, in whole or in part, the group to which the victims of the genocide belong.⁷⁰

Finally, the prohibition of genocide has entered the corpus of customary international law. Thus, the obligation to prevent and punish genocide exists independently of a state's treaty obligations (i.e. even states not parties to the Convention are bound by this obligation).⁷¹ Further, this norm has acquired the status of *jus cogens*, meaning that it is a higher-order norm overriding conflicting obligations and voiding conflicting treaties.⁷²

C. Elaboration of the Definition in Jurisprudence of the *ad hoc* International Criminal Tribunals

The jurisprudence of the International Criminal Tribunals (ad hoc Tribunals) for the former Yugoslavia and Rwanda has contributed to the elaboration of the law of genocide, particularly as applied to individual perpetrators.

1. Individual Criminal Responsibility

Early on, the ICTY confirmed that there is individual criminal responsibility under international law for the commission of genocide.⁷³ Thus, the commission of genocide can give rise to both state responsibility and individual criminal responsibility.

2. Elaboration of the Definition

The ICTR has adopted a fairly expansive interpretation of the definition of genocide; the ICTY less so. However, there is extensive cross-fertilization between the two tribunals, as each frequently cites cases of the other, leading to harmonization of their decisions.

a. Protected Groups

The ICTR has examined the nature of the groups listed in the definition and extracted what it deemed a common criterion — “that membership in such groups would seem to be normally not

⁷⁰ *Prosecutor v. Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipovic, Dragan Papic, Vladimir Santic, also known as “Vlado,”* IT-95-16, Judgment ¶ 636, (Trial Chamber II, January 14, 2000).

⁷¹ See *Reservations to the Convention on Genocide* (Advisory Opinion), ICJ Reports 1951.

⁷² Human Rights Committee, General Comment 6, 30 July 1982. See also *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))* (separate opinion of Judge Lauterpacht), 1993 I.C.J. 325. It should be noted, however, that the doctrine of *jus cogens* is not universally accepted.

⁷³ *The Prosecutor v. Dusko Tadic*, IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, at RP D6413-D6491 (October 2, 1995).

challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner.”⁷⁴ It determined that any permanent, stable group should be protected.

The ICTY took a similarly broad approach by holding that a group may be defined with reference to the perspective of the perpetrator. In the *Jelusic* case, the ICTY held:

to attempt to define a national, ethnical or racial group today using objective and scientifically irreproachable criteria would be a perilous exercise whose result would not necessarily correspond to the perception of the persons concerned by such categorisation. Therefore, it is more appropriate to evaluate the status of a national, ethnical or racial group from the point of view of those persons who wish to single that group out from the rest of the community.⁷⁵

The Tribunal stated further that a positive or negative approach could be used in making this determination.⁷⁶ A positive approach, as defined by the Tribunal, would involve distinguishing a group by characteristics that perpetrators deem particular to that group. A negative approach would be the case where perpetrators distinguish themselves as an ethnic, racial, religious, or national group distinct from the other group or groups.

D. Enumerated Acts

In the *Akayesu* case, the first genocide case prosecuted before an international criminal tribunal, the ICTR elaborated upon the possible acts that constitute genocide when committed with the requisite intent.

1. Killing members of the group

With regard to the first enumerated act, killing members of the group, the ICTR has employed a somewhat narrow interpretation by requiring that the killing amount to murder (a specific intent crime).⁷⁷ However, there is nothing particularly new in this holding as killing with the intent to destroy the group will generally mean that the perpetrator intended to kill the victim in any case.

2. Causing serious bodily or mental harm to members of the group

Regarding the second enumerated act, the ICTR stated in the *Akayesu* case that “[c]ausing serious bodily or mental harm to members of the group does not necessarily mean that the harm is

⁷⁴ See *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4, Opinion and Judgment ¶ 511 (Trial Chamber I, September 2, 1998).

⁷⁵ *Prosecutor v. Moran Jelusic*, IT-95-10, Judgment ¶ 70 (Trial Chamber I, December 14, 1999).

⁷⁶ *Jelusic*, Trial Chamber at ¶ 71. *But see* *Prosecutor v. Milomir Stakic*, IT-97-24, Judgment ¶ 732 (Trial Chamber II, July 31, 2003) (stating that “the Trial Chamber does not agree with the ‘negative approach’ taken by the Trial Chamber in *Jelusic*”).

⁷⁷ *Akayesu*, Trial Chamber, at ¶ 501. Similarly, the ICTY has defined “killing” as an “intentional but not necessarily premeditated act[.]” *Stakic*, Trial Chamber at ¶ 515.

permanent and irremediable.”⁷⁸ In doing so, it cited the *Eichmann* case for the proposition that “serious bodily or mental harm of members of the group can be caused ‘by the enslavement, starvation, deportation and persecution [...] and by their detention in ghettos, transit camps and concentration camps in conditions which were designed to cause their degradation, deprivation of their rights as human beings, and to suppress them and cause them inhumane suffering and torture’.”⁷⁹ Ultimately, the Tribunal took serious bodily or mental harm, “without limiting itself thereto, to mean acts of torture, be they bodily or mental, inhumane or degrading treatment, persecution.”⁸⁰ It expressly found that sexual violence fell into this category, and ultimately pointed to acts of rape in this case as genocidal acts.

3. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part

The ICTR held that the means of deliberately inflicting on the group conditions of life calculated to bring about its physical destruction, in whole or part, “include, *inter alia*, subjecting a group of people to a subsistence diet, systematic expulsion from homes and the reduction of essential medical services below minimum requirement.”⁸¹

4. Imposing measures intended to prevent births within the group

Within this category of measures, the ICTR included sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages.⁸² In addition, it held that in a culture where membership in the group is determined by the identity of the father, deliberate impregnation during rape by a man not of the group⁸³ could also constitute such a measure. The Tribunal further determined that such measures could be mental in nature. It stated, “For instance, rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate.”⁸⁴

5. Forcibly transferring children of the group to another group

In line with its expansive interpretation of the first four enumerated acts, the *Akayesu* Trial Chamber opined that the objective of the fifth enumerated act “is not only to sanction a direct act of forcible physical transfer, but also to sanction acts of threats or trauma which would lead to the forcible transfer of children from one group to another.”⁸⁵

⁷⁸ *Akayesu*, Trial Chamber, at ¶ 502.

⁷⁹ *Id.* at ¶ 503.

⁸⁰ *Id.* at ¶ 504.

⁸¹ *Id.* at ¶ 506.

⁸² *Id.* at ¶ 507.

⁸³ *Id.* at ¶ 507 (“In patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group.”).

⁸⁴ *Id.* at ¶ 508.

⁸⁵ *Id.* at ¶ 509.

E. The Intent Requirement

In addition to the *mens rea* of the underlying crime, genocide requires proof of a *dolus specialis*; that is, a specific intent to commit genocide. For that reason, genocide is not easy to prove. Recognizing that the special intent inherent in the crime of genocide is a mental factor which is difficult, even impossible, to determine, the *Akayesu* Trial Chamber noted that “in the absence of a confession from the accused, his intent can be inferred from a certain number of presumptions of fact.”⁸⁶

In the *Akayesu* case, the ICTR considered that it was possible to deduce the genocidal intent of a particular act from: (1) the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others; (2) the scale of atrocities committed, their general nature, in a region or a country; and (3) the deliberate and systematic targeting of victims on account of their membership of a particular group, while excluding the members of other groups.⁸⁷

The ICTY has held that the requisite intent may be inferred from “the perpetration of acts which violate, or which the perpetrators themselves consider to violate the very foundation of the group — acts which are not in themselves covered by the list in Article 4(2) but which are committed as part of the same pattern of conduct.”⁸⁸ In that case, the ICTY found that “this intent derives from the combined effect of speeches or projects laying the groundwork for and justifying the acts, from the massive scale of their destructive effect and from their specific nature, which aims at undermining what is considered to be the foundation of the group.”⁸⁹

The ICTR has provided additional examples of factors that can be used to infer genocidal intent. In the *Ruzindana* case, the Tribunal referred to a “pattern of purposeful action”, which might include: (1) the physical targeting of the group or their property; (2) the use of derogatory language toward members of the targeted group; (3) the weapons employed and the extent of bodily injury; and (4) the methodical way of planning, the systematic manner of killing.⁹⁰

1. “In whole or in part”

With respect to the “in whole or in part” aspect of the intended destruction, the ICTY affirmed the position of the International Law Commission that complete annihilation of a group from every corner of globe is not required.⁹¹ In particular, the *Jelusic* Tribunal held that the intent may extend only to a limited geographical area.⁹² Although there is no numeric threshold of victims necessary

⁸⁶ *Id.* at 523.

⁸⁷ *Id.* at ¶ 523.

⁸⁸ *Id.* at ¶ 524.

⁸⁹ *Id.*

⁹⁰ Prosecutor v. Clement Kayishema and Obed Ruzindana, 1: ICTR-95-1; 2: ICTR-96-10, Judgment, ¶ 93 (Trial Chamber, May 21, 1999).

⁹¹ Prosecutor v. Moran Jelusic, IT-95-10, Judgment (Trial Chamber I, December 14, 1999).

⁹² *Accord* Prosecutor v. Kristic, IT- 98-33, Judgment, ¶ 590 (Trial Chamber I, Aug. 2, 2001) (noting that although the killing of all members of a part of a group in a particular geographic area may result in less

to establish genocide, the ICTY held that “in part” means in *substantial* part. It further stated that a substantial part might include a large number or a representative faction. If the latter, that representative faction must be destroyed in such a way so as to threaten the survival of the group as a whole.⁹³

2. Role of the individual perpetrator

In *Jelusic*, the ICTY also dealt with the issue of the role of the individual perpetrator in the commission of genocide. Generally, the tribunals have first determined whether genocide occurred in an area, and then proceeded to determine whether an individual has shared the genocidal intent. In *Jelusic*, the ICTY indicated that an individual could be deemed responsible for genocide where he was one of many executing an over-all, higher level planned genocide, or where he individually committed genocide.⁹⁴ Thus the Tribunal indicated that an individual alone could be guilty of committing genocide; nevertheless, it is still very difficult to prove if the acts were not widespread and not backed by an organization or system.

3. Genocide v. forced expulsion

It cannot be emphasized enough that the presence of genocidal intent is determinative of whether the crime occurred. In this context, it is important to recall that although the *ad hoc* tribunals have held that forced expulsion may be one of the acts constituting genocide, this expulsion must be carried out with the intent to destroy the group if that act is to constitute genocide. Thus in the *Kupreskic* case, the ICTY found that:

The primary purpose of the massacre was to expel the Muslims from the village, by killing many of them, by burning their houses, slaughtering their livestock, and by illegally detaining and deporting the survivors to another area. The ultimate goal of these acts was to spread terror among the population so as to deter the members of that particular ethnic group from ever returning to their homes.⁹⁵

The Tribunal thus held that this was a case of the crime against humanity of persecution, and that it was not a case of genocide.⁹⁶ Comparatively, the *Krstić* Appeals Chamber found that where one-fifth of the population had been massacred, including all men of military age, the forcible transfer

killings than a campaign spread over a broad geographical area, it would “qualify as genocide if carried out with the intent to destroy the part of the group as such located in this small geographic area”).

⁹³ See *Jelusic*, Trial Chamber, ¶ 83 (Trial Chamber I, December 14, 1999). See also 18 USC 1093 (2000) (“‘Substantial part’ means a part of a group of such numerical significance that the destruction or loss of that part would cause the destruction of the group as a viable entity within the nation of which such group is a part.”).

⁹⁴ *Jelusic*, Trial Chamber, ¶ 78.

⁹⁵ *Kupreskic*, Trial Chamber, ¶ 749.

⁹⁶ *Kupreskic*, Trial Chamber, ¶ 751 (But note that the Prosecutor agreed with the Tribunal in that case.

Genocide was not charged). *Accord Stakic*, *supra* note 76, ¶ 519 (“A clear distinction must be drawn between physical destruction and mere dissolution of a group. The expulsion of a group or part of a group does not in itself suffice for genocide.”).

of women, children, and elderly could be “an additional means by which to ensure the physical destruction” of a community, eliminating any possibility that it could reconstitute itself.⁹⁷

4. Modes of participation

Unlike the Genocide Convention and the statutes of the ICTY and ICTR, which list five separate modes of participation for the crime of genocide, the UNTAET Regulation specifies five modes of participation for all crimes within the jurisdiction of the Panels and separately enumerates only one additional mode for genocide: “directly and publicly incit[ing] others to commit genocide.”⁹⁸ A discussion of these forms of criminal responsibility, including incitement to genocide, is included in the chapter on Individual Criminal Responsibility.

5. Comparison with the Rome Statute

Although the definition of genocide within UNTAET Regulation No. 2000/15 is identical to the one provided in the Rome Statute, the Elements of Crimes adopted by the ICC for each of the enumerated acts of genocide include a common element not explicitly required in the Regulation or in the jurisprudence of the ICTY or ICTR, namely that the conduct must have taken place “in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.”

⁹⁷ Prosecutor v. Krstić, IT-98-22-A, Judgment, ¶ 31 (Appeals Chamber April 19, 2004).

⁹⁸ See UNTAET Reg. No. 2000/15, § 14(e).

V. Torture

UNTAET Regulation No. 2000/15 potentially provides three separate ways to prosecute torture – torture as such, torture as a crime against humanity, and torture as a war crime. Further, the Regulation provides different definitions of torture depending on which type of crime is prosecuted.⁹⁹

A. Torture as an Independent Offense

Unlike other international or internationalized criminal tribunals or courts, UNTAET Regulation No. 2000/15 provides for the prosecution of torture independently of war crimes or crimes against humanity. Section 7.1 states that:

torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him/her or a third person information or a confession, punishing him/her for an act he/she or a third person has committed or is suspected of having committed, or humiliating, intimidating or coercing him/her or a third person, or for any reason based on discrimination of any kind. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Although there is no precedent in the statutes of other tribunals for separately enumerating torture, torture in itself is likely a crime under international law. As with the “grave breaches” provisions in the 1949 Geneva Conventions,¹⁰⁰ the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention), on which the definition in Section 7.1 is based, requires that all states criminalize the offense.¹⁰¹ Both the Geneva and the Torture Conventions couple this requirement with the obligation to seek out and bring perpetrators to justice through prosecution or extradition. In combination, these have been recognized as sufficient to give rise to individual criminal responsibility under international law.¹⁰²

It is worth noting that although the UNTAET Regulation’s definition is similar to that found in the Torture Convention, unlike the Convention, Section 7.1 does not require that torture be committed

⁹⁹ See UNTAET Reg. No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, UNTAET/REG/2000/15, §§ 5.2(d) (defining torture as a means of committing a crime against humanity) and 7 (defining torture as a separate criminal offense) (6 June 2000) [hereinafter UNTAET Regulation No. 2000/15].

¹⁰⁰ See Chapter II of this Discussion Guide for further discussion of “grave breaches” of the 1949 Geneva Conventions.

¹⁰¹ See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No.51) at 197, U.N. Doc. A/39/51, art. 4, (1984).

¹⁰² Prosecutor v. Dusko Tadic a/k/a “Dule”, IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 128 (Appeals Chamber, October 2, 1995) (noting that the “Nuremberg Tribunal considered a number of factors relevant to its conclusion that the authors of particular prohibitions incur individual responsibility: the clear and unequivocal recognition of the rules of warfare in international law and State practice indicating an intention to criminalize the prohibition, including statements by government officials and international organizations, as well as punishment of violations by national courts and military tribunals . . . Where these conditions are met, individuals must be held criminally responsible”).

“by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” This is generally consistent with ICTY Appeals Chamber jurisprudence, which has held that “the public official requirement is not a requirement under customary international law in relation to the criminal responsibility of an individual for torture outside of the framework of the Torture Convention.”¹⁰³

B. Torture as a Crime against Humanity or War Crime

Section 5.2(d) of the UNTAET Regulation provides that in the context of crimes against humanity:

“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.

This definition of torture as a crime against humanity, identical to that of article 7(2)(e) of the Rome Statute, does not require that there be a specific purpose, or that the offense be committed “by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”¹⁰⁴ At the Rome Conference, many believed it was necessary to expand the definition of torture from that found in the Torture Convention to include acts committed by non-state actors.¹⁰⁵ As mentioned above, the expanded definition is consistent with ICTY jurisprudence, which has recognized that the public official requirement is not necessary to establish the individual criminal responsibility of an individual for torture outside the framework of the Torture Convention.¹⁰⁶

Although the Regulation does not specifically define torture as a war crime, in discussing the crime in this context, the ICTY has stated that the constitutive elements of torture are as follows:

- (i) The infliction, by act or omission, of severe pain or suffering, whether physical or mental.
- (ii) The act or omission must be intentional.
- (iii) The act or omission must aim at obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person.¹⁰⁷

¹⁰³ Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, IT- 96-23/1, Judgment, ¶ 148 (Appeals Chamber, June 12, 2002). However, it should be noted that the Appeals Chamber made this statement in the context of its analysis of torture as a war crime or a crime against humanity, rather than as an independent offense. *See also* Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, IT- 96-23/1, Judgment, ¶ 495 (Trial Chamber II, February 22, 2001). Thus, it remains unclear whether the public official requirement remains inapplicable to the criminal responsibility of an individual for torture when not prosecuted in connection with war crimes or crimes against humanity.

¹⁰⁴ *See* Torture Convention, art. 1(1).

¹⁰⁵ Suzannah Linton, *Rising from the Ashes: the Creation of a Viable Criminal Justice System in East Timor*, 25 MELB. U. L. REV. 122, 167 (2001) (citing Timothy McCormack and Sue Robertson, *Jurisdictional Aspects of the Rome Statute for the New International Criminal Court*, 23 MELBOURNE UNIVERSITY LAW REVIEW 635, 655-6 (1999)).

¹⁰⁶ *Kunarac* Appeal Judgment, ¶ 148.

¹⁰⁷ *Id.* ¶ 142.

C. Difference between the Definitions of Torture

Torture as an independent offense is useful when the contextual requirements of the other crimes, such as the widespread or systematic elements of crimes against humanity or the armed conflict requirement for war crimes, cannot be established.

VI. Individual Criminal Responsibility

Section 14 of UNTAET Regulation No. 2000/15 (“Regulation”)¹⁰⁸ provides that “a person shall be criminally responsible and liable for punishment of a crime within the jurisdiction of the panels if that person” engages in one of the modes of participation enumerated within that section. Section 16 of the Regulation adds that “commanders and other superiors” may also be held criminally responsible under certain circumstances. The following chapter discusses the definition of each of these forms of criminal responsibility, as defined in the jurisprudence of the ICTY and ICTR, and in the *travaux préparatoires* of the Rome Statute, from which the drafters of the Regulation drew Section 14.

As an initial matter, it is worth noting that ICTY jurisprudence makes clear that a Trial Chamber may determine the level of criminal responsibility of the accused if the prosecution does not specify it.¹⁰⁹

A. Commission

1. UNTAET Statutory Language

Section 14.3 (a) of the Regulation provides for criminal responsibility of an accused who “commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible.”

2. ICTR and ICTY Jurisprudence

“Committing” can generally be considered to be the perpetration of a crime in a way that meets the required elements of the statute. “Committing” is defined in ICTY jurisprudence as “physically perpetrating a crime or engendering a culpable omission in violation of criminal law.”¹¹⁰ Commission does not require “direct personal or physical participation...”¹¹¹ In other words, there is no requirement of a direct act; thus, an omission can qualify as “committing.”

Additionally, “to hold an individual criminally responsible for his participation in the commission of a crime other than through direct commission, it should be demonstrated that he intended to participate in the commission of the crime and that his deliberate acts contributed directly and

¹⁰⁸ UNTAET Reg. No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, UNTAET/REG/2000/15, § 5. (6 June 2000). [hereinafter UNTAET Regulation No. 2000/15].

¹⁰⁹ Prosecutor v. Radislav Krstic, IT-98-33, Judgment, ¶ 481 (Trial Chamber I, August 2, 2001) (stating that “[s]ince the Prosecution has not charged any specific head of criminal responsibility under Article 7(1) of the Statute, it is within the discretion of the Trial Chamber to convict the Accused under the appropriate head within the limits of the Indictment and fair notice of the charges and insofar as the evidence permits”).

¹¹⁰ *Krstic* Trial Judgment, ¶ 480.

¹¹¹ Prosecutor v. Dario Kordic and Mario Cerkez, IT-95-14/2, Judgment, ¶375 (Trial Chamber III, February 26, 2001) (referencing Prosecutor v. Dusko Tadic a/k/a “Dule,” IT-94-1-A, Judgment, ¶188 (Appeals Chamber, July 15, 1999), which determined that individual criminal responsibility “covers first and foremost the physical perpetration of a crime by the offender himself, or the culpable omission of an act that was mandated by a rule of criminal law”).

substantially to the commission of the crime.”¹¹² Further, “[t]here can be several perpetrators regarding the same crime as long as each of them fulfils the requisite elements of the crime.”¹¹³

3. ICC Travaux Préparatoires

Following the Rome Statute’s construction, the UNTAET Regulation identifies three modes of commission resulting in individual criminal responsibility: solitary (direct), co-perpetration (“jointly with another”), and intermediate perpetration (“through another person”). Direct or solitary responsibility for a crime rests on commission by an individual, him or herself, as a principal perpetrator.¹¹⁴ It requires that an individual meet all statutory elements for a crime and thus does not necessarily mean that the individual committed a crime without any assistance. Thus, a solitary perpetrator may have been ordered, solicited, induced, or incited to act.

The Preparatory Commission developed criminal responsibility elements for crimes within the Rome Statute likely to have more than one perpetrator, assuring that no problems would occur with respect to the multiple guilty parties.¹¹⁵ A co-perpetrator must also fulfill all the definitional elements of the alleged crime but may contribute in a determinative way at any point during the full span of the commission of the crime, from planning to execution.¹¹⁶ Because intermediate perpetration focuses on the instrumentalizing of another as a tool to commit a crime, this method of commission requires more effort than inducing or soliciting by the intermediate perpetrator in making the actual perpetrator commit a crime.¹¹⁷

B. Ordering, Soliciting, Inducing

1. UNTAET Statutory Language

Section 14.3 (b) provides criminal responsibility for an accused who “orders, solicits or induces the commission of such a crime which in fact occurs or is attempted.” The Preparatory

¹¹² *Kordic* Trial Judgment, ¶ 385. See also *Prosecutor v. Dusko Tadic a/k/a “Dule,”* IT-94-1-T, Opinion and Judgment, ¶ 692 (Trial Chamber II, May 7, 1997) (“In sum, the accused will be found criminally culpable for any conduct where it is determined that he knowingly participated in the commission of an offence that violates international humanitarian law and his participation directly and substantially affected the commission of that offence through supporting the actual commission before, during, or after the incident. He will also be responsible for all that naturally results from the commission of the act in question.”).

¹¹³ *Prosecutor v. Mladen Naletilic a/k/a “Tuta” and Vinko Martinovic, a/k/a “Stela,”* IT-98-34, Judgment, ¶ 61 (Trial Chamber I, March 31, 2003).

¹¹⁴ 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 789 (Antonio Cassese et al. eds. 2002).

¹¹⁵ See e.g., Preparatory Commission for the International Criminal Court, Report of the Preparatory Commission for the International Criminal Court, Part II, Finalized draft text of the Elements of Crimes, Addendum, art 7(1)(i) n.23, U.N. Doc. PCNICC/2000/1/Add.2 (2000) (“Given the complex nature of this crime, it is recognized that its commission will normally involve more than one perpetrator as a part of a common criminal purpose.”).

¹¹⁶ *Id.* at 792-793.

¹¹⁷ *Id.* at 794. However, the Rome Statute provides no guide as to the methods of instrumentalization. The responsibility of the intermediate perpetrator does not depend on whether the actual perpetrator (the “instrument”) is also fully criminally responsible.

Commission, in drafting the elements of crimes, generally left the development of definitions for “inchoate” offenses in the Rome Statute to the Court.¹¹⁸

2. ICTY and ICTR Jurisprudence

The ICTY and ICTR Statutes lay out the modes of participation for individual criminal responsibility as “planned, instigated, ordered, committed . . . in the planning, preparation or execution of a crime.”¹¹⁹ This language is somewhat different from that appearing in the Rome Statute or the Regulation. However, a review of the modes of participation found in ICTY and ICTR jurisprudence may provide some guidance in interpreting the modes of participation within the Regulation.

a. Ordering

“‘Ordering’ entails a person in a position of authority using that position to convince another to commit an offence”¹²⁰ For this element, both ICTY and ICTR jurisprudence agree that there is no need for a *de jure* superior-subordinate relationship; however the “accused [must have] possessed the authority to order.”¹²¹ Evidence of the existence of an order can be inferred from circumstantial evidence.¹²²

Tribunal jurisprudence has determined that the order need not be written, discovered, or given directly to the actual perpetrator.¹²³ Additionally, the ICTY has stated that the “order does not need to be given in any particular form and can be explicit or implicit.”¹²⁴

b. Instigation

“‘Instigating’ means prompting another to commit an offence.”¹²⁵ This can be done through positive or negative acts, as long as the perpetrator intended the commission of the act.¹²⁶

Although a causal relationship between the instigation and the physical perpetration of the crime needs to be demonstrated (i.e., that the contribution of the accused in fact had an

¹¹⁸ THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 37 (Roy S. Lee ed. 2001)

¹¹⁹ Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, U.N. SCOR, 3217th mtg., art. 7(1), U.N. Doc. S/RES/827 (1993) [hereinafter ICTY Statute]; Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., Annex, art. 6(1), U.N. Doc. S/RES/955 (1994) [hereinafter ICTR Statute].

¹²⁰ *Krstic* Trial Judgment, ¶ 480.

¹²¹ *Kordic* Trial Judgment, ¶ 388, *See* Prosecutor v. Tihomir Blaskic, IT-95-14, Judgment, ¶281 (Trial Chamber I, March 2, 2000) (citing Prosecutor v. Jean-Paul Akayesu, ICTR-96-4, Opinion and Judgment ¶483 (Trial Chamber I, September 2, 1998)).

¹²² *Kordic* Trial Judgment, ¶ 388.

¹²³ *Id.*

¹²⁴ *Naletilic* Trial Judgment, ¶ 61.

¹²⁵ *Krstic* Trial Judgment, ¶ 480.

¹²⁶ *Kordic* Trial Judgment, ¶ 387 (citing *Blaskic* Trial Judgment, ¶ 280).

effect on the commission of the crime), it is not necessary to prove that the crime would not have been perpetrated without the accused's involvement.¹²⁷

C. Aiding, Abetting or Assisting

1. UNTAET Statutory Language

Section 14.3 (c) provides criminal responsibility for an accused who “for the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.”

2. ICTY and ICTR Jurisprudence

“‘Aiding and abetting’ means rendering a substantial contribution to the commission of a crime.”¹²⁸ The *Tadic* Appeals Chamber clearly laid out the main elements of aiding and abetting as well as the differences of this level of responsibility from “acting in pursuance of a common purpose or design to commit a crime.”

(i) The aider and abettor is always an accessory to a crime perpetrated by another person, the principal.

(ii) In the case of aiding and abetting no proof is required of the existence of a common concerted plan, let alone of the pre-existence of such a plan. No plan or agreement is required: indeed, the principal may not even know about the accomplice's contribution.

(iii) The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime. By contrast, in the case of acting in pursuance of a common purpose or design, it is sufficient for the participant to perform acts that in some way are directed to the furthering of the common plan or purpose.

(iv) In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal. By contrast, in the case of common purpose or design more is required (i.e., either intent to perpetrate the crime or intent to pursue the common criminal design plus foresight that those crimes outside the criminal common purpose were likely to be committed), as stated above.¹²⁹

In addition to these elements, aiding and abetting may be committed through an omission, “[a]s long as the omission had a significant effect on the commission of the crime and was accompanied by the necessary *mens rea*.”¹³⁰

¹²⁷ *Kordic* Trial Judgment, ¶ 387.

¹²⁸ *Krstic* Trial Judgment, ¶ 480.

¹²⁹ *Tadic* Appeal Judgment, ¶ 229.

¹³⁰ *Naletilic* Trial Judgment, ¶ 63.

For the *mens rea* element to be satisfied, the aider or abettor must know he is assisting in the crime; however, he “need not have known the precise crime being committed as long as he was aware that one of a number of crimes would be committed, including the one actually perpetrated.”¹³¹ However, the ICTY Appeals Chamber has found that “an individual who aids and abets a specific intent offense may be held responsible if he assists the commission of the crime knowing the intent behind the crime.”¹³² Thus,

the aider and abettor in persecution, . . . , must be aware not only of the crime whose perpetration he is facilitating but also of the discriminatory intent of the perpetrators of that crime. He need not share the intent but he must be aware of the discriminatory context in which the crime is to be committed and know that his support or encouragement has a substantial effect on its perpetration.¹³³

Likewise, the aider and abettor to genocide must know about the perpetrator’s genocidal intent.¹³⁴

If the aider or abettor was a superior officer, his mere presence may not be sufficient to infer his assistance, but can be indicia of such. As the ICTR has held,

Criminal responsibility as an “approving spectator” does require actual presence during the commission of the crime or at least presence in the immediate vicinity of the scene of the crime, which is perceived by the actual perpetrator as approval of his conduct. The authority of an individual is frequently a strong indication that the principal perpetrators will perceive his presence as an act of encouragement. Responsibility, however, is not automatic, and the nature of the accused’s presence must be considered against the background of the factual circumstances.¹³⁵

D. Acting as a Group with a Common Purpose¹³⁶

1. UNTAET Statutory Language

Section 14.3 (d) provides criminal responsibility for an accused who

in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

¹³¹ *Id.*

¹³² *Krstić* Appeal Judgment, ¶ 140.

¹³³ *Prosecutor v. Krnojelac*, IT-97-25 “Foca,” Judgment, ¶ 52 (Appeals Chamber, Sept. 17, 2003).

¹³⁴ *Krstić* Appeal Judgment, ¶ 140.

¹³⁵ *Prosecutor v. Semanza*, ICTR-97-20, Judgment and Sentence, ¶ 386 (Trial Chamber III, May 15, 2003).

¹³⁶ Judge Shahabudden of the ICTY has noted that the terms “common enterprise,” “joint enterprise,” “common plan,” and “common purpose,” among others, are often used with great flexibility. *Prosecutor v. Milutinović et al.*, IT-99-37-AR72, Judgment ¶ 4 (Appeals Chamber, May 21, 2003) (separate opinion of J. Shahabuddeen).

(i) be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the panels; or

(ii) be made in the knowledge of the intention of the group to commit the crime.

2. ICTY and ICTR Jurisprudence

Joint criminal enterprise liability “entails individual responsibility for participation in a joint criminal enterprise to commit a crime.”¹³⁷ According to the Appeals Chamber in *Tadic*, for joint criminal enterprise liability, three specific elements must be proved.

i. *A plurality of persons*. They need not be organized in a military, political or administrative structure

ii. *The existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute*. There is no necessity for this plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise.

iii. *Participation of the accused in the common design* involving the perpetration of one of the crimes provided for in the Statute. This participation need not involve commission of a specific crime under one of those provisions (for example, murder, extermination, torture, rape, etc.), but may take the form of assistance in, or contribution to, the execution of the common plan or purpose.¹³⁸

The requisite *mens rea* differs depending on whether the alleged crime:

(a) was within the object of the joint criminal enterprise, or

(b) went beyond the object of that enterprise, but was nevertheless a natural and foreseeable consequence of that enterprise.”¹³⁹

For the first type, where the crime is one that was an intended outcome of the joint criminal enterprise, “the prosecution must establish that the accused shared with the person who personally perpetrated the crime the state of mind required for that crime.”¹⁴⁰ In the second set of circumstances, where a crime occurs that was not part of the original plan, responsibility for one or many other additional crimes may still be possible if the following two elements are met:

¹³⁷ *Krstic* Trial Judgment, ¶ 480.

¹³⁸ *Tadic* Appeal Judgment, ¶ 227; see also *Krstic* Trial Judgment, ¶ 490.

¹³⁹ *Krstic* Trial Judgment, ¶ 492.

¹⁴⁰ *Id.*

- (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and
- (ii) the accused willingly took that risk.¹⁴¹

Thus, the ICTY Appeals Chamber¹⁴² has found that:

An accused convicted of a crime under the third category of joint criminal enterprise need not be shown to have intended to commit the crime or even to have known with certainty that the crime was to be committed. Rather, it is sufficient that that accused entered into a joint criminal enterprise to commit a different crime with the awareness that the commission of that agreed upon crime made it reasonably foreseeable to him that the crime charged would be committed by other members of the joint criminal enterprise, and it was committed.¹⁴³

Moreover, an individual can be held responsible for genocide under this theory if the prosecution can “establish that it was reasonably foreseeable to the accused that an act [of genocide] would be committed and that it would be committed with genocidal intent.”¹⁴⁴

E. Incitement to Genocide

1. UNTAET Statutory language

Section 14.3 (e) provides criminal responsibility for an accused who “in respect of the crime of genocide, directly and publicly incites others to commit genocide.”

2. ICTY and ICTR Jurisprudence

The incitement to genocide provision reflects the provisions in the Genocide Convention and the statutes of the *ad hoc* criminal tribunals. A charge under § 14.3 (e) does not require either commission or attempt.¹⁴⁵ This interpretation follows the *Akayesu* Trial Chamber which noted that tribunals must punish incitement regardless of whether the inciter’s desires were executed.¹⁴⁶

Under ICTR jurisprudence, direct and public incitement to genocide requires the same *dolus specialis* as genocide. The *Akayesu* Trial Chamber defined the requisite specific intent as the “intent to directly prompt or provoke another to commit genocide.”¹⁴⁷ Since the action implies that the perpetrator wants a certain result, the person who is inciting genocide must have himself

¹⁴¹ *Tadic* Appeal Judgment, ¶ 228 (emphasis in original).

¹⁴² See *Prosecutor v. Radoslav Brjdanin*, Case No. IT-99-36-A, Decision on Interlocutory Appeal, ICTY Appeals Chamber, 19 March 2004.

¹⁴³ See *Brjdanin*, ¶ 5.

¹⁴⁴ See *id.*, ¶ 6.

¹⁴⁵ If incitement to commit genocide required either commission or attempt a separate provision would be superfluous because §14.3(b) would likely cover such crimes.

¹⁴⁶ See *Akayesu* Trial Judgment, ¶ 562.

¹⁴⁷ *Id.* ¶ 560.

the specific intent to “to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.”¹⁴⁸

F. Attempt and Abandonment

1. UNTAET Statutory Language

Section 14.3(f) provides for individual criminal responsibility for:

attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person’s intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under the present regulation for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

2. ICTY and ICTR Jurisprudence

Unlike the ICTY and ICTR Statutes, which limit criminal responsibility for attempts to the crime of genocide,¹⁴⁹ the Regulation establishes criminal responsibility for attempts to commit any crime within the jurisdiction of Regulation.¹⁵⁰ As attempt liability is limited under the ICTY and ICTR, jurisprudence regarding this issue is scarce. Further, there is nothing in the drafting history of Article 25 of the Rome Statute, on which Section 14.3(f) was based, which suggests why criminal responsibility for attempts was similarly broadened to apply to all crimes within the jurisdiction of the Court.

G. Responsibility of Commanders and Other Superiors

1. UNTAET Statutory Language

Section 16 of the Regulation provides:

In addition to other grounds of criminal responsibility under the present regulation for serious criminal offences referred to in Sections 4 to 7 of the present regulation, the fact

¹⁴⁸ *Id.* The ICTR also addressed incitement to genocide in *Kambanda* and *Ruggiu*. In both cases, the defendants plead guilty; consequently the judgments offer little analysis of the *mens rea*. *Kambanda* acknowledged the use of the media in mobilizing and inciting the population to commit massacres of civilian Tutsi populations. See Prosecutor v. Jean Kambanda, ICTR-97-23-S, Judgment and Sentence, ¶ 39(vi) (Trial Chamber I, Spetmeber 4, 1998). In *Ruggiu*, the court found that a defendant must have genocidal intent in order to convict him or her for incitement to genocide. See Prosecutor v. Georges Ruggiu, ICTR-97-32, Judgment and Sentence, ¶ 14 (Trial Chamber I, June 1, 2000).

¹⁴⁹ See e.g., ICTR Statute, art. 2(3)(d) (“The following acts shall be punishable . . . Attempt to commit genocide.”).

¹⁵⁰ If the drafters of 14.3(f) had intended this provision to apply to genocide only, they would have limited this provision accordingly, as they did with section 14.3(e) of the Regulation. See UNTAET Regulation No. 2000/15, § 14.3(e) (providing criminal responsibility for an accused who “*in respect of the crime of genocide, directly and publicly incites others to commit genocide*”) (emphasis added).

that any of the acts referred to in the said Sections 4 to 7 was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

2. Comparison with the Rome Statute

The Regulation does not follow the exact language of command and superior responsibility developed in the Rome Statute. For instance, unlike the Rome Statute, the Regulation does not include an “effective command/authority and control” clause.¹⁵¹ Additionally, the Rome Statute differentiates the knowledge requirement between commanders and superiors (“knew or . . . should have known” and “knew . . . or consciously disregarded,” respectively), whereas the Regulation uses a more common construction (“knew or had reason to know”).

3. ICTY and ICTR Jurisprudence

The UNAET Regulation appears to more closely follow ICTY and ICTR jurisprudence, which holds that whether the commander/superior knew or should have known of the acts informs whether he or she is responsible for not preventing or punishing the perpetration of the crimes. It is this omission or negative action that elevates the responsibility of a commanding officer or superior to this level. Command or superior responsibility is therefore not a form of strict liability, but a type of imputed responsibility.¹⁵² As the *Kordic* Trial Chamber explains:

The type of responsibility provided for in Article 7(3) may be described as “indirect” as it does not stem from a “direct” involvement by the superior in the commission of a crime but rather from his omission to prevent or punish such offence, i.e., of his failure to act in spite of knowledge. This responsibility arises only where the superior is under a legal obligation to act.¹⁵³

This element of responsibility arises from treaty law and customary international law, including Additional Protocol I to the Geneva Conventions establishing an affirmative duty for commanders to prevent and punish violations of international humanitarian law.¹⁵⁴ However, “only feasible measures in the power of a superior are required.”¹⁵⁵

The *Mucic* Trial Chamber developed three elements to determine whether command responsibility existed:

- (i) the existence of a superior-subordinate relationship

¹⁵¹ However, as discussed *infra*, ICTY jurisprudence also requires that the commander/superior have effective control over his or her subordinates. See *Naletilic* Trial Judgment, ¶ 67.

¹⁵² See *Kordic* Trial Judgment, ¶ 365.

¹⁵³ *Id.*

¹⁵⁴ See *id.*

¹⁵⁵ *Naletilic* Trial Judgment, ¶ 77.

(ii) the superior knew or had reason to know that the criminal act was about to be or had been committed; and

(iii) the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.¹⁵⁶

The *Naletilic* Trial Chamber also emphasized the importance of effective control in determining whether command responsibility arises.¹⁵⁷ Although actual knowledge cannot be presumed, the fact that an individual was a commanding officer may be used to show that he or she had knowledge of the acts of his or her subordinates.¹⁵⁸ For a commander/superior to “have reason to know,” ICTY jurisprudence dictates that:

a superior can be held criminally responsible only if some specific information was in fact available to him which would provide notice of offences committed by his subordinates. This information need not be such that it by itself was sufficient to compel the conclusion of the existence of such crimes. It is sufficient that the superior was put on further inquiry by the information, or, in other words, that it indicated the need for additional investigation in order to ascertain whether offences were being committed or about to be committed by his subordinates.¹⁵⁹

¹⁵⁶ Prosecutor v. Mucic, IT-96-21, Judgment, ¶ 346 (Trial Chamber II, November 16, 1998).

¹⁵⁷ See *Naletilic* Trial Judgment, ¶ 66.

¹⁵⁸ See *id.* ¶ 71.

¹⁵⁹ *Id.* ¶ 74 (citing *Mucic* Trial Judgment, ¶ 393).

VII. The Principle of Legality

A. Nullum Crimen Sine Lege

The principle *nullum crimen sine lege*, no crime without law, has developed as a rule prohibiting retroactive application of criminal laws. It is counted among the so-called “principles of legality,”¹⁶⁰ and may be found in various international legal instruments, including international human rights and humanitarian law treaties.¹⁶¹ The principle is articulated in Section 12 of UNTAET Regulation No. 2000/15, which provides that “[a] person shall not be criminally responsible under the present regulation unless the conduct in question constitutes, at the time it takes place, a crime under international law or the laws of East Timor.”

According to the ordinary meaning of this phrase,¹⁶² the act must have been criminalized under international law or the domestic law applicable in East Timor. Thus, if not criminalized under domestic law, the act must have been a crime under international law giving rise to individual criminal responsibility at the time the act occurred. The jurisprudence of the European Court of Human Rights as well as of the ad-hoc criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) indicates that it would not be sufficient for the act to be merely prohibited by international law.¹⁶³ International law must recognize that the act entails criminal liability. Thus, acts that have been recognized as giving rise to international criminal responsibility under customary international law, such as those enumerated in the International Military Tribunal’s Charter and the Statutes of the ICTY and ICTR, would satisfy the *nullum crimen* principle.

Application of the *nullum crimen* principle raises the question of whether the conduct must have been proscribed as a crime in the specific terms in which it is being prosecuted. Although nothing in the text of UNTAET Regulation No. 2000/15 speaks directly to this question, the jurisprudence of the European Court of Human Rights and the ICTY suggests that conduct can be prosecuted in terms that vary from the manner in which such conduct was proscribed as long as 1) the *essence* of the conduct being prosecuted is

¹⁶⁰ M. Cherif Bassiouni, *The Sources and Content of International Criminal Law: A Theoretical Framework*, in 1 INTERNATIONAL CRIMINAL LAW at 33 (M. Cherif Bassiouni 2d.ed. 1999).

¹⁶¹ See, e.g., Article 11(2) of the Universal Declaration of Human Rights; Article 15(1) of the International Covenant on Civil and Political Rights; Article 7(1) of the European Convention on Human Rights and Fundamental Freedoms; Article 9 of the American Convention on Human Rights; Article 7(2) of the African Charter on Human and Peoples’ Rights; Article 67 of the Fourth Geneva Convention; and Article 13 of the International Law Commission’s Draft Code of Crimes Against the Peace and Security of Mankind.

¹⁶² The periodic reports of the UN Secretary-General to the Security Council on UNTAET’s activities and developments in East Timor that precede the promulgation of UNTAET Regulation 2000/15 do not elaborate on the content of UNTAET Regulations and do not contain any “drafting history” of Section 12 of UNTAET Regulation No. 2000/15.

¹⁶³ See Case of Streletz, Kessler and Krentz v. Germany, Judgment of 22 March 2001 (Applications nos. 34044/96, 35532/97 and 44801/98); Prosecutor v. Dusko Tadic, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, (Appeals Chamber, October 2, 1995); Prosecutor v. Georges Anderson Nderubumwe Rutaganda, ICTR-96-3, Judgement and Sentence, ¶ 86 (6 December 1999).

the same as that which was proscribed at the time of its commission and 2) individuals could reasonably have foreseen from that law what acts or omissions could entail criminal responsibility.¹⁶⁴

B. Limitation on Use of Analogy

A related issue is the extent to which the Special Panels may use analogy in defining the contours of the crimes proscribed by the UNTAET Regulation No. 2000/15 without running afoul of the *nullum crimen* principle. Section 12.2 of UNTAET Regulation No. 2000/15 addresses this issue by providing: “The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.” This provision reproduces verbatim the text of Article 22(2) of the Rome Statute.

Crimes may not be extended by analogy to create new crimes; however, a certain level of judicial interpretation seems permissible, particularly in the process of clarifying the contours of crimes already proscribed. Indeed, a limited use of analogy is permissible as long as the resultant interpretation or clarification is consistent with the essence of the offense and individuals could reasonably have foreseen from the law what acts or omissions could entail criminal responsibility.¹⁶⁵ Additionally, the drafting history of the Rome Statute, from which drafters of UNTAET Regulation 2000/15 drew Section 12, suggests that customary international law can be used as one of the possible sources in interpreting the contours of the crimes enumerated in UNTAET Regulation No. 2000/15.¹⁶⁶

C. Nulla Poena Sine Lege

A related aspect of the principle of legality addresses whether the penalty must also be prescribed. Known as the principle of *nulla poena sine lege*, this principle is dealt with in Section 13 of UNTAET Regulation No. 2000/15, which reads: “A person convicted by a panel may be punished only in accordance with the present regulation.” This section must be read in

¹⁶⁴ See *Case of Stretetz, Kessler and Krentz*, ¶ 105; Prosecutor v. Hadzahasanovic, Case No. IT-01-47-PT, Decision on Joint Challenge to Jurisdiction, ¶165 (12 November 2002) (“the principle of *nullum crimen sine lege* is satisfied if the underlying criminal conduct as such was punishable, regardless of how the concrete charges in a specific law would have been formulated”).

¹⁶⁵ See *S.W. v. the United Kingdom* (Application No. 20166/92) and *C.R. v. the United Kingdom*, Judgments (Application No. 20190/92) of 22 November 1995 (Series A nos. 335-B and 335-C, pp. 41-42, ¶¶34-36, and p. 68 and 69, ¶¶32-34, respectively), available at <http://echr.coe.int> (“However clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. . . . Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen.”).

¹⁶⁶ In language akin to that of Article 21 of the ICC Statute, Section 3.1(a) of the UNTAET Regulation directs the Special Panels to apply the law of East Timor as promulgated by UNTAET Regulations, while Section 3.1(b) adds that “applicable treaties and recognized principles and norms of international law, including the established principles of the international law of armed conflict” may be relied on, where appropriate. Thus, it appears that drafters meant to include customary international law as one of the possible sources that could be used as an aide in interpreting the contours of the crimes enumerated in UNTAET Regulation No. 2000/15.

conjunction with Section 10 of the Regulation, which directs the Special Panels to “have recourse to the general practice regarding prison sentences in the courts of East Timor.”

Having recourse to the sentencing practices of national jurisdictions does not mean the tribunals are restricted by them, however.¹⁶⁷ Thus, a tribunal may look to, but is not bound by, a country’s penalty provisions. In light of this flexibility, there appears to be more room for analogy in the context of the application of penalties than with respect to the definitions of crimes.

¹⁶⁷ See *Prosecutor v. Mucic*, IT-96-21, Judgment, ¶¶ 1209-1212. (Trial Chamber II, November 16, 1998). The ICTR has similarly concluded that the reference to sentencing practice in Rwanda was not mandatory, but rather intended to provide the Tribunal with guidance. See *Prosecutor v. Jean Kambanda*, ICTR-97-23-S, Judgment and Sentence, ¶ 23 (Trial Chamber I, September 4, 1998).

VIII. The *Non Bis In Idem* Principle

A. UNTAET Regulation No. 2000/15

Pursuant to UNTAET Regulation No. 2000/15, individuals who have already been tried by a court outside East Timor for any of the offenses that are subject to the jurisdiction of the Special Panels may not be tried before the Panels “with respect to the same conduct unless the proceedings in the other court . . . [w]ere for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the panel” or “[o]therwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.”¹⁶⁸

Under this regulation, individuals already prosecuted in Indonesia could be prosecuted before a Special Panel in East Timor if the latter prosecution did not involve “the same conduct”; if the proceedings in Indonesia were undertaken to shield the perpetrator from criminal responsibility for a crime within the jurisdiction of the Special Panels; or if the proceedings in Indonesia did not conform to international standards of fair process and were conducted in a manner that is “inconsistent with an intent” to bring the perpetrator to justice.

Section 10.3 of UNTAET Regulation No. 2000/15 would allow but not require a Special Panel that convicted an individual who had already been tried for the same conduct in Indonesia to deduct from any sentence the Panel imposed time already served in connection with the Indonesian proceeding.

Each of the provisions of UNTAET Regulation No. 2000/15 noted above is adapted from similar provisions in the Rome Statute of the International Criminal Court (ICC).¹⁶⁹

B. East Timor Constitution

Under Section 31(4) of the Constitution of the Democratic Republic of East Timor, “No one shall be tried and convicted for the same criminal offence more than once.” This provision is vague in many respects. For instance, it remains unclear whether Section 31(4) bars only subsequent prosecutions instituted within the same state or whether it also prohibits the prosecution of an offense that was previously prosecuted in a different state.

A review of international law may provide some guidance in interpreting the ambiguity inherent in this Constitutional provision. Indeed, Section 9(1) of the East Timorese Constitution not only permits, but requires recourse to principles of international law: the “legal system of East Timor shall adopt the general or customary principles of international law.” However, it is doubtful whether “general or customary principles of international law” include the *non bis in idem* principle.

¹⁶⁸UNTAET Reg. No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, UNTAET/REG/2000/15, §11.3 (a) and (b) (6 June 2000).

¹⁶⁹UN Doc. A/CONF.183/9 (1998) [as corrected by the procès-verbaux of 10 November 1998 and 12 July 1999] (“Rome Statute”).

The law of most countries recognizes a *non bis in idem* principle,¹⁷⁰ which is also affirmed in numerous international human rights and extradition instruments. In light of this, Christine Van den Wyngaert and Tom Ongena write, “one might, at first sight, think of it as a generally accepted principle of fairness and of criminal justice and perhaps even as a principle of customary international law.”¹⁷¹ They nonetheless conclude that “national legislation and international instruments differ so widely that it would be nearly impossible to define the rule in such a way that it would reflect the positive law of most nations or of conventional international law.”¹⁷² Another writer similarly concludes that “no general international *ne bis in idem* exists in [international criminal law] and it thus does not seem to be a rule of customary international law.”¹⁷³ If these writers are correct, it would appear that Section 9(1) of East Timor’s Constitution does not, by its incorporation of “general or customary principles of international law,” impose any restraints on East Timor’s ability to prosecute individuals already tried in Indonesia beyond those imposed by domestic sources of law.

Further, under well-recognized principles of statutory construction, provisions that appear to conflict with one another should be read to give effect to both whenever possible. The Constitutional provision does not explicitly preclude the articulation of the *ne bis in idem* principle found in UNTAET Regulation No. 2000/15. Thus, both provisions can be read consistently with one another. A construction that would effectuate both provisions would bar prosecution for the same criminal offence more than once unless the prior prosecution was conducted in another state and did not involve “the same conduct”; the proceedings in the other state were undertaken to shield the perpetrator from criminal responsibility for a crime within the jurisdiction of the Special Panels; or the proceedings in that other state did not conform to international standards of fair process.

C. International Standards Governing Prosecutions in Two or More States

Despite the absence of a general international *ne bis in idem* principle, a review of *non bis in idem* provisions in international instruments supports the propositions that the *ne bis in idem* principle applies primarily to prosecutions instituted within the same state and that individuals prosecuted in one state may be prosecuted in another state under certain limited circumstances.

Several international human rights treaties include a *non bis in idem* provision.¹⁷⁴ None of these

¹⁷⁰See *id.* at 706. See also The Prosecutor v. Duško Tadic, IT-94-1-T, Decision on the Defence Motion on the Principle of *Non-Bis-In-Idem*, ¶ 9 (November 14, 1995); M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT’L L. 235, 289 (1993).

¹⁷¹Christine Van den Wyngaert and Tom Ongena, “*Ne bis in idem* Principle, Including the Issue of Amnesty,” in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 706 (Antonio Cassese, Paola Gaeta and John R.W.D. Jones, eds., 2002).

¹⁷²*Id.*

¹⁷³GEERT-JAN ALEXANDER KNOOPS, SURRENDERING TO INTERNATIONAL CRIMINAL COURTS: CONTEMPORARY PRACTICE AND PROCEDURES 316 (2002).

¹⁷⁴Both the International Covenant on Civil and Political Rights (ICCPR) and Protocol 7 to the European

treaties is in force with respect to East Timor,¹⁷⁵ however, and in any event their *non bis in idem* provisions apply only to prosecutions instituted within the same state that conducted the prior prosecution. However, many extradition treaties contain a transnational analogue to these provisions. Bilateral extradition treaties frequently contain such provisions.¹⁷⁶ In addition, some multilateral treaties on matters of transnational criminal procedure include a *non bis in idem* rule.

In brief, these treaties suggest that an individual who has already been prosecuted may be prosecuted in another country if 1) the second prosecution does not involve the same conduct or offense prosecuted in the first proceeding; 2) the first proceeding did not result in a final judgment; 3) there are new or newly discovered facts that were not available at the first trial; or 4) the first prosecution suffered from a fundamental defect. In addition, a second trial may be especially appropriate when undertaken in the country where the crimes concerned occurred.

D. Approaches of the International Criminal Tribunals

The approach to the *non bis in idem* principle taken in each of the statutes of the ICTY and ICTR support a similar proposition, namely that individuals tried in national jurisdictions may, under certain limited circumstances, also be tried before the *ad hoc* tribunals. However, the *ad hoc* tribunals differ with respect to how they characterize the “idem” for which a second trial is generally barred.

1. ICTY and ICTR

Article 10(2) of the ICTY Statute provides in part:

1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal.
2. A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if:
 - (a) The act for which he or she was tried was characterized as an ordinary crime; or
 - (b) The national court proceedings were not impartial or independent,

Convention on the Protection of Human Rights and Fundamental Freedoms (“European Convention”) prohibit retrial following either a final conviction or acquittal, while the American Convention on Human Rights protects against retrial only after an acquittal.

¹⁷⁵This observation may be subject to one qualification. UNTAET Regulation 1999/1 on the authority of the Transitional Administration in East Timor provides that “all persons undertaking public duties or holding public office in East Timor shall observe internationally recognized human rights standards, as reflected, in particular, in . . . The International Covenant on Civil and Political Rights . . . and its Protocols.” UNTAET/REG/1999/1, § 2 (27 November 1999). Since this regulation was adopted, the UN transitional administration has handed over authority to the government of East Timor. Still, Article 165 of the Constitution of the Democratic Republic of East Timor provides: “Laws and regulations in force in East Timor shall continue to be applicable to all matters except to the extent that they are inconsistent with the Constitution or the principles contained therein.”

¹⁷⁶See I.A. SHEARER, EXTRADITION IN INTERNATIONAL LAW 13 (1971).

were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.

Virtually identical provisions appear in Article 9(1) and (2) of the ICTR Statute.¹⁷⁷

Several decisions of an ICTR trial chamber have apparently interpreted the phrase “acts constituting serious violations of international humanitarian law” in Article 9(2) of the ICTR Statute to encompass all charges entailing serious violations of international humanitarian law that relate to the same act.¹⁷⁸ If, however, a national court prosecuted a defendant under charges that amount to an “ordinary crime,” the ICTY and ICTR would not be barred from prosecuting the same defendant for the same act.¹⁷⁹ It should also be noted that the *non bis in idem* provisions of both statutes direct the relevant tribunal to “take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.”¹⁸⁰

2. ICC

Article 20(3) of the Rome Statute provides:

(3) No person who has been tried by another court for conduct also proscribed under [the provisions of the Rome Statute establishing crimes that may be prosecuted before the ICC] shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

- (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
- (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

Like the corresponding provision of UNTAET Regulation No. 2000/15, Article 20(3) uses the word “conduct” rather than “offense” to characterize the “idem” for which a second trial before the ICC is generally barred. Had Article 20(3) used the term “offense” or “crime” instead of “conduct,” it would have been more plausible to interpret the Rome Statute to allow the ICC to try someone on a charge such as genocide who had already been prosecuted for the same underlying conduct on a charge such as murder. As written, the actual phrasing of Article 20(3)

¹⁷⁷The only difference in the text of the ICTR Statute is the addition of the words “for Rwanda” following “the International Tribunal” in paragraphs 1 and 2.

¹⁷⁸See *In the Matter of Alfred Musema*, ICTR-96-5-D, Decision of the Trial Chamber on the Application by the Prosecutor for a Formal Request for Deferral, ¶12 (March 12, 1996). See also *In the Matter of Radio Television Libre des Mille Collines SARL*, ICTR-96-6-D, Decision of the Trial Chamber on the Application of the Prosecutor for a Formal Request for Deferral, para. 11 (March 13, 1996); and *In the Matter of Théoneste Bagosora*, ICTR-96-7-D, Decision of the Trial Chamber on the Application by the Prosecutor for a formal Request for Deferral, ¶¶ (May 17, 1996).

¹⁷⁹See ICTY Statute, art. 10(2)(a), quoted above, and ICTR Statute, art. 9(2)(a).

¹⁸⁰ICTY Statute, art. 10(3); ICTR Statute, art. 9(3).

of the Rome Statute seems to preclude a second trial for the same underlying conduct.¹⁸¹ This conclusion is reinforced by the fact that, in contrast to the *non bis in idem* provisions in the statutes of the ad hoc tribunals, the Rome Statute does not provide an exception to its *non bis in idem* rule when the conduct in question was characterized as an “ordinary crime” in previous national proceedings.

¹⁸¹ According to one writer, however, the phrase “with respect to the same conduct” was added to the chapeau of Article 20(3) “to clarify that the Court could try someone even if that person had been tried in a national court provided that different conduct was the subject of prosecution.” John T. Holmes, “The Principle of Complementarity,” in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE; ISSUES, NEGOTIATIONS, RESULTS* 59 (Roy S. Lee, ed., 1999). Unfortunately, the writer does not provide further elaboration.

APPENDIX A

RELEVANT EXCERPTS FROM:

THE CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL (IMT), THE UNITED NATIONS SECRETARY-GENERAL'S REPORT ON THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (ICTY), AND THE STATUTES OF THE ICTY, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (ICTR), AND THE INTERNATIONAL CRIMINAL COURT (ICC)

1. CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL

II. JURISDICTION AND GENERAL PRINCIPLES

Article 6.

The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) **CRIMES AGAINST PEACE:** namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) **WAR CRIMES:** namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) **CRIMES AGAINST HUMANITY:** namely, murder, extermination, enslavement, deportation, and other inhumane acts 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, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

Article 7.

The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.

Article 8.

The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

2.

**THE SECRETARY-GENERAL PURSUANT TO
PARAGRAPH 2 OF SECURITY COUNCIL RESOLUTION 808 (1993),
PRESENTED 3 MAY 1993 (S/25704)**

REPORT OF

II. COMPETENCE OF THE INTERNATIONAL TRIBUNAL

31. The competence of the International Tribunal derives from the mandate set out in paragraph 1 of resolution 808 (1993). This part of the report will examine and make proposals regarding these fundamental elements of its competence: *ratione materiae* (subject-matter jurisdiction), *ratione personae* (personal jurisdiction), *ratione loci* (territorial jurisdiction) and *ratione temporis* (temporal jurisdiction), as well as the question of the concurrent jurisdiction of the International Tribunal and national courts.

32. The statute should begin with a general article on the competence of the International Tribunal which would read as follows:

**Article 1
Competence of the International Tribunal**

The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute.

A. Competence ratione materiae (subject-matter jurisdiction)

33. According to paragraph 1 of resolution 808 (1993), the international tribunal shall prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. This body of law exists in the form of both conventional law and customary law. While there is international customary law which is not laid down in conventions, some of the major conventional humanitarian law has become part of customary international law.

34. In the view of the Secretary-General, the application of the principle *nullum crimen sine lege* 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. This would appear to be particularly important in the context of an international tribunal prosecuting persons responsible for serious violations of international humanitarian law.

35. The part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied in: the Geneva Conventions of 12 August 1949 for the Protection of War Victims³; the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907⁴; the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948⁵; and the Charter of the International Military Tribunal of 8 August 1945⁶.

36. Suggestions have been made that the international tribunal should apply domestic law in so far as it incorporates customary international humanitarian law. While international humanitarian law as outlined above provides a sufficient basis for subject-matter jurisdiction, there is one related issue which would require reference to domestic practice, namely, penalties (see para. 111).

Grave breaches of the 1949 Geneva Conventions

37. The Geneva Conventions constitute rules of international humanitarian law and provide the core of the customary law applicable in international armed conflicts. These Conventions regulate the conduct of war from the

humanitarian perspective by protecting certain categories of persons: namely, wounded and sick members of armed forces in the field; wounded, sick and shipwrecked members of armed forces at sea; prisoners of war, and civilians in time of war.

38. Each Convention contains a provision listing the particularly serious violations that qualify as "grave breaches" or war crimes. Persons committing or ordering grave breaches are subject to trial and punishment. The lists of grave breaches contained in the Geneva Conventions are reproduced in the article which follows.

39. The Security Council has reaffirmed on several occasions that persons who commit or order the commission of grave breaches of the 1949 Geneva Conventions in the territory of the former Yugoslavia are individually responsible for such breaches as serious violations of international humanitarian law.

40. The corresponding article of the statute would read:

Article 2
Grave breaches of the Geneva Conventions of 1949

The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

- (a) wilful killing;
- (b) torture or inhuman treatment, including biological experiments;
- (c) wilfully causing great suffering or serious injury to body or health;
- (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
- (f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
- (g) unlawful deportation or transfer or unlawful confinement of a civilian;
- (h) taking civilians as hostages.

Violations of the laws or customs of war

41. The 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto comprise a second important area of conventional humanitarian international law which has become part of the body of international customary law.

42. The Nürnberg Tribunal recognized that many of the provisions contained in the Hague Regulations, although innovative at the time of their adoption were, by 1939, recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war. The Nürnberg Tribunal also recognized that war crimes defined in article 6(b) of the Nürnberg Charter were already recognized as war crimes under international law, and covered in the Hague Regulations, for which guilty individuals were punishable.

43. The Hague Regulations cover aspects of international humanitarian law which are also covered by the 1949 Geneva Conventions. However, the Hague Regulations also recognize that the right of belligerents to conduct warfare is not unlimited and that resort to certain methods of waging war is prohibited under the rules of land warfare.

44. These rules of customary law, as interpreted and applied by the Nürnberg Tribunal, provide the basis for the corresponding article of the statute which would read as follows:

Article 3
Violations of the laws or customs of war

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

- (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
- (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
- (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
- (e) plunder of public or private property.

Genocide

45. The 1948 Convention on the Prevention and Punishment of the Crime of Genocide confirms that genocide, whether committed in time of peace or in time of war, is a crime under international law for which individuals shall be tried and punished. The Convention is today considered part of international customary law as evidenced by the International Court of Justice in its Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951⁷.

46. The relevant provisions of the Genocide Convention are reproduced in the corresponding article of the statute, which would read as follows:

Article 4 Genocide

1. The International Tribunal shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

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

3. The following acts shall be punishable:

- (a) genocide;
- (b) conspiracy to commit genocide;
- (c) direct and public incitement to commit genocide;
- (d) attempt to commit genocide;
- (e) complicity in genocide.

Crimes against humanity

47. Crimes against humanity were first recognized in the Charter and Judgement of the Nürnberg Tribunal, as well as in Law No. 10 of the Control Council for Germany⁸. Crimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character⁹.

48. Crimes against humanity refer to inhumane acts of a very serious nature, such as wilful killing, torture or rape, committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds. In the conflict in the territory of the former Yugoslavia, such inhumane acts have taken the form of so-called "ethnic cleansing" and widespread and systematic rape and other forms of sexual assault, including enforced prostitution.

49. The corresponding article of the statute would read as follows:

Article 5
Crimes against humanity

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

- (a) murder;
- (b) extermination;
- (c) enslavement;
- (d) deportation;
- (e) imprisonment;
- (f) torture;
- (g) rape;
- (h) persecutions on political, racial and religious grounds;
- (i) other inhumane acts.

B. Competence *ratione personae* (personal jurisdiction) and individual criminal responsibility

...

Individual criminal responsibility

53. An important element in relation to the competence *ratione personae* (personal jurisdiction) of the International Tribunal is the principle of individual criminal responsibility. As noted above, the Security Council has reaffirmed in a number of resolutions that persons committing serious violations of international humanitarian law in the former Yugoslavia are individually responsible for such violations.

54. The Secretary-General believes that all persons who participate in the planning, preparation or execution of serious violations of international humanitarian law in the former Yugoslavia contribute to the commission of the violation and are, therefore, individually responsible.

55. Virtually all of the written comments received by the Secretary-General have suggested that the statute of the International Tribunal should contain provisions with regard to the individual criminal responsibility of heads of State, government officials and persons acting in an official capacity. These suggestions draw upon the precedents following the Second World War. The Statute should, therefore, contain provisions which specify that a plea of head of State immunity or that an act was committed in the official capacity of the accused will not constitute a defence, nor will it mitigate punishment.

56. A person in a position of superior authority should, therefore, be held individually responsible for giving the unlawful order to commit a crime under the present statute. But he should also be held responsible for failure to prevent a crime or to deter the unlawful behaviour of his subordinates. This imputed responsibility or criminal negligence is engaged if the person in superior authority knew or had reason to know that his subordinates were about to commit or had committed crimes and yet failed to take the necessary and reasonable steps to prevent or repress the commission of such crimes or to punish those who had committed them.

57. Acting upon an order of a Government or a superior cannot relieve the perpetrator of the crime of his criminal responsibility and should not be a defence. Obedience to superior orders may, however, be considered a mitigating factor, should the International Tribunal determine that justice so requires. For example, the International Tribunal may consider the factor of superior orders in connection with other defences such as coercion or lack of moral choice.

58. The International Tribunal itself will have to decide on various personal defences which may relieve a person of individual criminal responsibility, such as minimum age or mental incapacity, drawing upon general principles of law recognized by all nations.

59. The corresponding article of the statute would read:

Article 7
Individual criminal responsibility

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.
2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.
4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.

3. STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (ICTY)

Article 1

Competence of the International Tribunal

The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute.

Article 2

Grave breaches of the Geneva Conventions of 1949

The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

- (a) wilful killing;
- (b) torture or inhuman treatment, including biological experiments;
- (c) wilfully causing great suffering or serious injury to body or health;
- (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
- (f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
- (g) unlawful deportation or transfer or unlawful confinement of a civilian;
- (h) taking civilians as hostages.

Article 3

Violations of the laws or customs of war

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

- (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
- (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
- (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
- (e) plunder of public or private property.

Article 4

Genocide

1. The International Tribunal shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) killing members of the group;
- (b) causing serious bodily or mental harm to members of the group;
- (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

- (d) imposing measures intended to prevent births within the group;
- (e) forcibly transferring children of the group to another group.

3. The following acts shall be punishable:

- (a) genocide;
- (b) conspiracy to commit genocide;
- (c) direct and public incitement to commit genocide;
- (d) attempt to commit genocide;
- (e) complicity in genocide.

Article 5 **Crimes against humanity**

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

- (a) murder;
- (b) extermination;
- (c) enslavement;
- (d) deportation;
- (e) imprisonment;
- (f) torture;
- (g) rape;
- (h) persecutions on political, racial and religious grounds;
- (i) other inhumane acts.

Article 7 **Individual criminal responsibility**

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.
2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.
4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.

Article 24 **Penalties**

1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.
2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.
3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.

4. STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (ICTR)

Article 1: Competence of the International Tribunal for Rwanda

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute.

Article 2: Genocide

1. The International Tribunal for Rwanda shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this Article or of committing any of the other acts enumerated in paragraph 3 of this Article.

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, such as:

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

3. The following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide.

Article 3: Crimes against Humanity

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation;
- (e) Imprisonment;
- (f) Torture;
- (g) Rape;
- (h) Persecutions on political, racial and religious grounds;
- (i) Other inhumane acts.

**Article 4: Violations of Article 3 Common to the Geneva Conventions
and of Additional Protocol II**

The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:

- (a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
- (b) Collective punishments;
- (c) Taking of hostages;
- (d) Acts of terrorism;
- (e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
- (f) Pillage;

(g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilised peoples;

(h) Threats to commit any of the foregoing acts.

Article 6: Individual Criminal Responsibility

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 4 of the present Statute, shall be individually responsible for the crime.

2. The official position of any accused person, whether as Head of state or government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

3. The fact that any of the acts referred to in Articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

4. The fact that an accused person acted pursuant to an order of a government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal for Rwanda determines that justice so requires.

Article 23: Penalties

1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of Rwanda.

2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.

5. ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (ICC)

PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW

Article 5

Crimes within the jurisdiction of the Court

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

- (a) The crime of genocide;
- (b) Crimes against humanity;
- (c) War crimes;
- (d) The crime of aggression.

2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

Article 6

Genocide

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

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

Article 7

Crimes against humanity

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

- (a) Murder;

- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

- (a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;
- (b) "Extermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;
- (c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;
- (d) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;
- (e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;
- (f) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

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

Article 8 War crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

2. For the purpose of this Statute, "war crimes" means:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(i) Wilful killing;

(ii) Torture or inhuman treatment, including biological experiments;

(iii) Wilfully causing great suffering, or serious injury to body or health;

(iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

(vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

(vii) Unlawful deportation or transfer or unlawful confinement;

(viii) Taking of hostages.

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

- (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
- (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
- (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
- (v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
- (vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;
- (vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;
- (viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
- (ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
- (x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
- (xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;
- (xii) Declaring that no quarter will be given;
- (xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;
- (xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
- (xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;
- (xvi) Pillaging a town or place, even when taken by assault;
- (xvii) Employing poison or poisoned weapons;

- (xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
- (xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
- (xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;
- (xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- (xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;
- (xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;
- (xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
- (xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;
- (xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

- (i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- (iii) Taking of hostages;
- (iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

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

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(v) Pillaging a town or place, even when taken by assault;

(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;

(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

(viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

(ix) Killing or wounding treacherously a combatant adversary;

(x) Declaring that no quarter will be given;

(xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

(f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when

there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

3. Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.

Article 9 Elements of Crimes

1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8. They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.
2. Amendments to the Elements of Crimes may be proposed by:
 - (a) Any State Party;
 - (b) The judges acting by an absolute majority;
 - (c) The Prosecutor.

Such amendments shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.

3. The Elements of Crimes and amendments thereto shall be consistent with this Statute.

Article 20 Ne bis in idem

1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.
2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.
3. No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:
 - (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
 - (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

Article 21 Applicable law

1. The Court shall apply:
 - (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;

(b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;

(c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

2. The Court may apply principles and rules of law as interpreted in its previous decisions.

3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

PART 3. GENERAL PRINCIPLES OF CRIMINAL LAW

Article 22

Nullum crimen sine lege

1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.

2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.

3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.

Article 23

Nulla poena sine lege

A person convicted by the Court may be punished only in accordance with this Statute.

Article 25

Individual criminal responsibility

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.

2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

- (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
- (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
- (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
 - (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
 - (ii) Be made in the knowledge of the intention of the group to commit the crime;
- (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
- (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

Article 27
Irrelevance of official capacity

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Article 28
Responsibility of commanders and other superiors

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

- (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
 - (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

Article 30
Mental element

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.

2. For the purposes of this article, a person has intent where:

(a) In relation to conduct, that person means to engage in the conduct;

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.

APPENDIX B
ICC ELEMENTS OF CRIMES

New York
13-31 March 2000
12-30 June 2000

Report of the Preparatory Commission for the International Criminal Court

Addendum

Finalized draft text of the Elements of Crimes*

Explanatory note: The structure of the elements of the crimes of genocide, crimes against humanity and war crimes follows the structure of the corresponding provisions of articles 6, 7 and 8 of the Rome Statute. Some paragraphs of those articles of the Rome Statute list multiple crimes. In those instances, the elements of crimes appear in separate paragraphs which correspond to each of those crimes to facilitate the identification of the respective elements.

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* In view of paragraph 16 of the Introduction, the final version of this report will be issued at a later stage under the symbol PCNICC/2000/1.

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Elements of crimes

General introduction

1. Pursuant to article 9, the following Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8, consistent with the Statute. The provisions of the Statute, including article 21 and the general principles set out in Part 3, are applicable to the Elements of Crimes.

2. As stated in article 30, unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge. Where no reference is made in the Elements of Crimes to a mental element for any particular conduct, consequence or circumstance listed, it is understood that the relevant mental element, i.e., intent, knowledge or both, set out in article 30 applies. Exceptions to the article 30 standard, based on the Statute, including applicable law under its relevant provisions, are indicated below.

3. Existence of intent and knowledge can be inferred from relevant facts and circumstances.

4. With respect to mental elements associated with elements involving value judgement, such as those using the terms “inhumane” or “severe”, it is not necessary that the perpetrator personally completed a particular value judgement, unless otherwise indicated.

5. Grounds for excluding criminal responsibility or the absence thereof are generally not specified in the elements of crimes listed under each crime.¹⁸²

6. The requirement of “unlawfulness” found in the Statute or in other parts of international law, in particular international humanitarian law, is generally not specified in the elements of crimes.

7. The elements of crimes are generally structured in accordance with the following principles:

- As the elements of crimes focus on the conduct, consequences and circumstances associated with each crime, they are generally listed in that order;
- When required, a particular mental element is listed after the affected conduct, consequence or circumstance;
- Contextual circumstances are listed last.

8. As used in the Elements of Crimes, the term “perpetrator” is neutral as to guilt or innocence. The elements, including the appropriate mental elements, apply *mutatis mutandis* to all those

whose criminal responsibility may fall under articles 25 and 28 of the Statute.

¹⁸² This paragraph is without prejudice to the obligation of the Prosecutor under article 54, paragraph 1, of the Statute.

9. A particular conduct may constitute one or more crimes.
10. The use of short titles for the crimes has no legal effect.

Article 6 Genocide

Introduction

With respect to the last element listed for each crime:

- The term “in the context of” would include the initial acts in an emerging pattern;
- The term “manifest” is an objective qualification;
- Notwithstanding the normal requirement for a mental element provided for in article 30, and recognizing that knowledge of the circumstances will usually be addressed in proving genocidal intent, the appropriate requirement, if any, for a mental element regarding this circumstance will need to be decided by the Court on a case-by-case basis.

Article 6 (a) Genocide by killing

Elements

1. The perpetrator killed¹⁸³ one or more persons.
2. Such person or persons belonged to a particular national, ethnical, racial or religious group.
3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
4. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.

Article 6 (b) Genocide by causing serious bodily or mental harm

Elements

1. The perpetrator caused serious bodily or mental harm to one or more persons.¹⁸⁴
2. Such person or persons belonged to a particular national, ethnical, racial or religious group.
3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.

¹⁸³ The term “killed” is interchangeable with the term “caused death”.

¹⁸⁴ This conduct may include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment.

4. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.

Article 6 (c)

Genocide by deliberately inflicting conditions of life calculated to bring about physical destruction

Elements

1. The perpetrator inflicted certain conditions of life upon one or more persons.
2. Such person or persons belonged to a particular national, ethnical, racial or religious group.
3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
4. The conditions of life were calculated to bring about the physical destruction of that group, in whole or in part.¹⁸⁵
5. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.

Article 6 (d)

Genocide by imposing measures intended to prevent births

Elements

1. The perpetrator imposed certain measures upon one or more persons.
2. Such person or persons belonged to a particular national, ethnical, racial or religious group.
3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
4. The measures imposed were intended to prevent births within that group.

5. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.

Article 6 (e)

Genocide by forcibly transferring children

¹⁸⁵ The term “conditions of life” may include, but is not necessarily restricted to, deliberate deprivation of resources indispensable for survival, such as food or medical services, or systematic expulsion from homes.

Elements

1. The perpetrator forcibly transferred one or more persons.¹⁸⁶
2. Such person or persons belonged to a particular national, ethnical, racial or religious group.
3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
4. The transfer was from that group to another group.
5. The person or persons were under the age of 18 years.
6. The perpetrator knew, or should have known, that the person or persons were under the age of 18 years.
7. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.

¹⁸⁶ 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.

Article 7

Crimes against humanity

Introduction

1. Since article 7 pertains to international criminal law, its provisions, consistent with article 22, must be strictly construed, taking into account that crimes against humanity as defined in article 7 are among the most serious crimes of concern to the international community as a whole, warrant and entail individual criminal responsibility, and require conduct which is impermissible under generally applicable international law, as recognized by the principal legal systems of the world.

2. The last two elements for each crime against humanity describe the context in which the conduct must take place. These elements clarify the requisite participation in and knowledge of a widespread or systematic attack against a civilian population. However, the last element should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization. In the case of an emerging widespread or systematic attack against a civilian population, the intent clause of the last element indicates that this mental element is satisfied if the perpetrator intended to further such an attack.

3. “Attack directed against a civilian population” in these context elements is understood to mean a course of conduct involving the multiple commission of acts referred to in article 7, paragraph 1, of the Statute against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack. The acts need not constitute a military attack. It is understood that “policy to commit such attack” requires that the State or organization actively promote or encourage such an attack against a civilian population.¹⁸⁷

Article 7 (1) (a)

Crime against humanity of murder

Elements

1. The perpetrator killed¹⁸⁸ one or more persons.

¹⁸⁷ A policy which has a civilian population as the object of the attack would be implemented by State or organizational action. Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack. The existence of such a policy cannot be inferred solely from the absence of governmental or organizational action.

¹⁸⁸ The term “killed” is interchangeable with the term “caused death”. This footnote applies to all elements which use either of these concepts.

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.

Article 7 (1) (b) **Crime against humanity of extermination**

Elements

1. The perpetrator killed¹⁸⁹ one or more persons, including by inflicting conditions of life calculated to bring about the destruction of part of a population.¹⁹⁰
2. The conduct constituted, or took place as part of,¹⁹¹ a mass killing of members of a civilian population.
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. 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) (c) **Crime against humanity of enslavement**

Elements

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.¹⁹²
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 directed against a civilian population.

¹⁸⁹ The conduct could be committed by different methods of killing, either directly or indirectly.

¹⁹⁰ The infliction of such conditions could include the deprivation of access to food and medicine.

¹⁹¹ The term “as part of” would include the initial conduct in a mass killing.

¹⁹² It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.

Article 7 (1) (d)
Crime against humanity of deportation or forcible transfer of population

Elements

1. The perpetrator deported or forcibly¹⁹³ transferred,¹⁹⁴ 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.
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) (e)
Crime against humanity of imprisonment or other severe deprivation of physical liberty

Elements

1. The perpetrator imprisoned one or more persons or otherwise severely deprived one or more persons of physical liberty.
2. The gravity of the conduct was such that it was in violation of fundamental rules of international law.
3. The perpetrator was aware of the factual circumstances that established the gravity of the conduct.
4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
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.

¹⁹³ 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.

¹⁹⁴ “Deported or forcibly transferred” is interchangeable with “forcibly displaced”.

Article 7 (1) (f)
Crime against humanity of torture¹⁹⁵

Elements

1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.
2. Such person or persons were in the custody or under the control of the perpetrator.
3. Such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions.
4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
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) (g)-1
Crime against humanity of rape

Elements

1. The perpetrator invaded¹⁹⁶ the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
2. The invasion was committed by force, or by 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 another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.¹⁹⁷
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. 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.

¹⁹⁵ It is understood that no specific purpose need be proved for this crime.

¹⁹⁶ The concept of “invasion” is intended to be broad enough to be gender-neutral.

¹⁹⁷ It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity. This footnote also applies to the corresponding elements of article 7 (1) (g)-3, 5 and 6.

Article 7 (1) (g)-2
Crime against humanity of sexual slavery¹⁹⁸

Elements

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.¹⁹⁹
2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. 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) (g)-3
Crime against humanity of enforced prostitution

Elements

1. The perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by 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 or such person's or persons' incapacity to give genuine consent.
2. The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature.
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. 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.

¹⁹⁸ Given the complex nature of this crime, it is recognized that its commission could involve more than one perpetrator as a part of a common criminal purpose.

¹⁹⁹ It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.

Article 7 (1) (g)-4
Crime against humanity of forced pregnancy

Elements

1. The perpetrator confined one or more women forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.
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 directed against a civilian population.

Article 7 (1) (g)-5
Crime against humanity of enforced sterilization

Elements

1. The perpetrator deprived one or more persons of biological reproductive capacity.²⁰⁰
2. The conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent.²⁰¹
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. 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) (g)-6
Crime against humanity of sexual violence

Elements

1. The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by 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 or such person's or persons' incapacity to give genuine consent.
2. Such conduct was of a gravity comparable to the other offences in article 7, paragraph 1 (g), of the Statute.

²⁰⁰ The deprivation is not intended to include birth-control measures which have a non-permanent effect in practice.

²⁰¹ It is understood that "genuine consent" does not include consent obtained through deception.

3. The perpetrator was aware of the factual circumstances that established the gravity of the conduct.
4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
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) (h)

Crime against humanity of persecution

Elements

1. The perpetrator severely deprived, contrary to international law,²⁰² one or more persons of fundamental rights.
2. The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.
3. Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law.
4. The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court.²⁰³
5. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
6. 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) (i)

Crime against humanity of enforced disappearance of persons^{204 205}

Elements

1. The perpetrator:
 - (a) Arrested, detained^{206 207} or abducted one or more persons; or

²⁰² This requirement is without prejudice to paragraph 6 of the General Introduction to the Elements of Crimes.

²⁰³ It is understood that no additional mental element is necessary for this element other than that inherent in element 6.

²⁰⁴ Given the complex nature of this crime, it is recognized that its commission will normally involve more than one perpetrator as a part of a common criminal purpose.

²⁰⁵ This crime falls under the jurisdiction of the Court only if the attack referred to in elements 7 and 8 occurs after the entry into force of the Statute.

- (b) Refused to acknowledge the arrest, detention or abduction, or to give information on the fate or whereabouts of such person or persons.
2. (a) Such arrest, detention or abduction was followed or accompanied by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons; or
- (b) Such refusal was preceded or accompanied by that deprivation of freedom.
3. The perpetrator was aware that:²⁰⁸
- (a) Such arrest, detention or abduction would be followed in the ordinary course of events by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons;²⁰⁹ or
- (b) Such refusal was preceded or accompanied by that deprivation of freedom.
4. Such arrest, detention or abduction was carried out by, or with the authorization, support or acquiescence of, a State or a political organization.
5. Such refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons was carried out by, or with the authorization or support of, such State or political organization.
6. The perpetrator intended to remove such person or persons from the protection of the law for a prolonged period of time.
7. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
8. 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.

²⁰⁶ The word “detained” would include a perpetrator who maintained an existing detention.

²⁰⁷ It is understood that under certain circumstances an arrest or detention may have been lawful.

²⁰⁸ This element, inserted because of the complexity of this crime, is without prejudice to the General Introduction to the Elements of Crimes.

²⁰⁹ It is understood that, in the case of a perpetrator who maintained an existing detention, this element would be satisfied if the perpetrator was aware that such a refusal had already taken place.

Article 7 (1) (j)
Crime against humanity of apartheid

Elements

1. The perpetrator committed an inhumane act against one or more persons.
2. Such act was an act referred to in article 7, paragraph 1, of the Statute, or was an act of a character similar to any of those acts.²¹⁰
3. The perpetrator was aware of the factual circumstances that established the character of the act.
4. The conduct was committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups.
5. The perpetrator intended to maintain such regime by that conduct.
6. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
7. 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)
Crime against humanity of other inhumane acts

Elements

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.²¹¹
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.
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.

²¹⁰ It is understood that “character” refers to the nature and gravity of the act.

²¹¹ It is understood that “character” refers to the nature and gravity of the act.

Article 8

War crimes

Introduction

The elements for war crimes under article 8, paragraph 2 (c) and (e), are subject to the limitations addressed in article 8, paragraph 2 (d) and (f), which are not elements of crimes.

The elements for war crimes under article 8, paragraph 2, of the Statute shall be interpreted within the established framework of the international law of armed conflict including, as appropriate, the international law of armed conflict applicable to armed conflict at sea.

With respect to the last two elements listed for each crime:

- There is no requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict or its character as international or non-international;
- In that context there is no requirement for awareness by the perpetrator of the facts that established the character of the conflict as international or non-international;
- There is only a requirement for the awareness of the factual circumstances that established the existence of an armed conflict that is implicit in the terms “took place in the context of and was associated with”.

Article 8 (2) (a)

Article 8 (2) (a) (i)

War crime of wilful killing

Elements

1. The perpetrator killed one or more persons.²¹²
2. Such person or persons were protected under one or more of the Geneva Conventions of 1949.
3. The perpetrator was aware of the factual circumstances that established that protected status.^{213 214}

²¹² The term “killed” is interchangeable with the term “caused death”. This footnote applies to all elements which use either of these concepts.

²¹³ This mental element recognizes the interplay between articles 30 and 32. This footnote also applies to the corresponding element in each crime under article 8 (2) (a), and to the element in other crimes in article 8 (2) concerning the awareness of factual circumstances that establish the status of persons or property protected under the relevant international law of armed conflict.

²¹⁴ With respect to nationality, it is understood that the perpetrator needs only to know that the victim belonged to an adverse party to the conflict. This

footnote also applies to the corresponding element in each crime under article 8 (2) (a).

4. The conduct took place in the context of and was associated with an international armed conflict.²¹⁵

5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (a) (ii)-1 War crime of torture

Elements²¹⁶

1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.

2. The perpetrator inflicted the pain or suffering for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind.

3. Such person or persons were protected under one or more of the Geneva Conventions of 1949.

4. The perpetrator was aware of the factual circumstances that established that protected status.

5. The conduct took place in the context of and was associated with an international armed conflict.

6. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (a) (ii)-2 War crime of inhuman treatment

Elements

1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.

2. Such person or persons were protected under one or more of the Geneva Conventions of 1949.

3. The perpetrator was aware of the factual circumstances that established that protected status.

4. The conduct took place in the context of and was associated with an international armed conflict.

5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

²¹⁵ The term “international armed conflict” includes military occupation. This footnote also applies to the corresponding element in each crime under article 8 (2) (a).

²¹⁶ As element 3 requires that all victims must be “protected persons” under one or more of the Geneva Conventions of 1949, these elements do not include the custody or control requirement found in the elements of article 7 (1) (e).

Article 8 (2) (a) (ii)-3
War crime of biological experiments

Elements

1. The perpetrator subjected one or more persons to a particular biological experiment.
2. The experiment seriously endangered the physical or mental health or integrity of such person or persons.
3. The intent of the experiment was non-therapeutic and it was neither justified by medical reasons nor carried out in such person's or persons' interest.
4. Such person or persons were protected under one or more of the Geneva Conventions of 1949.
5. The perpetrator was aware of the factual circumstances that established that protected status.
6. The conduct took place in the context of and was associated with an international armed conflict.
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (a) (iii)
War crime of wilfully causing great suffering

Elements

1. The perpetrator caused great physical or mental pain or suffering to, or serious injury to body or health of, one or more persons.
2. Such person or persons were protected under one or more of the Geneva Conventions of 1949.
3. The perpetrator was aware of the factual circumstances that established that protected status.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (a) (iv)
War crime of destruction and appropriation of property

Elements

1. The perpetrator destroyed or appropriated certain property.
2. The destruction or appropriation was not justified by military necessity.
3. The destruction or appropriation was extensive and carried out wantonly.

4. Such property was protected under one or more of the Geneva Conventions of 1949.
5. The perpetrator was aware of the factual circumstances that established that protected status.
6. The conduct took place in the context of and was associated with an international armed conflict.
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (a) (v)

War crime of compelling service in hostile forces

Elements

1. The perpetrator coerced one or more persons, by act or threat, to take part in military operations against that person's own country or forces or otherwise serve in the forces of a hostile power.
2. Such person or persons were protected under one or more of the Geneva Conventions of 1949.
3. The perpetrator was aware of the factual circumstances that established that protected status.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (a) (vi)

War crime of denying a fair trial

Elements

1. The perpetrator deprived one or more persons of a fair and regular trial by denying judicial guarantees as defined, in particular, in the third and the fourth Geneva Conventions of 1949.
2. Such person or persons were protected under one or more of the Geneva Conventions of 1949.
3. The perpetrator was aware of the factual circumstances that established that protected status.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (a) (vii)-1

War crime of unlawful deportation and transfer

Elements

1. The perpetrator deported or transferred one or more persons to another State or to another location.
2. Such person or persons were protected under one or more of the Geneva Conventions of 1949.
3. The perpetrator was aware of the factual circumstances that established that protected status.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (a) (vii)-2 War crime of unlawful confinement

Elements

1. The perpetrator confined or continued to confine one or more persons to a certain location.
2. Such person or persons were protected under one or more of the Geneva Conventions of 1949.
3. The perpetrator was aware of the factual circumstances that established that protected status.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (a) (viii) War crime of taking hostages

Elements

1. The perpetrator seized, detained or otherwise held hostage one or more persons.
2. The perpetrator threatened to kill, injure or continue to detain such person or persons.
3. The perpetrator intended to compel a State, an international organization, a natural or legal person or a group of persons to act or refrain from acting as an explicit or implicit condition for the safety or the release of such person or persons.
4. Such person or persons were protected under one or more of the Geneva Conventions of 1949.
5. The perpetrator was aware of the factual circumstances that established that protected status.

6. The conduct took place in the context of and was associated with an international armed conflict.

7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b)

Article 8 (2) (b) (i)

War crime of attacking civilians

Elements

1. The perpetrator directed an attack.
2. The object of the attack was a civilian population as such or individual civilians not taking direct part in hostilities.
3. The perpetrator intended the civilian population as such or individual civilians not taking direct part in hostilities to be the object of the attack.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (ii)

War crime of attacking civilian objects

Elements

1. The perpetrator directed an attack.
2. The object of the attack was civilian objects, that is, objects which are not military objectives.
3. The perpetrator intended such civilian objects to be the object of the attack.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (iii)
War crime of attacking personnel or objects involved in a humanitarian assistance or peacekeeping mission

Elements

1. The perpetrator directed an attack.
2. The object of the attack was personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations.
3. The perpetrator intended such personnel, installations, material, units or vehicles so involved to be the object of the attack.
4. Such personnel, installations, material, units or vehicles were entitled to that protection given to civilians or civilian objects under the international law of armed conflict.
5. The perpetrator was aware of the factual circumstances that established that protection.
6. The conduct took place in the context of and was associated with an international armed conflict.
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (iv)
War crime of excessive incidental death, injury, or damage

Elements

1. The perpetrator launched an attack.
2. The attack was such that it would cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated.²¹⁷
3. The perpetrator knew that the attack would cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment and that such death, injury or damage would be of such

²¹⁷ The expression “concrete and direct overall military advantage” refers to a military advantage that is foreseeable by the perpetrator at the relevant time. Such advantage may or may not be temporally or geographically related to the object of the attack. The fact that this crime admits the possibility of lawful incidental injury and collateral damage does not in any way justify any violation of the law applicable in armed conflict. It does not address justifications for war or other rules related to *jus ad bellum*. It reflects the proportionality requirement inherent in determining the legality of any military activity undertaken in the context of an armed conflict.

an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated.²¹⁸

4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (v)
War crime of attacking undefended places²¹⁹

Elements

1. The perpetrator attacked one or more towns, villages, dwellings or buildings.
2. Such towns, villages, dwellings or buildings were open for unresisted occupation.
3. Such towns, villages, dwellings or buildings did not constitute military objectives.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (vi)
War crime of killing or wounding a person *hors de combat*

Elements

1. The perpetrator killed or injured one or more persons.
2. Such person or persons were *hors de combat*.
3. The perpetrator was aware of the factual circumstances that established this status.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

²¹⁸ As opposed to the general rule set forth in paragraph 4 of the General Introduction, this knowledge element requires that the perpetrator make the value judgement as described therein. An evaluation of that value judgement must be based on the requisite information available to the perpetrator at the time.

²¹⁹ The presence in the locality of persons specially protected under the Geneva Conventions of 1949 or of police forces retained for the sole purpose of maintaining law and order does not by itself render the locality a military objective.

Article 8 (2) (b) (vii)-1
War crime of improper use of a flag of truce

Elements

1. The perpetrator used a flag of truce.
2. The perpetrator made such use in order to feign an intention to negotiate when there was no such intention on the part of the perpetrator.
3. The perpetrator knew or should have known of the prohibited nature of such use.²²⁰
4. The conduct resulted in death or serious personal injury.
5. The perpetrator knew that the conduct could result in death or serious personal injury.
6. The conduct took place in the context of and was associated with an international armed conflict.
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (vii)-2
War crime of improper use of a flag, insignia or uniform of the hostile party

Elements

1. The perpetrator used a flag, insignia or uniform of the hostile party.
2. The perpetrator made such use in a manner prohibited under the international law of armed conflict while engaged in an attack.
3. The perpetrator knew or should have known of the prohibited nature of such use.²²¹
4. The conduct resulted in death or serious personal injury.
5. The perpetrator knew that the conduct could result in death or serious personal injury.
6. The conduct took place in the context of and was associated with an international armed conflict.
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (vii)-3
War crime of improper use of a flag, insignia or uniform of the United Nations

²²⁰ This mental element recognizes the interplay between article 30 and article 32. The term “prohibited nature” denotes illegality.

²²¹ This mental element recognizes the interplay between article 30 and article 32. The term “prohibited nature” denotes illegality.

Elements

1. The perpetrator used a flag, insignia or uniform of the United Nations.
2. The perpetrator made such use in a manner prohibited under the international law of armed conflict.
3. The perpetrator knew of the prohibited nature of such use.²²²
4. The conduct resulted in death or serious personal injury.
5. The perpetrator knew that the conduct could result in death or serious personal injury.
6. The conduct took place in the context of and was associated with an international armed conflict.
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (vii)-4

War crime of improper use of the distinctive emblems of the Geneva Conventions

Elements

1. The perpetrator used the distinctive emblems of the Geneva Conventions.
2. The perpetrator made such use for combatant purposes²²³ in a manner prohibited under the international law of armed conflict.
3. The perpetrator knew or should have known of the prohibited nature of such use.²²⁴
4. The conduct resulted in death or serious personal injury.
5. The perpetrator knew that the conduct could result in death or serious personal injury.
6. The conduct took place in the context of and was associated with an international armed conflict.
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

²²² This mental element recognizes the interplay between article 30 and article 32. The “should have known” test required in the other offences found in article 8 (2) (b) (vii) is not applicable here because of the variable and regulatory nature of the relevant prohibitions.

²²³ “Combatant purposes” in these circumstances means purposes directly related to hostilities and not including medical, religious or similar activities.

²²⁴ This mental element recognizes the interplay between article 30 and article 32. The term “prohibited nature” denotes illegality.

Article 8 (2) (b) (viii)

The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory

Elements

1. The perpetrator:
 - (a) Transferred,²²⁵ directly or indirectly, parts of its own population into the territory it occupies; or
 - (b) Deported or transferred all or parts of the population of the occupied territory within or outside this territory.
2. The conduct took place in the context of and was associated with an international armed conflict.
3. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (ix)

War crime of attacking protected objects²²⁶

Elements

1. The perpetrator directed an attack.
2. The object of the attack was one or more buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected, which were not military objectives.
3. The perpetrator intended such building or buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected, which were not military objectives, to be the object of the attack.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

²²⁵ The term “transfer” needs to be interpreted in accordance with the relevant provisions of international humanitarian law.

²²⁶ The presence in the locality of persons specially protected under the Geneva Conventions of 1949 or of police forces retained for the sole purpose of maintaining law and order does not by itself render the locality a military objective.

Article 8 (2) (b) (x)-1
War crime of mutilation

Elements

1. The perpetrator subjected one or more persons to mutilation, in particular by permanently disfiguring the person or persons, or by permanently disabling or removing an organ or appendage.
2. The conduct caused death or seriously endangered the physical or mental health of such person or persons.
3. The conduct was neither justified by the medical, dental or hospital treatment of the person or persons concerned nor carried out in such person's or persons' interest.²²⁷
4. Such person or persons were in the power of an adverse party.
5. The conduct took place in the context of and was associated with an international armed conflict.
6. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (x)-2
War crime of medical or scientific experiments

Elements

1. The perpetrator subjected one or more persons to a medical or scientific experiment.
2. The experiment caused death or seriously endangered the physical or mental health or integrity of such person or persons.
3. The conduct was neither justified by the medical, dental or hospital treatment of such person or persons concerned nor carried out in such person's or persons' interest.
4. Such person or persons were in the power of an adverse party.
5. The conduct took place in the context of and was associated with an international armed conflict.
6. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

²²⁷ Consent is not a defence to this crime. The crime prohibits any medical procedure which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the party conducting the procedure and who are in no way deprived of liberty. This footnote also applies to the same element for article 8 (2) (b) (x)-2.

Article 8 (2) (b) (xi)
War crime of treacherously killing or wounding

Elements

1. The perpetrator invited the confidence or belief of one or more persons that they were entitled to, or were obliged to accord, protection under rules of international law applicable in armed conflict.
2. The perpetrator intended to betray that confidence or belief.
3. The perpetrator killed or injured such person or persons.
4. The perpetrator made use of that confidence or belief in killing or injuring such person or persons.
5. Such person or persons belonged to an adverse party.
6. The conduct took place in the context of and was associated with an international armed conflict.
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (xii)
War crime of denying quarter

Elements

1. The perpetrator declared or ordered that there shall be no survivors.
2. Such declaration or order was given in order to threaten an adversary or to conduct hostilities on the basis that there shall be no survivors.
3. The perpetrator was in a position of effective command or control over the subordinate forces to which the declaration or order was directed.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (xiii)
War crime of destroying or seizing the enemy's property

Elements

1. The perpetrator destroyed or seized certain property.
2. Such property was property of a hostile party.
3. Such property was protected from that destruction or seizure under the international law of armed conflict.

4. The perpetrator was aware of the factual circumstances that established the status of the property.
5. The destruction or seizure was not justified by military necessity.
6. The conduct took place in the context of and was associated with an international armed conflict.
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (xiv)

War crime of depriving the nationals of the hostile power of rights or actions

Elements

1. The perpetrator effected the abolition, suspension or termination of admissibility in a court of law of certain rights or actions.
2. The abolition, suspension or termination was directed at the nationals of a hostile party.
3. The perpetrator intended the abolition, suspension or termination to be directed at the nationals of a hostile party.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (xv)

War crime of compelling participation in military operations

Elements

1. The perpetrator coerced one or more persons by act or threat to take part in military operations against that person's own country or forces.
2. Such person or persons were nationals of a hostile party.
3. The conduct took place in the context of and was associated with an international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (xvi)

War crime of pillaging

Elements

1. The perpetrator appropriated certain property.

2. The perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use.²²⁸
3. The appropriation was without the consent of the owner.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (xvii)

War crime of employing poison or poisoned weapons

Elements

1. The perpetrator employed a substance or a weapon that releases a substance as a result of its employment.
2. The substance was such that it causes death or serious damage to health in the ordinary course of events, through its toxic properties.
3. The conduct took place in the context of and was associated with an international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (xviii)

War crime of employing prohibited gases, liquids, materials or devices

Elements

1. The perpetrator employed a gas or other analogous substance or device.
2. The gas, substance or device was such that it causes death or serious damage to health in the ordinary course of events, through its asphyxiating or toxic properties.²²⁹
3. The conduct took place in the context of and was associated with an international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

²²⁸ As indicated by the use of the term “private or personal use”, appropriations justified by military necessity cannot constitute the crime of pillaging.

²²⁹ Nothing in this element shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law with respect to development, production, stockpiling and use of chemical weapons.

Article 8 (2) (b) (xix)
War crime of employing prohibited bullets

Elements

1. The perpetrator employed certain bullets.
2. The bullets were such that their use violates the international law of armed conflict because they expand or flatten easily in the human body.
3. The perpetrator was aware that the nature of the bullets was such that their employment would uselessly aggravate suffering or the wounding effect.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (xx)
War crime of employing weapons, projectiles or materials or methods of warfare listed in the Annex to the Statute

Elements

[Elements will have to be drafted once weapons, projectiles or material or methods of warfare have been included in an annex to the Statute.]

Article 8 (2) (b) (xxi)
War crime of outrages upon personal dignity

Elements

1. The perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons.²³⁰
2. The severity of the humiliation, degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity.
3. The conduct took place in the context of and was associated with an international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

²³⁰ For this crime, “persons” can include dead persons. It is understood that the victim need not personally be aware of the existence of the humiliation or degradation or other violation. This element takes into account relevant aspects of the cultural background of the victim.

Article 8 (2) (b) (xxii)-1 War crime of rape

Elements

1. The perpetrator invaded²³¹ the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
2. The invasion was committed by force, or by 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 another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.²³²
3. The conduct took place in the context of and was associated with an international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (xxii)-2 War crime of sexual slavery²³³

Elements

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.²³⁴
2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.
3. The conduct took place in the context of and was associated with an international armed conflict.

²³¹ The concept of “invasion” is intended to be broad enough to be gender-neutral.

²³² It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity. This footnote also applies to the corresponding elements of article 8 (2) (b) (xxii)-3, 5 and 6.

²³³ Given the complex nature of this crime, it is recognized that its commission could involve more than one perpetrator as a part of a common criminal purpose.

²³⁴ It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.

4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (xxii)-3
War crime of enforced prostitution

Elements

1. The perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by 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 or such person's or persons' incapacity to give genuine consent.
2. The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature.
3. The conduct took place in the context of and was associated with an international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (xxii)-4
War crime of forced pregnancy

Elements

1. The perpetrator confined one or more women forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.
2. The conduct took place in the context of and was associated with an international armed conflict.
3. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (xxii)-5
War crime of enforced sterilization

Elements

1. The perpetrator deprived one or more persons of biological reproductive capacity.²³⁵
2. The conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent.²³⁶

²³⁵ The deprivation is not intended to include birth-control measures which have a non-permanent effect in practice.

3. The conduct took place in the context of and was associated with an international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (xxii)-6
War crime of sexual violence

Elements

1. The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by 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 or such person's or persons' incapacity to give genuine consent.
2. The conduct was of a gravity comparable to that of a grave breach of the Geneva Conventions.
3. The perpetrator was aware of the factual circumstances that established the gravity of the conduct.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (xxiii)
War crime of using protected persons as shields

Elements

1. The perpetrator moved or otherwise took advantage of the location of one or more civilians or other persons protected under the international law of armed conflict.
2. The perpetrator intended to shield a military objective from attack or shield, favour or impede military operations.
3. The conduct took place in the context of and was associated with an international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

²³⁶ It is understood that “genuine consent” does not include consent obtained through deception.

Article 8 (2) (b) (xxiv)

War crime of attacking objects or persons using the distinctive emblems of the Geneva Conventions

Elements

1. The perpetrator attacked one or more persons, buildings, medical units or transports or other objects using, in conformity with international law, a distinctive emblem or other method of identification indicating protection under the Geneva Conventions.
2. The perpetrator intended such persons, buildings, units or transports or other objects so using such identification to be the object of the attack.
3. The conduct took place in the context of and was associated with an international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (xxv)

War crime of starvation as a method of warfare

Elements

1. The perpetrator deprived civilians of objects indispensable to their survival.
2. The perpetrator intended to starve civilians as a method of warfare.
3. The conduct took place in the context of and was associated with an international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (xxvi)

War crime of using, conscripting or enlisting children

Elements

1. The perpetrator conscripted or enlisted one or more persons into the national armed forces or used one or more persons to participate actively in hostilities.
2. Such person or persons were under the age of 15 years.
3. The perpetrator knew or should have known that such person or persons were under the age of 15 years.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (c)

Article 8 (2) (c) (i)-1 War crime of murder

Elements

1. The perpetrator killed one or more persons.
2. Such person or persons were either *hors de combat*, or were civilians, medical personnel, or religious personnel²³⁷ taking no active part in the hostilities.
3. The perpetrator was aware of the factual circumstances that established this status.
4. The conduct took place in the context of and was associated with an armed conflict not of an international character.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (c) (i)-2 War crime of mutilation

Elements

1. The perpetrator subjected one or more persons to mutilation, in particular by permanently disfiguring the person or persons, or by permanently disabling or removing an organ or appendage.
2. The conduct was neither justified by the medical, dental or hospital treatment of the person or persons concerned nor carried out in such person's or persons' interests.
3. Such person or persons were either *hors de combat*, or were civilians, medical personnel or religious personnel taking no active part in the hostilities.
4. The perpetrator was aware of the factual circumstances that established this status.
5. The conduct took place in the context of and was associated with an armed conflict not of an international character.
6. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (c) (i)-3 War crime of cruel treatment

Elements

1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.

²³⁷ The term "religious personnel" includes those non-confessional non-combatant military personnel carrying out a similar function.

2. Such person or persons were either *hors de combat*, or were civilians, medical personnel, or religious personnel taking no active part in the hostilities.
3. The perpetrator was aware of the factual circumstances that established this status.
4. The conduct took place in the context of and was associated with an armed conflict not of an international character.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (c) (i)-4 War crime of torture

Elements

1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.
2. The perpetrator inflicted the pain or suffering for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind.
3. Such person or persons were either *hors de combat*, or were civilians, medical personnel or religious personnel taking no active part in the hostilities.
4. The perpetrator was aware of the factual circumstances that established this status.
5. The conduct took place in the context of and was associated with an armed conflict not of an international character.
6. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (c) (ii) War crime of outrages upon personal dignity

Elements

1. The perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons.²³⁸
2. The severity of the humiliation, degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity.

²³⁸ For this crime, “persons” can include dead persons. It is understood that the victim need not personally be aware of the existence of the humiliation or degradation or other violation. This element takes into account relevant aspects of the cultural background of the victim.

3. Such person or persons were either *hors de combat*, or were civilians, medical personnel or religious personnel taking no active part in the hostilities.
4. The perpetrator was aware of the factual circumstances that established this status.
5. The conduct took place in the context of and was associated with an armed conflict not of an international character.
6. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (c) (iii)
War crime of taking hostages

Elements

1. The perpetrator seized, detained or otherwise held hostage one or more persons.
2. The perpetrator threatened to kill, injure or continue to detain such person or persons.
3. The perpetrator intended to compel a State, an international organization, a natural or legal person or a group of persons to act or refrain from acting as an explicit or implicit condition for the safety or the release of such person or persons.
4. Such person or persons were either *hors de combat*, or were civilians, medical personnel or religious personnel taking no active part in the hostilities.
5. The perpetrator was aware of the factual circumstances that established this status.
6. The conduct took place in the context of and was associated with an armed conflict not of an international character.
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (c) (iv)
War crime of sentencing or execution without due process

Elements

1. The perpetrator passed sentence or executed one or more persons.²³⁹

²³⁹ The elements laid down in these documents do not address the different forms of individual criminal responsibility, as enunciated in articles 25 and 28 of the Statute.

2. Such person or persons were either *hors de combat*, or were civilians, medical personnel or religious personnel taking no active part in the hostilities.
3. The perpetrator was aware of the factual circumstances that established this status.
4. There was no previous judgement pronounced by a court, or the court that rendered judgement was not “regularly constituted”, that is, it did not afford the essential guarantees of independence and impartiality, or the court that rendered judgement did not afford all other judicial guarantees generally recognized as indispensable under international law.²⁴⁰
5. The perpetrator was aware of the absence of a previous judgement or of the denial of relevant guarantees and the fact that they are essential or indispensable to a fair trial.
6. The conduct took place in the context of and was associated with an armed conflict not of an international character.
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (e)

Article 8 (2) (e) (i)

War crime of attacking civilians

Elements

1. The perpetrator directed an attack.
2. The object of the attack was a civilian population as such or individual civilians not taking direct part in hostilities.
3. The perpetrator intended the civilian population as such or individual civilians not taking direct part in hostilities to be the object of the attack.
4. The conduct took place in the context of and was associated with an armed conflict not of an international character.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (e) (ii)

War crime of attacking objects or persons using the distinctive emblems of the Geneva Conventions

²⁴⁰ With respect to elements 4 and 5, the Court should consider whether, in the light of all relevant circumstances, the cumulative effect of factors with respect to guarantees deprived the person or persons of a fair trial.

Elements

1. The perpetrator attacked one or more persons, buildings, medical units or transports or other objects using, in conformity with international law, a distinctive emblem or other method of identification indicating protection under the Geneva Conventions.
2. The perpetrator intended such persons, buildings, units or transports or other objects so using such identification to be the object of the attack.
3. The conduct took place in the context of and was associated with an armed conflict not of an international character.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (e) (iii)

War crime of attacking personnel or objects involved in a humanitarian assistance or peacekeeping mission

Elements

1. The perpetrator directed an attack.
2. The object of the attack was personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations.
3. The perpetrator intended such personnel, installations, material, units or vehicles so involved to be the object of the attack.
4. Such personnel, installations, material, units or vehicles were entitled to that protection given to civilians or civilian objects under the international law of armed conflict.
5. The perpetrator was aware of the factual circumstances that established that protection.
6. The conduct took place in the context of and was associated with an armed conflict not of an international character.
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (e) (iv)

War crime of attacking protected objects²⁴¹

Elements

1. The perpetrator directed an attack.

²⁴¹ The presence in the locality of persons specially protected under the Geneva Conventions of 1949 or of police forces retained for the sole purpose of maintaining law and order does not by itself render the locality a military objective.

2. The object of the attack was one or more buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected, which were not military objectives.
3. The perpetrator intended such building or buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected, which were not military objectives, to be the object of the attack.
4. The conduct took place in the context of and was associated with an armed conflict not of an international character.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (e) (v)
War crime of pillaging

Elements

1. The perpetrator appropriated certain property.
2. The perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use.²⁴²
3. The appropriation was without the consent of the owner.
4. The conduct took place in the context of and was associated with an armed conflict not of an international character.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (e) (vi)-1
War crime of rape

Elements

1. The perpetrator invaded²⁴³ the body of a person by conduct resulting in penetration, however slight, of any part of the body of the

victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.

2. The invasion was committed by force, or by 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 another person, or by

²⁴² As indicated by the use of the term “private or personal use”, appropriations justified by military necessity cannot constitute the crime of pillaging.

²⁴³ The concept of “invasion” is intended to be broad enough to be gender-neutral.

taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.²⁴⁴

3. The conduct took place in the context of and was associated with an armed conflict not of an international character.

4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (e) (vi)-2 War crime of sexual slavery²⁴⁵

Elements

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.²⁴⁶

2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.

3. The conduct took place in the context of and was associated with an armed conflict not of an international character.

4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (e) (vi)-3 War crime of enforced prostitution

Elements

1. The perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by 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

²⁴⁴ It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity. This footnote also applies to the corresponding elements in article 8 (2) (e) (vi)-3, 5 and 6.

²⁴⁵ Given the complex nature of this crime, it is recognized that its commission could involve more than one perpetrator as a part of a common criminal purpose.

²⁴⁶ It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.

advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.

2. The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature.
3. The conduct took place in the context of and was associated with an armed conflict not of an international character.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (e) (vi)-4 War crime of forced pregnancy

Elements

1. The perpetrator confined one or more women forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.
2. The conduct took place in the context of and was associated with an armed conflict not of an international character.
3. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (e) (vi)-5 War crime of enforced sterilization

Elements

1. The perpetrator deprived one or more persons of biological reproductive capacity.²⁴⁷
2. The conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent.²⁴⁸
3. The conduct took place in the context of and was associated with an armed conflict not of an international character.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (e) (vi)-6 War crime of sexual violence

Elements

²⁴⁷ The deprivation is not intended to include birth-control measures which have a non-permanent effect in practice.

²⁴⁸ It is understood that "genuine consent" does not include consent obtained through deception.

1. The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by 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 or such person's or persons' incapacity to give genuine consent.
2. The conduct was of a gravity comparable to that of a serious violation of article 3 common to the four Geneva Conventions.
3. The perpetrator was aware of the factual circumstances that established the gravity of the conduct.
4. The conduct took place in the context of and was associated with an armed conflict not of an international character.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (e) (vii)
War crime of using, conscripting and enlisting children

Elements

1. The perpetrator conscripted or enlisted one or more persons into an armed force or group or used one or more persons to participate actively in hostilities.
2. Such person or persons were under the age of 15 years.
3. The perpetrator knew or should have known that such person or persons were under the age of 15 years.
4. The conduct took place in the context of and was associated with an armed conflict not of an international character.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (e) (viii)
War crime of displacing civilians

Elements

1. The perpetrator ordered a displacement of a civilian population.
2. Such order was not justified by the security of the civilians involved or by military necessity.
3. The perpetrator was in a position to effect such displacement by giving such order.
4. The conduct took place in the context of and was associated with an armed conflict not of an international character.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (e) (ix)

War crime of treacherously killing or wounding

Elements

1. The perpetrator invited the confidence or belief of one or more combatant adversaries that they were entitled to, or were obliged to accord, protection under rules of international law applicable in armed conflict.
2. The perpetrator intended to betray that confidence or belief.
3. The perpetrator killed or injured such person or persons.
4. The perpetrator made use of that confidence or belief in killing or injuring such person or persons.
5. Such person or persons belonged to an adverse party.
6. The conduct took place in the context of and was associated with an armed conflict not of an international character.
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (e) (x)

War crime of denying quarter

Elements

1. The perpetrator declared or ordered that there shall be no survivors.
2. Such declaration or order was given in order to threaten an adversary or to conduct hostilities on the basis that there shall be no survivors.
3. The perpetrator was in a position of effective command or control over the subordinate forces to which the declaration or order was directed.
4. The conduct took place in the context of and was associated with an armed conflict not of an international character.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (e) (xi)-1

War crime of mutilation

Elements

1. The perpetrator subjected one or more persons to mutilation, in particular by permanently disfiguring the person or persons, or by permanently disabling or removing an organ or appendage.

2. The conduct caused death or seriously endangered the physical or mental health of such person or persons.
3. The conduct was neither justified by the medical, dental or hospital treatment of the person or persons concerned nor carried out in such person's or persons' interest.²⁴⁹
4. Such person or persons were in the power of another party to the conflict.
5. The conduct took place in the context of and was associated with an armed conflict not of an international character.
6. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (e) (xi)-2

War crime of medical or scientific experiments

Elements

1. The perpetrator subjected one or more persons to a medical or scientific experiment.
2. The experiment caused the death or seriously endangered the physical or mental health or integrity of such person or persons.
3. The conduct was neither justified by the medical, dental or hospital treatment of such person or persons concerned nor carried out in such person's or persons' interest.
4. Such person or persons were in the power of another party to the conflict.
5. The conduct took place in the context of and was associated with an armed conflict not of an international character.
6. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (e) (xii)

War crime of destroying or seizing the enemy's property

Elements

1. The perpetrator destroyed or seized certain property.
2. Such property was property of an adversary.

²⁴⁹ Consent is not a defence to this crime. The crime prohibits any medical procedure which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the party conducting the procedure and who are in no way deprived of liberty. This footnote also applies to the similar element in article 8 (2) (e) (xi)-2.

3. Such property was protected from that destruction or seizure under the international law of armed conflict.
 4. The perpetrator was aware of the factual circumstances that established the status of the property.
 5. The destruction or seizure was not required by military necessity.
 6. The conduct took place in the context of and was associated with an armed conflict not of an international character.
 7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.
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APPENDIX C

**DOCUMENTS RELATING TO THE SPECIAL PANELS
FOR SERIOUS CRIMES IN EAST TIMOR**

UNITED NATIONS Security Council

Distr.
GENERAL
S/RES/1272 (1999)
25 October 1999

RESOLUTION 1272 (1999)
Adopted by the Security Council at its 4057th meeting, on 25 October 1999

The Security Council,

Recalling its previous resolutions and the statements of its President on the situation in East Timor, in particular resolutions 384 (1975) of 22 December 1975, 389 (1976) of 22 April 1976, 1236 (1999) of 7 May 1999, 1246 (1999) of 11 June 1999, 1262 (1999) of 27 August 1999 and 1264 (1999) of 15 September 1999,

Recalling also the Agreement between Indonesia and Portugal on the question of East Timor of 5 May 1999 and the Agreements between the United Nations and the Governments of Indonesia and Portugal of the same date regarding the modalities for the popular consultation of the East Timorese through a direct ballot and security arrangements (S/1999/513, annexes I to III),

Reiterating its welcome for the successful conduct of the popular consultation of the East Timorese people of 30 August 1999, and taking note of its outcome through which the East Timorese people expressed their clear wish to begin a process of transition under the authority of the United Nations towards independence, which it regards as an accurate reflection of the views of the East Timorese people,

Welcoming the decision of the Indonesian People's Consultative Assembly on 19 October 1999 concerning East Timor,

Stressing the importance of reconciliation among the East Timorese people,

Commending the United Nations Mission in East Timor (UNAMET) for the admirable courage and determination shown in the implementation of its mandate,

Welcoming the deployment of a multinational force to East Timor pursuant to resolution 1264 (1999), and recognizing the importance of continued cooperation between the Government of Indonesia and the multinational force in this regard,

Noting the report of the Secretary-General of 4 October 1999 (S/1999/1024),

Noting with satisfaction the successful outcome of the trilateral meeting held on 28 September 1999, as outlined in the report of the Secretary-General,

Deeply concerned by the grave humanitarian situation resulting from violence in East Timor and the large-scale displacement and relocation of East Timorese civilians, including large numbers of women and children,

Reaffirming the need for all parties to ensure that the rights of refugees and displaced persons are protected, and that they are able to return voluntarily in safety and security to their homes,

Reaffirming respect for the sovereignty and territorial integrity of Indonesia,

Noting the importance of ensuring the security of the boundaries of East Timor, and **noting** in this regard the expressed intention of the Indonesian authorities to cooperate with the multinational force deployed pursuant to resolution 1264 (1999) and with the United Nations Transitional Administration in East Timor,

Expressing its concern at reports indicating that systematic, widespread and flagrant violations of international humanitarian and human rights law have been committed in East Timor, **stressing** that persons committing such violations bear individual responsibility, and **calling** on all parties to cooperate with investigations into these reports,

Recalling the relevant principles contained in the Convention on the Safety of United Nations and Associated Personnel adopted on 9 December 1994,

Determining that the continuing situation in East Timor constitutes a threat to peace and security,

Acting under Chapter VII of the Charter of the United Nations,

1. **Decides** to establish, in accordance with the report of the Secretary-General, a United Nations Transitional Administration in East Timor (UNTAET), which will be endowed with overall responsibility for the administration of East Timor and will be empowered to exercise all legislative and executive authority, including the administration of justice;

2. **Decides also** that the mandate of UNTAET shall consist of the following elements:

(a) To provide security and maintain law and order throughout the territory of East Timor;

(b) To establish an effective administration;

(c) To assist in the development of civil and social services;

(d) To ensure the coordination and delivery of humanitarian assistance, rehabilitation and development assistance;

(e) To support capacity-building for self-government;

(f) To assist in the establishment of conditions for sustainable development;

3. **Decides further** that UNTAET will have objectives and a structure along the lines set out in part IV of the report of the Secretary-General, and in particular that its main components will be:

(a) A governance and public administration component, including an international police element with a strength of up to 1,640 officers;

(b) A humanitarian assistance and emergency rehabilitation component;

(c) A military component, with a strength of up to 8,950 troops and up to 200 military observers;

4. **Authorizes** UNTAET to take all necessary measures to fulfil its mandate;

5. **Recognizes** that, in developing and performing its functions under its mandate, UNTAET will need to draw on the expertise and capacity of Member States, United Nations agencies and other international organizations, including the international financial institutions;

6. **Welcomes** the intention of the Secretary-General to appoint a Special Representative who, as the Transitional Administrator, will be responsible for all aspects of the United Nations work in East Timor and will have the power to enact new laws and regulations and to amend, suspend or repeal existing ones;

7. **Stresses** the importance of cooperation between Indonesia, Portugal and UNTAET in the implementation of this resolution;

8. **Stresses** the need for UNTAET to consult and cooperate closely with the East Timorese people in order to carry out its mandate effectively with a view to the development of local democratic institutions, including an independent East Timorese human rights institution, and the transfer to these institutions of its administrative and public service functions;

9. **Requests** UNTAET and the multinational force deployed pursuant to resolution 1264 (1999) to cooperate closely with each other, with a view also to the replacement as soon as possible of the multinational force by the military component of UNTAET, as notified by the Secretary-General having consulted the leadership of the multinational force, taking into account conditions on the ground;

10. **Reiterates** the urgent need for coordinated humanitarian and reconstruction assistance, and calls upon all parties to cooperate with humanitarian and human rights organizations so as to ensure their safety, the protection of civilians, in particular children, the safe return of refugees and displaced persons and the effective delivery of humanitarian aid;

11. **Welcomes** the commitment of the Indonesian authorities to allow the refugees and displaced persons in West Timor and elsewhere in Indonesia to choose whether to return to East Timor, remain where they are or be resettled in other parts of Indonesia, and stresses the importance of allowing full, safe and unimpeded access by humanitarian organizations in carrying out their work;

12. **Stresses** that it is the responsibility of the Indonesian authorities to take immediate and effective measures to ensure the safe return of refugees in West Timor and other parts of Indonesia to East Timor, the security of refugees, and the civilian and humanitarian character of refugee camps and settlements, in particular by curbing the violent and intimidatory activities of the militias there;

13. **Welcomes** the intention of the Secretary-General to establish a Trust Fund available for, inter alia, the rehabilitation of essential infrastructure, including the building of basic institutions, the functioning of public services and utilities, and the salaries of local civil servants;

14. **Encourages** Member States and international agencies and organizations to provide personnel, equipment and other resources to UNTAET as requested by the Secretary-General, including for the building of basic institutions and capacity, and stresses the need for the closest possible coordination of these efforts;

15. **Underlines** the importance of including in UNTAET personnel with appropriate training in international humanitarian, human rights and refugee law, including child and gender-related provisions, negotiation and communication skills, cultural awareness and civilian-military coordination;

16. **Condemns** all violence and acts in support of violence in East Timor, calls for their immediate end, and demands that those responsible for such violence be brought to justice;

17. **Decides** to establish UNTAET for an initial period until

31 January 2001;

18. **Requests** the Secretary-General to keep the Council closely and regularly informed of progress towards the implementation of this resolution, including, in particular, with regard to the deployment of UNTAET and possible future reductions of its military component if the situation in East Timor improves, and to submit a report within three months of the date of adoption of this resolution and every six months thereafter;

19. **Decides** to remain actively seized of the matter.

27 November 1999

**REGULATION NO. 1999/1
ON THE AUTHORITY OF THE TRANSITIONAL ADMINISTRATION
IN EAST TIMOR**

The Special Representative of the Secretary-General (hereinafter: Transitional Administrator),

Recalling resolution 1272 (1999) of 25 October 1999, whereby the United Nations Security Council, acting under Chapter VII of the Charter of the United Nations, decided to establish a United Nations Transitional Administration in East Timor (UNTAET), endowed with overall responsibility for the administration of East Timor empowered to exercise all legislative and executive authority, including the administration of justice, with the mandate as described in the resolution;

Acting pursuant to the authority given to him under United Nations Security Council resolution 1272 (1999) of 25 October 1999, after consultation with representatives of the East Timorese people, and for the purpose of establishing and maintaining an effective transitional administration in East Timor;

Hereby promulgates the following:

Section 1

Authority of the interim administration

1.1 All legislative and executive authority with respect to East Timor, including the administration of the judiciary, is vested in UNTAET and is exercised by the Transitional Administrator. In exercising these functions the Transitional Administrator shall consult and cooperate closely with representatives of the East Timorese people.

1.2 The Transitional Administrator may appoint any person to perform functions in the civil administration in East Timor, including the judiciary, or remove such person. Such functions shall be exercised in accordance with the existing laws, as specified in section 3, and any regulations and directives issued by the Transitional Administrator.

Section 2

Observance of internationally recognized standards

In exercising their functions, all persons undertaking public duties or holding public office in East Timor shall observe internationally recognized human

rights standards, as reflected, in particular, in:

- The Universal Declaration on Human Rights of 10 December 1948;
- The International Covenant on Civil and Political Rights of 16 December 1966 and its Protocols;
- The International Covenant on Economic, Social and Cultural Rights of 16 December 1966;
- The Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965;
- The Convention on the Elimination of All Forms of Discrimination Against Women of 17 December 1979;
- The Convention Against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment of 17 December 1984;
- The International Convention on the Rights of the Child of 20 November 1989.

They shall not discriminate against any person on any ground such as sex, race, colour, language, religion, political or other opinion, national, ethnic or social origin, association with a national community, property, birth or all other status.

Section 3

Applicable law in East Timor

3.1 Until replaced by UNTAET regulations or subsequent legislation of democratically established institutions of East Timor, the laws applied in East Timor prior to 25 October 1999 shall apply in East Timor insofar as they do not conflict with the standards referred to in section 2, the fulfillment of the mandate given to UNTAET under United Nations Security Council resolution 1272 (1999), or the present or any other regulation and directive issued by the Transitional Administrator.

3.2 Without prejudice to the review of other legislation, the following laws, which do not comply with the standards referred to in section 2 and 3 of the present regulation, as well as any subsequent amendments to these laws and their administrative regulations, shall no longer be applied in East Timor:

- Law on Anti-Subversion;
- Law on Social Organizations;
- Law on National Security;
- Law on National Protection and Defense;
- Law on Mobilization and Demobilization;
- Law on Defense and Security.

3.3 Capital punishment is abolished.

Section 4

Regulations issued by UNTAET

In the performance of the duties entrusted to the transitional administration under United Nations Security Council resolution 1272 (1999), the Transitional Administrator will, as necessary, issue legislative acts in the form of regulations. Such regulations will remain in force until repealed by the Transitional Administrator or superseded by such rules as are issued upon the transfer of UNTAET's administrative and public service functions to the democratic institutions of East Timor, as provided for in United Nations Security Council resolution 1272 (1999).

Section 5

Entry into force and promulgation of regulations issued by UNTAET

5.1 The promulgation of any UNTAET regulation requires the approval and the signature of the Transitional Administrator. The regulation shall enter into force upon the date specified therein.

5.2 UNTAET regulations shall be issued in English, Portuguese and Bahasa Indonesian. Translations in Tetun shall be made available as required. In case of divergence, the English text shall prevail. The regulations shall be published in a manner that ensures their wide dissemination by public announcement and publication.

5.3 UNTAET regulations shall bear the symbol UNTAET/REG/, followed by the year of issuance and the issuance number of that year. A register of the regulations shall indicate the date of entry into force, the subject matter and amendments or changes thereto or the repeal or suspension thereof.

Section 6

Directives

6.1 The Transitional Administrator shall have the power to issue administrative directives in relation to the implementation of regulations promulgated.

6.2 The provisions of section 5 shall apply also to administrative directives. They shall bear the symbol of UNTAET/DIR/, followed by the year of issuance and the issuance number of that year.

Section 7

Administration of property

7.1 UNTAET shall administer immovable or movable property, including monies, bank accounts, and other property of, or registered in the name of the Republic of Indonesia, or any of its subsidiary organs and agencies, which is in the territory of East Timor.

7.2 UNTAET shall also administer any property, both as specified in section 7.1 of the present regulation and privately owned that was abandoned after 30 August 1999, the date of the popular consultation, until such time as the lawful owners are determined.

Section 8

Entry into force

The present regulation shall be deemed to have entered into force as of 25 October 1999, the date of adoption by the United Nations Security Council of resolution 1272 (1999).

(Signed)
Sergio Vieira de Mello
Transitional Administrator

UNITED NATIONS

United Nations Transitional Administration Administration

UNTAET

UNTAET/REG/2000/15

6 June 2000

**REGULATION NO. 2000/15
ON THE ESTABLISHMENT OF PANELS WITH EXCLUSIVE JURISDICTION
OVER SERIOUS CRIMINAL OFFENCES**

The Special Representative of the Secretary-General (hereinafter: Transitional Administrator),

Pursuant to the authority given to him under United Nations Security Council resolution 1272 (1999) of 25 October 1999,

Taking into account United Nations Transitional Administration in East Timor (UNTAET) Regulation No.1999/1 of 27 November 1999 on the Authority of the Transitional Administration in East Timor (hereinafter: UNTAET Regulation No. 1999/1),

Taking into account UNTAET Regulation No. 2000/11 of 6 March 2000 on the Organisation of Courts in East Timor (hereinafter: UNTAET Regulation No. 2000/11) as amended by UNTAET Regulation No. 2000/14 of 10 May 2000 (hereinafter: UNTAET Regulation No. 2000/14),

Recalling the recommendations of the International Commission of Inquiry of East Timor in their report to the Secretary-General of January 2000,

After consultation in the National Consultative Council,

For the purpose of establishing panels with exclusive jurisdiction over serious criminal offences as referred to under Section 10.1 of UNTAET Regulation No. 2000/11, Promulgates the following:

I. General

Section 1

Panels with Jurisdiction over Serious Criminal Offences

1.1 Pursuant to Section 10.3 of UNTAET Regulation No. 2000/11, there shall be established panels of judges (hereinafter: "panels") within the District Court in Dili with exclusive jurisdiction to deal with serious criminal offences.

1.2 Pursuant to Section 15.5 of UNTAET Regulation No. 2000/11 there shall be

established panels within the Court of Appeal in Dili to hear and decide an appeal on a matter under Section 10 of UNTAET Regulation No. 2000/11, as specified in Sections 4 to 9 of the present regulation.

1.3 The panels established pursuant to Sections 10.3 and 15.5 of UNTAET Regulation No. 2000/11 and as specified under Section 1 of the present regulation, shall exercise jurisdiction in accordance with Section 10 of UNTAET Regulation No. 2000/11 and with the provisions of the present regulation with respect to the following serious criminal offences:

- (a) Genocide;
- (b) War Crimes;
- (c) Crimes against Humanity;
- (d) Murder;
- (e) Sexual Offences; and
- (f) Torture.

1.4 At any stage of the proceedings, in relation to cases of serious criminal offences listed under Section 10 (a) to (f) of UNTAET Regulation No. 2000/11, as specified in Sections 4 to 9 of the present regulation, a panel may have deferred to itself a case which is pending before another panel or court in East Timor.

Section 2 **Jurisdiction**

2.1 With regard to the serious criminal offences listed under Section 10.1 (a), (b), (c) and (f) of UNTAET Regulation No. 2000/11, as specified in Sections 4 to 7 of the present regulation, the panels shall have universal jurisdiction.

2.2 For the purposes of the present regulation, "universal jurisdiction" means jurisdiction irrespective of whether:

- (a) the serious criminal offence at issue was committed within the territory of East Timor;
- (b) the serious criminal offence was committed by an East Timorese citizen; or
- (c) the victim of the serious criminal offence was an East Timorese citizen.

2.3 With regard to the serious criminal offences listed under Section 10.1(d) to (e) of UNTAET Regulation No. 2000/11 as specified in Sections 8 to 9 of the present regulation, the panels established within the District Court in Dili shall have exclusive jurisdiction only insofar as the offence was committed in the period between 1 January 1999 and 25 October 1999.

2.4 The panels shall have jurisdiction in respect of crimes committed in East Timor prior to 25 October 1999 only insofar as the law on which the serious criminal offence is based is consistent with Section 3.1 of UNTAET Regulation No. 1999/1 or any other UNTAET Regulation.

2.5 In accordance with Section 7.3 of UNTAET Regulation No. 2000/11, the panels established by the present regulation shall have jurisdiction (*ratione loci*) throughout the

entire territory of East Timor.

Section 3
Applicable Law

3.1 In exercising their jurisdiction, the panels shall apply:

- (a) the law of East Timor as promulgated by Sections 2 and 3 of UNTAET Regulation No. 1999/1 and any subsequent UNTAET regulations and directives; and
- (b) where appropriate, applicable treaties and recognised principles and norms of international law, including the established principles of the international law of armed conflict.

3.2 In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply.

II. Serious Criminal Offences

Section 4
Genocide

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

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

Section 5
Crimes Against Humanity

5.1 For the purposes of the present regulation, "crimes against humanity" means any of the following acts when committed as part of a widespread or systematic attack and 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 Section 5.3 of the present regulation, 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 panels;
- (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.

5.2 For the purposes of Section 5.1 of the present regulation:

- (a) "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;
- (b) "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;
- (c) "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;
- (d) "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;
- (e) "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;
- (f) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;
- (g) "The crime of apartheid" means inhumane acts of a character similar to those

referred to in Section 5.1, 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 committed with the intention of maintaining that regime;

(h) "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.

5.3 For the purpose of the present regulation, 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.

Section 6 War crimes

6.1 For the purposes of the present regulation, "war crimes" means:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

- (i) Wilful killing;
- (ii) Torture or inhuman treatment, including biological experiments;
- (iii) Wilfully causing great suffering, or serious injury to body or health;
- (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
- (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
- (vii) Unlawful deportation or transfer or unlawful confinement;
- (viii) Taking of hostages.

(b) Other serious violations of the laws and customs applicable in international

armed conflict, within the established framework of international law, namely, any of the following acts:

- (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
- (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
- (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
- (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
- (v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
- (vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;
- (vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;
- (viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
- (ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
- (x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of

the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

- (xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;
- (xii) Declaring that no quarter will be given;
- (xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;
- (xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
- (xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;
- (xvi) Pillaging a town or place, even when taken by assault;
- (xvii) Employing poison or poisoned weapons;
- (xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
- (xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
- (xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict;
- (xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- (xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in Section 5.2 (e) of the present regulation, enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;
- (xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

- (xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
 - (xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;
 - (xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.
- (c) In the case of an armed conflict not of an international character, serious violations of Article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause:
- (i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - (ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
 - (iii) Taking of hostages;
 - (iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.
- (d) Section 6.1 (c) of the present regulation applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.
- (e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:
- (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
 - (ii) Intentionally directing attacks against buildings, material, medical

units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

- (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
 - (iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
 - (v) Pillaging a town or place, even when taken by assault;
 - (vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in Section 5.2 (e) of the present regulation, enforced sterilization, and any other form of sexual violence also constituting a serious violation of Article 3 common to the four Geneva Conventions;
 - (vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;
 - (viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
 - (ix) Killing or wounding treacherously a combatant adversary;
 - (x) Declaring that no quarter will be given;
 - (xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
 - (xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;
- (f) Section 6.1 (e) of the present regulation applies to armed conflicts not of an

international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

6.2 Nothing in Section 6.1 (c) and (e) of the present regulation shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.

Section 7

Torture

7.1 For the purposes of the present regulation, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him/her or a third person information or a confession, punishing him/her for an act he/she or a third person has committed or is suspected of having committed, or humiliating, intimidating or coercing him/her or a third person, or for any reason based on discrimination of any kind. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

7.2 This Section is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

7.3 No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

Section 8

Murder

For the purposes of the present regulation, the provisions of the applicable Penal Code in East Timor shall, as appropriate, apply.

Section 9

Sexual Offences

For the purposes of the present regulation, the provisions of the applicable Penal Code in East Timor shall, as appropriate, apply.

Section 10

Penalties

10.1 A panel may impose one of the following penalties on a person convicted of a crime specified under Sections 4 to 7 of the present regulation:

- (a) Imprisonment for a specified number of years, which may not exceed a

maximum of 25 years. In determining the terms of imprisonment for the crimes referred to in Sections 4 to 7 of the present regulation, the panel shall have recourse to the general practice regarding prison sentences in the courts of East Timor and under international tribunals; for the crimes referred to in Sections 8 and 9 of the present regulation, the penalties prescribed in the respective provisions of the applicable Penal Code in East Timor, shall apply.

(b) A fine up to a maximum of US\$ 500,000.

(c) A forfeiture of proceeds, property and assets derived directly or indirectly from the crime, without prejudice to the rights of *bona fide* third parties.

10.2 In imposing the sentences, the panel shall take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

10.3 In imposing a sentence of imprisonment, the panel shall deduct the time, if any, previously spent in detention due to an order of the panel or any other court in East Timor (for the same criminal conduct). The panel may deduct any time otherwise spent in detention in connection with the conduct (underlying the crime).

III. General Principles of Criminal Law

Section 11

Ne bis in idem

11.1 No person shall be tried before a panel established by the present regulation with respect to conduct (which formed the basis of crimes) for which the person has been convicted or acquitted by a panel.

11.2 No person shall be tried by another court (in East Timor) for a crime referred to in Sections 4 to 9 of the present regulation for which that person has already been convicted or acquitted by a panel.

11.3 No person who has been tried by another court for conduct also proscribed under Sections 4 to 9 of the present regulation shall be tried by a panel with respect to the same conduct unless the proceedings in the other court:

(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the panel; or

(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

Section 12

Nullum crimen sine lege

12.1 A person shall not be criminally responsible under the present regulation unless the conduct in question constitutes, at the time it takes place, a crime under international law or the laws of East Timor.

12.2 The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.

12.3 The present Section shall not affect the characterization of any conduct as criminal under principles and rules of international law independently of the present regulation.

Section 13

Nulla poena sine lege

A person convicted by a panel may be punished only in accordance with the present regulation.

Section 14

Individual criminal responsibility

14.1 The panels shall have jurisdiction over natural persons pursuant to the present regulation.

14.2 A person who commits a crime within the jurisdiction of the panels shall be individually responsible and liable for punishment in accordance with the present regulation.

14.3 In accordance with the present regulation, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the panels if that person:

- (a) commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
- (b) orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
- (c) for the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
- (d) in any other way contributes to the commission or attempted commission of

such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

- (i) be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the panels; or
 - (ii) be made in the knowledge of the intention of the group to commit the crime;
- (e) in respect of the crime of genocide, directly and publicly incites others to commit genocide;
- (f) attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under the present regulation for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

Section 15

Irrelevance of official capacity

15.1 The present regulation shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under the present regulation, nor shall it, in and of itself, constitute a ground for reduction of sentence.

15.2 Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the panels from exercising its jurisdiction over such a person.

Section 16

Responsibility of commanders and other superiors

In addition to other grounds of criminal responsibility under the present regulation for serious criminal offences referred to in Sections 4 to 7 of the present regulation, the fact that any of the acts referred to in the said Sections 4 to 7 was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

Section 17

Statute of limitations

17.1 The serious criminal offences under Section 10.1 (a), (b), (c) and (f) of UNTAET Regulation No. 2000/11 and under Sections 4 to 7 of the present regulation shall not be subject to any statute of limitations.

17.2 The serious criminal offences under Section 10.1 (d) to (e) of UNTAET Regulation No. 2000/11 and under Sections 8 to 9 of the present regulation shall be subject to applicable law.

Section 18

Mental element

18.1 A person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the panels only if the material elements are committed with intent and knowledge.

18.2 For the purposes of the present Section, a person has "intent" where:

- (a) In relation to conduct, that person means to engage in the conduct;
- (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

18.3 For the purposes of the present Section, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.

Section 19

Grounds for excluding criminal responsibility

19.1 A person shall not be criminally responsible if, at the time of that person's conduct:

- (a) the person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;
- (b) the person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the panels;
- (c) the person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of

danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;

(d) the conduct which is alleged to constitute a crime within the jurisdiction of the panels has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

(i) made by other persons; or

(ii) constituted by other circumstances beyond that person's control.

19.2 The panel shall determine the applicability of the grounds for excluding criminal responsibility provided for in the present regulation to the case before it.

19.3 At trial, the panel may consider a ground for excluding criminal responsibility other than those referred to in Section 19.1 of the present regulation where such a ground is derived from applicable law. The procedures relating to the consideration of such a ground shall be provided for in an UNTAET directive.

Section 20

Mistake of fact or mistake of law

20.1 A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.

20.2 A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the panels shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in Section 21 of the present regulation.

Section 21

Superior orders and prescription of law

The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if a panel determines that justice so requires.

IV. Composition of the Panels and Procedure

Section 22

Composition of the Panels

22.1 In accordance with Sections 9 and 10.3 of UNTAET Regulation No. 2000/11 the panels in the District Court of Dili shall be composed of two international judges and one East Timorese judge.

22.2 In accordance with Section 15 of UNTAET Regulation No. 2000/11 the panels in the Court of Appeal in Dili shall be composed of two international judges and one East Timorese judge. In cases of special importance or gravity a panel of five judges composed of three international and two East Timorese judges may be established.

Section 23

Qualifications of Judges

23.1 The judges of the panels established within the District Court in Dili and the Court of Appeal in Dili shall be selected and appointed in accordance with UNTAET Regulation No. 1999/3, Section 10.3 of UNTAET Regulation No. 2000/11 and Sections 22 and 23 of the present regulation.

23.2 The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to judicial offices. In the overall composition of the panels due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.

V. Other Matters

Section 24

Witness Protection

24.1 The panels shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the panels shall have regard to all relevant factors, including age, gender, health and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children.

24.2 Procedures regarding the protection of witnesses shall be elaborated in an UNTAET directive.

Section 25

Trust Fund

25.1 A Trust Fund may be established by decision of the Transitional Administrator in consultation with the National Consultative Council for the benefit of victims of crimes within the jurisdiction of the panels, and of the families of such victims.

25.2 The panels may order money and other property collected through fines, forfeiture, foreign donors or other means to be transferred to the Trust Fund.

25.3 The Trust Fund shall be managed according to criteria to be determined by an UNTAET directive.

Section 26
Entry into force

The present regulation shall enter into force on 6 June 2000.

Sergio Vieira de Mello
Transitional Administrator

EAST TIMOR CONSITUTION

Part I

Section 9

(International law)

1. The legal system of East Timor shall adopt the general or customary principles of international law.
2. Rules provided for in international conventions, treaties and agreements shall apply in the internal legal system of East Timor following their approval, ratification or accession by the respective competent organs and after publication in the official gazette.
3. All rules that are contrary to the provisions of international conventions, treaties and agreements applied in the internal legal system of East Timor shall be invalid.

Part II – Title 2

Section 31

(Application of criminal law)

1. No one shall be subjected to trial, except in accordance with the law.
2. No one shall be tried and convicted for an act that does not qualify in the law as a criminal offence at the moment it was committed, nor endure security measures the provisions of which are not clearly established in previous law.
3. Penalties or security measures not clearly provided for by law at the moment the criminal offence was committed shall not be enforced.
4. No one shall be tried and convicted for the same criminal offence more than once.
5. Criminal law shall not be enforced retroactively, except if the new law is in favour of the accused.
6. Anyone who has been unjustly convicted has the right to a fair compensation in accordance with the law.

Part III - Title 5

CHAPTER I - COURTS AND THE JUDICIARY

Section 118

(Jurisdiction)

1. Courts are organs of sovereignty with competencies to administer justice in the name of the people.
2. In performing their functions, the courts shall be entitled to the assistance of other authorities.
3. Court decisions shall be binding and shall prevail over the decisions of any other authority.

Section 119

(Independence)

Courts are independent and subject only to the Constitution and the law.

Section 120

(Review of unconstitutionality)

The courts shall not apply rules that contravene the Constitution or the principles contained therein.

Section 121

(Judges)

1. Jurisdiction lies exclusively with the judges installed in accordance with the law.
2. In performing their functions, judges are independent and owe obedience only to the Constitution, the law and to their own conscience.
3. Judges have security of tenure and, unless otherwise provided for by law, may not be transferred, suspended, retired or removed from office.
4. To guarantee their independence, judges may not be held liable for their judgments and decisions, except in the circumstances provided for by law.
5. The law shall regulate the judicial organisation and the status of the judges of the courts of law.

Section 122

(Exclusiveness)

Judges in office may not perform any other functions, whether public or private, other than teaching or legal research, in accordance with the law.

Section 123

(Categories of courts)

1. There shall be the following categories of courts in the Democratic Republic of East Timor:
 - a) The Supreme Court of Justice and other courts of law;
 - b) The High Administrative, Tax and Audit Court and other administrative courts of first instance;
 - c) Military Courts.
2. Courts of exception shall be prohibited and there shall be no special courts to judge certain categories of criminal offence.
3. There may be Maritime Courts and Arbitration Courts.
4. The law shall determine the establishment, organisation and functioning of the courts provided for in the preceding items.

5. The law may institutionalise means and ways for the non-jurisdictional resolution of disputes.

Section 124

(Supreme Court of Justice)

1. The Supreme Court of Justice is the highest court of law and the guarantor of a uniform enforcement of the law, and has jurisdiction throughout the national territory.
2. It is also incumbent on the Supreme Court of Justice to administer justice on matters of legal, constitutional and electoral nature..
3. The President of the Supreme Court of Justice shall be appointed by the President of the Republic from among judges of the Supreme Court of Justice for a term of office of four years.

Section 125

(Functioning and Composition)

1. The Supreme Court of Justice shall operate:
 - a) In sections, like a court of first instance, in the cases provided for in the law;
 - b) In plenary, like a court of second and single instance, in the cases expressly provided for in the law;
2. The Supreme Court of Justice shall consist of career judges, magistrates of the Public Prosecution or jurists of recognised merit in number to be established by law, as follows:
 - a) One elected by the National Parliament;
 - b) And all the others designated by the Superior Council for the Judiciary.

Section 126

(Electoral and Constitutional Competence)

1. It is incumbent upon the Supreme Court of Justice, on legal and constitutional matters:
 - a) To review and declare the unconstitutionality and illegality of normative and legislative acts by the organs of the State;
 - b) To provide an anticipatory verification of the legality and constitutionality of the statutes and referenda;
 - c) To verify cases of unconstitutionality by omission;
 - d) To rule, as a venue of appeal, on the suppression of norms considered unconstitutional by the courts of instance;
 - e) To verify the legality regarding the establishment of political parties and their coalitions and order their registration or dissolution, in accordance with the Constitution and the law;
 - f) To exercise all other competencies provided for by the Constitution or the law.
2. It is incumbent upon the Supreme Court of Justice, in the specific field of elections:
 - a) To verify the legal requirements for candidates for the office of President of the Republic;
 - b) To certify at last instance the regularity and validity of the acts of the electoral process, in accordance with the respective law;

- c) To validate and proclaim the results of the electoral process.

Section 127

(Eligibility)

1. Only career judges or magistrates of the Public Prosecution or jurists of recognised merit of East Timorese nationality may become members of the Supreme Court of Justice.
2. In addition to the requirements referred to in the preceding item, the law may define other requirements.

Section 128

(Superior Council for the Judiciary)

1. The Superior Council for the Judiciary is the organ of management and discipline of the judges of the courts and it is incumbent upon it to appoint, assign, transfer and promote the judges.
2. The Superior Council for the Judiciary shall be presided over by the President of the Supreme Court of Justice and shall have the following members:
 - a) One designated by the President of the Republic;
 - b) One elected by the National Parliament;
 - c) One designated by the Government;
 - d) One elected by the judges of the courts of law from among their peers;
3. The law shall regulate the competence, organisation and functioning of the Superior Council for the Judiciary.

Section 129

(High Administrative, Tax and Audit Court)

1. The High Administrative, Tax and Audit Court is the highest body in the hierarchy of the administrative, tax and audit courts, without prejudice to the competence of the Supreme Court of Justice.
2. The President of the High Administrative, Tax and Audit Court is elected from among and by respective judges for a term of office of four years.
3. It is incumbent upon the High Administrative, Tax and Audit Court as a single instance to monitor the lawfulness of public expenditure and to audit State accounts.
4. It is incumbent upon the High Administrative, Tax and Audit Court and the administrative and tax courts of first instance:
 - a) To judge actions aiming at resolving disputes arising from legal, fiscal and administrative relations;
 - b) To judge contentious appeals against decisions made by State organs, their respective office holders and agents;
 - c) To perform all the other functions as established by law.

Section 130

(Military Courts)

1. It is incumbent upon military courts to judge in first instance crimes of military nature.

2. The competence, organisation, composition and functioning of military courts shall be established by law.

Section 131

(Court Hearings)

Court hearings shall be public, unless the court hearing a matter rules otherwise through a well-founded order to safeguard personal dignity or public morality and national security, or guarantee its own smooth operation.

CHAPTER II - PUBLIC PROSECUTORS.

Section 132

(Functions and Status)

1. Public Prosecutors have the responsibility for representing the State, taking criminal action, ensuring the defence of the underage, absentees and the disabled, defending the democratic legality, and promoting the enforcement of the law.
2. Public Prosecutors shall be a body of judicial officers, hierarchically graded, and shall be accountable to the Prosecutor-General .
3. In performing their duties, Public Prosecutors shall be subject to legality, objectivity and impartiality criteria, and obedience to the directives and orders as established by law.
4. Public Prosecutors shall be governed by their own statutes, and shall only be suspended, retired or dismissed under the circumstances provided for in the law.
5. It is incumbent upon the Office of the Prosecutor-General to appoint, assign, transfer and promote public prosecutors and exercise disciplinary actions.

Section 133

(Office of the Prosecutor-General)

1. The Office of the Prosecutor-General is the highest authority in public prosecution, and its composition and competencies shall be defined by law.
2. The Office of the Prosecutor-General shall be headed by the Prosecutor-General, who, in his or her absence or inability to act, shall be replaced in accordance with the law.
3. The Prosecutor-General shall be appointed by the President of the Republic for a term of office of six years, in accordance with the terms established by law.
4. The Prosecutor-General shall be accountable to the Head of State and shall submit annual reports to the National Parliament.
5. The Prosecutor-General shall request the Supreme Court of Justice to make a generally binding declaration of unconstitutionality of any law ruled unconstitutional in three concrete cases.
6. Deputy Prosecutor-General s shall be appointed, dismissed or removed from office by the President of the Republic after consultation with the Superior Council for the Public Prosecution.

Section 134

(Superior Council for the Public Prosecution).

1. The Superior Council for the Public Prosecution is an integral part of the office of the Prosecutor-General .
2. The Superior Council for the Public Prosecution shall be headed by the Prosecutor-General and shall comprise the following members:
 - a) One designated by the President of the Republic;
 - b) One elected by the National Parliament;
 - c) One designated by the Government;
 - d) One elected by the magistrates of the Public Prosecution from among their peers.
3. The law shall regulate the competence, organisation and functioning of the Superior Council for the Public Prosecution.

CHAPTER III - LAWYERS

Section 135

(Lawyers)

1. Legal and judicial aid is of social interest, and lawyers and defenders shall be governed by this principle.
2. The primary role of lawyers and defenders is to contribute to the good administration of justice and the safeguard of the rights and legitimate interests of the citizens.
3. The activity of lawyers shall be regulated by law.

Section 136

(Guarantees in the activity of lawyers)

1. The State shall, in accordance with the law, guarantee the inviolability of documents related to legal proceedings. No search, seizure, listing or other judicial measures shall be permitted without the presence of the competent magistrate and, whenever possible, of the lawyer concerned.
2. Lawyers have the right to contact their clients personally with guarantees of confidentiality, especially where the clients are under detention or arrest in military or civil prison centers.

Section 137

(Public Administration general principles)

1. Public Administration shall aim at meeting public interest, in the respect for the legitimate rights and interests of citizens and constitutional institutions.
2. The Public Administration shall be structured to prevent excessive bureaucracy, provide more accessible services to the people and ensure the contribution of individuals interested in its efficient management.
3. The law shall establish the rights and guarantees of the citizens, namely against acts likely to affect their legitimate rights and interests.

Part VII

Section 158

(Treaties, agreements and alliances)

1. Confirmation, accession and ratification of bilateral and multilateral conventions, treaties, agreements or alliances that took place before the entry into force of the present Constitution shall be decided upon by the respective competent bodies on a case-by-case basis.
2. The Democratic Republic of East Timor shall not be bound by any treaty, agreement or alliance entered into prior to the entry into force of the Constitution which is not confirmed or ratified or adhered to, pursuant to item 1 above.
3. The Democratic Republic of East Timor shall not recognise any acts or contracts concerning the natural resources, referred to in item 1 of Section 139 entered into or undertaken prior to the entry into force of the Constitution which are not confirmed by the competent bodies after the Constitution enters into force.

Section 160

(Serious Crimes)

Acts committed between the 25th of April 1974 and the 31st of December 1999 that can be considered crimes against humanity of genocide or of war shall be liable to criminal proceedings with the national or international courts.

Section 163

(Transitional judicial organization)

1. The collective judicial instance existing in East Timor, integrated by national and international judges with competencies to judge serious crimes committed between the 1st of January and the 25th of October 1999, shall remain operational for the time deemed strictly necessary to conclude the cases under investigation.
2. The judicial Organization existing in East Timor on the day the present Constitution enters into force shall remain operational until such a time as the new judicial system is established and starts its functions.

Section 164

(Transitional competence of the Supreme Court of Justice)

1. After the Supreme Court of Justice starts its functions and before the establishment of courts as laid down in Section 129, the respective competence shall be exercised by the Supreme Court of Justice and other courts of justice.
2. Until such a time as the Supreme Court of Justice is established and starts its functions all powers conferred to it by the Constitution shall be exercised by the highest judicial instance of the judicial organization existing in East Timor.

Section 165

(Previous Law)

Laws and regulations in force in East Timor shall continue to be applicable to all matters except to the extent that they are inconsistent with the Constitution or the principles contained therein.

Section 170

(Entry into force of the Constitution)

The Constitution of the Democratic Republic of East Timor shall enter into force on the 20th of May of 2002.

APPENDIX D

USEFUL WEBSITES FOR INTERNET RESEARCH

African Commission on Human & People's Rights

<http://www.achpr.org/>

State Reports, African Charter on Human and Peoples' Rights, Protocol to the Charter, rules of procedure for the Commission, publications.

American Society for International Law Guide to Electronic Resources for International Law

<http://www.asil.org/resource/crim1.htm>

Provides information on the major electronic sources for researching international and transnational crime, as well as current issues common to both categories, such as efforts to codify international crimes, activities aimed at crime prevention, cooperation in law enforcement, jurisdictional questions, international judicial cooperation, and the effects of bilateral and multilateral treaties

Avalon Project: The International Military Tribunal for Germany, Yale University

<http://www.yale.edu/lawweb/avalon/imt/imt.htm>

Collection of trial documents, motions, conventions, rules of procedure, indictments, and all other memoranda and documents associated with the Nuremberg Trials.

Canada and the International Criminal Court

http://www.dfait-maeci.gc.ca/foreign_policy/icc/history-en.asp

Canada's Department of Foreign Affairs and International Trade website on the International Criminal Court.

Council of Europe Treaty Office

<http://conventions.coe.int/>

Database of European treaties.

European Court of Human Rights

<http://www.echr.coe.int/>

General information, pending cases, judgments and decisions, basic texts, press releases.

European Union—Court of Justice

<http://curia.eu.int/en/index.htm>

Homepage with links to case law, press and information, research and documentation, library, and texts relating to the organization.

Inter-American Court of Human Rights

<http://www.corteidh.or.cr/>

International Court of Justice (ICJ)

<http://www.icj-cij.org/>

Homepage with docket, decisions, news, publications, and general information on the ICJ.

International Criminal Court (ICC)

<http://www.icc-cpi.int/index.php>

Office site of the ICC with information on the organization and its work, recent news, legal documents.

International Criminal Tribunal for Rwanda (ICTR)

<http://www.icttr.org/>

Court homepage with information on the organization and its work, recent news, legal texts.

International Criminal Tribunal for the Former Yugoslavia (ICTY)

<http://www.un.org/icty/>

Overview of the tribunal, latest developments, indictments and proceedings, publications.

International Humanitarian Law Database, ICRC

<http://www.icrc.org/ihl>

91 treaties and texts, commentaries on the four Geneva Conventions and their Additional Protocols, an up-to-date list of signatures, ratifications relating to IHL treaties and full text of reservations.

International War Crimes Project, New England School of Law

http://www.nesl.edu/center/WAR_CRIMES.htm

Links to resources on trials of war criminals. The site has full texts of war crimes charters, statutes, trial transcripts, amicus curiae briefs, decisions, etc.

Judicial System Monitoring Programme

<http://www.jsmp.minihub.org/>

NGO established in East Timor for trial monitoring, legal analysis, and reports on the justice system. News, resources, and trial information.

Khmer Rouge Trials Task Force

http://www.ocm.gov.kh/krt_main.htm

Links to legal documents, indictments, statements, letters, and legislation related to the trials.

Law of Armed Conflict Treaty Links, University of Minnesota

<http://www1.umn.edu/humanrts/instree/auoy.htm>

Database of treaties, conventions, and other documents relating to armed conflict.

National Archives of Cambodia

<http://www.camnet.com.kh/archives.cambodia/>

Preserves documents created by the government of Cambodia, including records of the French colonial administration and post-independence Cambodian governments.

National Implementation Database, ICRC

<http://www.icrc.org/ihl-nat>

Provides documentation and commentaries concerning the implementation of international humanitarian law at national level.

NEPAD Organizations

<http://www.avmedia.at/nepad/indexgb.html>

Links to the homepages, charters, declarations, resolutions, and protocols of various African inter-governmental organizations like the African Union, the African Economic Community, and the various African economic communities.

No Peace Without Justice Sierra Leone Special Court Page

<http://www.specialcourt.org/>

Special Court news releases, briefing papers, Special Court documents, and other information.

Organization of American States Documents Page

http://www.oas.org/XXXIIGA/english/documents_eng.htm

Special Court for Sierra Leone

<http://www.sc-sl.org/scsl.htm>

Official website of the Special Court for Sierra Leone.

UN Documentation Centre

<http://www.un.org/documents/>

Database of General Assembly, Security Council, Economic and Social Council, and Secretariat press releases, resolutions, documents, decisions, reports, archives, etc. Links to these bodies' homepages.

UN ICTY Documents

<http://www.un.org/icty/legaldoc/index.htm>

Official document database of the tribunal, including the statute of the tribunal, rules of evidence and procedure, codes of professional conduct, regulations, and standards.

UN ICTR Documents

<http://www.icttr.org/wwwroot/legal.htm>

Official database of tribunal documents, including the statute of the tribunal, rules of evidence, Security Council resolutions, codes of conduct, etc.

UNAMSIL Documents

<http://www.un.org/Depts/dpko/missions/unamsil/docs.html>

Resolutions, reports, statements, documents.

UNTAET Documents

<http://www.un.org/peace/etimor/docs/UntaetD.htm>

Resolutions, reports, letters, and other official documents on the UN mission in East Timor.

UN Mission of Support in East Timor (UNMISSET)

<http://www.un.org/Depts/dpko/missions/unmisset/index.html>

Background, mandate, facts and figures, UN documents, press releases and briefings, photo gallery.

War Crimes, Crimes Against Humanity Treaty Links, University of Minnesota

<http://www1.umn.edu/humanrts/instree/auox.htm>

Database of conventions and other documents relating to war crimes, crimes against humanity, genocide and terrorism, including rules of procedure and evidence for various international courts and tribunals.

War Crimes Studies Center, UC Berkeley

<http://socrates.berkeley.edu/~warcrime/>

Center houses an archive of World War II war crimes trials and others materials relating to subsequent international and national war crimes tribunals.

Web Genocide Documentation Centre, University of the West of England

<http://www.ess.uwe.ac.uk/genocide.htm>

Resources on genocide, war crimes, and mass killing.

Yale University Genocide Studies Program

<http://www.yale.edu/gsp/>

Links to Yale's East Timor, Cambodia, and Rwanda genocide projects.

- **Cambodia Genocide Program and Database, Yale University**

<http://www.yale.edu/cgp/>

Cambodian genocide databases containing primary and secondary documents, articles and books; databases on military, political leaders, and victims of the Khmer Rouge regime; a large photographic database; and a geographic database of interactive maps, as well as maps showing locations of mass graves, prisons, and memorials.

- **East Timor Genocide Project, Yale University**
http://www.yale.edu/gsp/east_timor/index.html
- **Rwandan Genocide Project, Yale University**
<http://www.yale.edu/gsp/rwanda/index.html>